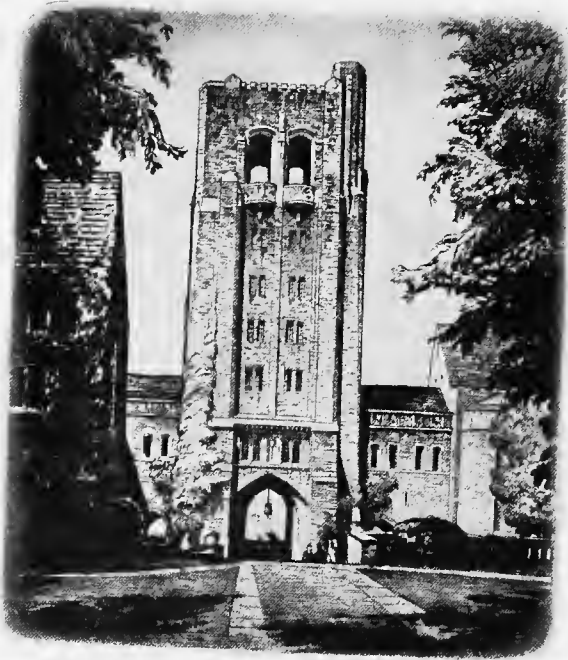




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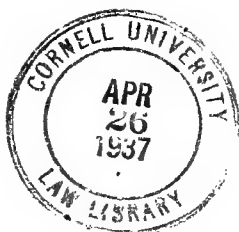
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ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

ON THE TRIAL OF

Civil Actions

NINETEENTH EDITION

BY

JAMES S. HENDERSON,

OF THE MIDDLE TEMPLE, BARRISTER-AT-LAW.

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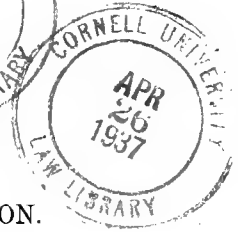
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MR. MAURICE POWELL, whose name was so closely associated with successive editions of this work, first as co-editor and then as sole editor, died in December, 1914. For this edition he had made numerous notes, these sometimes taking the form of new paragraphs, and sometimes merely the name of a decision the effect of which was to be incorporated into the text. On being requested by the publishers to continue Mr. Powell's work for this edition, these notes were placed in my hands and I gladly acknowledge the assistance I have derived from them.

I have retained the same arrangement as in previous editions, but being requested by the publishers to decrease the bulk of the work if possible, I have, with this view, omitted the table of stamp duties and also, after careful consideration, the subject of marine insurance; and in addition I have shortened certain of the sections.

References to the *Law Journal Reports* have been added; and cases reported since the text was in type, up to this month, have been noted in the Addenda, p. clxiii.

In the preparation of the Table of Cases Cited I received valuable assistance from Mr. J. W. Cunnison and Mr. A. C. Cunnison, and in the repaging and alteration of the Index I had the valuable help of Mr. J. D. Cowley, the Assistant Librarian of the Middle Temple.

J. S. HENDERSON.

TEMPLE,
April, 1922.

THE AUTHOR

AND

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TABLE OF CONTENTS.

	PAGE
ADVERTISEMENT TO THE NINETEENTH EDITION	iii
FORMER EDITIONS AND EDITORS	iv
TABLE OF CONTENTS	v
TABLE OF CASES CITED	xi
TABLE OF STATUTES CITED	cxliii
ADDENDA	clxiii

PART I.

EVIDENCE IN GENERAL.

NATURE OF EVIDENCE.

Primary evidence	1
Secondary evidence	4
Oral evidence to explain or add to documents	13
Presumptive evidence	30
Hearsay	40
Admissions	57

OBJECT OF EVIDENCE.

Evidence confined to the issue	72
The substance of the issue only need be proved	80
Onus probandi	84

PROOF OF DOCUMENTS.

Proof by copies	86
exemplification	<i>id.</i>
office copy	87
examined copy	<i>id.</i>
certified copy	88
Custody of ancient writings	91
Proof of Acts and Journals of Parliament	93
proclamations and orders	94
letters patent of the Crown	95
records and judgments	<i>id.</i>
fines and common recoveries	97
verdicts	98
writs	<i>id.</i>
inquisitions	99
rules or orders of court, and judges' orders	<i>id.</i>
decrees and answers in Chancery	100
depositions and affidavits	101

	PAGE		PAGE
Adsetts v. Hives	545	Alexander v. N. E. Ry.	755
Aflalo v. Fourdrinier	10	— v. Sizer	332
African Association v. Allen ...	404	— v. Southey	849, 851
Agar v. Athenæum Insur. Co.	976	— v. Vanderzee	21
Aggs v. Nicholson	332, 976	— v. Vane	478
Agius v. Great W. Colliery Co.	379, 436	Alexandra Dock, &c., Co. v. Taff Vale Ry.	512
Agnew v. British Legal Life Assur. Co.	733	Alhambra, The	355
Agra & Masterman's Bank v. Leighton	589	Alison's Case	168, 493
Agricultural Cattle Insur. Co. v. Fitzgerald	975	Alison v. Furnival	108
Ahearn v. Bellman	892	Allan, <i>Ex parte</i>	1050
Ahmedbhoy Habbibhoy v. Bombay Fire Insur. Co.	343	Allan v. Liverpool	234, 806
Ahrbecker v. Frost	229	— v. Mawson	280
Aiken v. Short	498	— v. Morrison	201
Ainsworth v. Wilding	211	Allard, <i>Ex parte</i>	830
Aird v. Farbert School Board	992	Allason v. Stark	256, 872
Airey, <i>In re</i>	123	Allay v. Hutchings	156
Aitken v. Caledonian Ry.	734	Allbutt v. General Council of Medical Education	752
Aitkenhead v. Blades	814	Allcock v. Moorhouse...257, 263,	271
Ajello v. Worsley	725	Allday v. Gt. W. Ry. Co.	529
Akrokerri Mines v. Economic Bank	329	Allred v. Metropolitan Trams Co.	649
Aktieselkab v. Ekman	21	Allen, <i>In re</i>	845
Aktieselskabet Olivebank v. Dansk Svoivloyre Fabrik	355	— v. Allen	178
Alabaster v. Harness	550	— v. Allen (No. 2)	159
Alban v. Pritchett	66	— v. Bayley	817, 951
Albert v. Grosvenor Investment Co.	15	— v. Bennet...236, 418, 419,	1038
Alcock v. Delay	197, 199	— v. Coltart	355
— v. Royal Exchange Assur- ance Corporation	158	— v. Cook	515
Alcott v. Millar's Karri, &c., Co.	759	— v. Dundas	180, 1005
Aldenburgh v. Peuple	777	— v. Edmundson	300, 306
Aldersey, <i>In re</i>	38	— v. Flicker	774
Alderson v. Clay	2, 33	— v. Flood	786
— v. Devonport	1033	— v. Gomme	715
— v. Langdale 315, 458,	584	— v. Graves	462
— v. Pope	444	— v. Hartley	71
Aldin v. Latimer & Co. ... 700,	820	— v. Hayward	648
Aldous v. Cornwell	315, 545	— v. L. & S. W. Ry. ... 798,	957
Aldred's Case	644	— v. New Gas Co.	681
Aldridge v. Ferne	624	— v. Pink	3
— v. Gt. W. Ry. 521,	672	— v. Rivington	871
— v. Haines	183	— v. Seckham	700
— v. Howard	616	— v. Smith	857, 858
— v. Johnson	826	— v. Taylor	697
Alexander, <i>Ex parte</i>	1047	— v. Thompson	1053
— v. Automatic Telephone Co.	962	— v. Waldegrave	471
— v. Burchfield	326	— & Driscoll's Contract, <i>In re</i>	626
— v. Gardner	430	Allgood v. Blake	29
— v. Gibson	377	Allhusen v. Lahouchere	737
— v. Jenkins	732	Alliance Bank v. Kearsley ...	486
		Alliance Bank of Simla v. Carey	563, 564
		Allies v. Probyn	544
		Allison, <i>In re</i>	940
		— v. Bristol Marine Insur. Co.	356
		— v. Haydon	401

	PAGE		PAGE
Allison v. Scargill	887	Anderson v. Edie	337
Allison's Case	112	— v. Fitzgerald	338
Allix, <i>In re</i>	1064	— v. Gorrie	795
Allsop v. Allsop	742	— v. Hamilton	154, 155
— v. Day	1045	— (or Henderson) v. L. & N. W. Ry. Co.	524
Allum v. Dickinson	624	— v. Martindale	598
Allwood v. Heywood	868	— v. May	392, 394
Almada, &c., Co., <i>In re</i>	962	— v. Midland Ry.	885, 945
Alms Corn Charity, <i>In re</i>	191	— v. Morice	348, 426, 825
Alne Home, The	354	— v. Oppenheimer	628
Alner v. George	61	— v. Pignet	876
Alsager v. Close	847, 853	— v. Pitcher	23
Alsop v. Yates	682	— v. Radcliffe	809
Alton v. Harrison	1038	— v. Sanderson	66
— v. Midland Ry. ...	83, 538, 657	— v. Weston	32, 293, 311
Altree v. Altree	1058	Anderton v. Magawley	99
Alves v. Hodgson	202	Andree v. Fletcher	505
Amalgamated Society of Rail- way Servants v. Osborne ...	556	Andrew v. Bridgman	612, 613, 903
Amann v. Damm	738, 749	— v. Hancock	265
Ambergate, &c., Ry. v. Coult- hard	983	— v. Motley	92, 133, 134
— v. Midland Ry.	950	Andrews v. Askey	789
— v. Norcliffe	983	— v. Barnes	224
Ambler, <i>In re</i>	1014, 1016	— v. Dixon	1066
— v. Bradford Cor.	990	— v. Hailes	880
— v. Gordon	701	— v. Lawrence	545
Ambrose v. Kerrison	484, 1008	— v. Marris	183
American Braided Wire Co. v. Thomson	227	— v. Mockford	727
American Concentrated Must Co. v. Hendry	778	— v. Nott-Bower	752
Ames v. Waterlow	796	— v. Ramsay	477
Amey v. Long	139	— v. Ryde Corporation	118
Amfield v. White	623	— v. Waite	700
Amicable Assur. Soc. v. Bol- land (Fauntleroy's Case) ...	339	Angel v. Jay	724
Amis, <i>In re</i>	131	Angell v. Duke	14, 16, 235
Amon v. Bobbett	229	— v. Randall	258
Amor v. Fearon	406	Angerstein v. Handson	272
Amorett v. James	555	Anglesey (Marquis), <i>In re</i> ...	510
Amos v. Hughes	211	— v. Hatherton (Lord) ...	35, 45, 77, 187
— v. Smith	571	Anglo-African Co. v. Lamzed	360
Amott v. Holden	603	Anglo-Egyptian Navigation Co. v. Rennie	828
Amstell v. Alexander	156	Anglo-Italian Bank v. Davies	924
Amy v. Andrews	64	Angrove v. Tippett	567
Amys v. Barton	51	Angus v. Clifford	723
Ancaster v. Milling	820	— v. MacLachlan	860
Ancona v. Marks	291	— v. McLachlan	542
— v. Rogers	1049	— v. Smith	162
Anderson's Case	966	Ankerson v. Connelly	701
Anderson, <i>Ex parte</i>	96	Annie, The	667
—, <i>In re</i>	877	Annot Lyle, The	666
— v. Anderson	134	Anon., Arch. Pl. & Ev. 1st ed. 378	121
— v. Bank of British Columbia	140	—, 4 Bl. Comm. 126	155
— v. Beard	464, 467	—, B. N. P. 108; 1 Ld. Raym. 735	920
— v. Boynton	388, 393	—, 1 Dowl. 173	579
— v. Collinson	182, 790	—, Cro. Eliz. 13	776
		—, Cro. Eliz. 46	808

	PAGE		PAGE
Anon., Cro. Eliz. 68	581	Armement Adolf Deppe v. Robinson	352
—, 15 East, 407	377	Armistead v. Wilde	542
—, 1 Esp. 116	246	Armitage v. Armitage	910, 914
—, 1 Esp. 349	592	— v. A.-G.	918
—, Freem. 253	19	— v. Insole	433
—, Hobart J., 1 Lev. 82 ...	744	Armory v. Delamirie	841
—, Holt N. P. 381	575	Armour v. Bate	218
—, 12 Mod. 345	73, 191, 306	Armstrong v. Hewitt	50, 91
—, 12 Mod. 607	119	— v. Jackson...422, 465, 547, 724	724
—, Noy, 69	1009	— v. Milburn	399, 566
—, 1 Ld. Raym. 731	277	— v. Normandy	63
—, Raym. 480, 1096; S.C., Salk. 695, 44	558	— v. Stokes	442
—, 1 Show. 95	441	Armsworth v. S. E. Ry.	691
—, 2 Show. 283	355	Arne, The	353
—, Skinner, 404; Lill. Pr. Reg. 556	152	Arnison, <i>Ex parte</i>	775, 900
—, Stra. 95	50	— v. Smith	725
—, Stra. 527	66	Arnitt v. Garnett	1066
—, Taunt. 499, 509	856	Arnold v. Bainbrigge	589
—, 1 Vent. 257	12	— v. Bath & Wells (Bishop) ..	191
— (Assignees) v. S. E. Ry. ..	851	— v. Blaker	645
— v. Moor	756	— v. Cheque Bank	70, 325
Ansell v. Baker	320, 578	— v. Dimsdale	997
Anstee v. Nelms	29	— v. Holbrook	639, 818
Anstey v. Brit. Natural Premiums, &c.	338	— v. Jeffreys	222
— v. Manners	453, 1021	— v. Morgan	712
Anthony v. Anthony	155	— v. Poole (Mayor)	388, 953
Antonadi v. Smith	1049, 1056	Arnot's Case	965
Anworth v. Johnson	269	Arnsby v. Woodward	903, 904
Apollo, The	679	Aron & Co. v. Comptoir Wegimont	428
Apothecaries Co. v. Bentley ...	85	Aronson v. Liverpool Corporation	219
— v. Greenough	400	Artizans', &c., Corporation, <i>In re</i>	566, 602, 603
— v. Jones	638	Arundell v. Tregono	761
Applebee v. Percy	668	Asfar v. Blundell	354, 360
Appleby v. Franklin	791	Ash v. Dawnay	1037
— v. Johnson	410	— v. Pouppeville	320
— v. Myers	476	Ashbury Ry. Carriage Co. v. Riche	550, 971
Appleton v. Braybrook	87	Ashby v. Bates	212, 214
Arbib & Class's Contract, <i>In re</i> ..	251	— v. James	570
Arbon v. Fussell	127, 198	— (or Ashley) v. Minnitt ...	1037
Arcangelo v. Thompson ...	109, 192	Ashcombe v. Ellam	199
Arcdeckne, <i>In re</i>	482	Ashcroft v. Morrin	418
Archer's Case	490	Ashendon v. London, Brighton & S. Coast Ry.	528
Archer v. Slater	920	Asher v. Whitlock ...	871, 933, 934
Ardan S.S. Co. v. Weir	352	Ashford v. Price	395
Arden v. Pullen	264	Ashforth v. Redford	21
— v. Sharp	285	Ashley v. Ashley	337
— v. Sullivan	270, 271, 883	— v. Harrison	741, 742
— v. Tucker	215	— v. Taylor	1007
Arding v. Flower	139	Ashley's Case	973
Argent v. St. Paul's (Dean) ...	956	Ashling v. Boon	200, 486
Argentina, The	347	Ashmead v. Ranger	808
Argentino, The	667	Ashmole v. Wainwright ...	500, 518
Argoll v. Cheney	546	Ashmore, <i>In re</i>	131, 132
Argyle v. Hunt	75		
Arkwright v. Gell	718		
Arlett v. Ellis	705, 819		

	PAGE		PAGE
Ashpitel v. Sercombe	494	Attersol v. Briant	846
Ashton, <i>In re</i>	28	Att.-Gen. v. Antrobus ... 45, 46,	711
— v. Blackshaw	1047	— v. Brighton, &c., Supply	
— v. London & N. W. Ry.	517	Assoc.	642
— v. Stock	935	— v. Briant	154
Ashworth v. Outram	1023	— v. Bulpit	142
— v. Stanwix	681	— v. Churchill's Vet. Sani-	
Askew v. Lewis	1056	torium	402
Askew's Case	500	— v. Cleeve	50
Aslin v. Parkin	821	— v. Cole	642, 643
Aspden v. Seddon	694	— v. Conduit Colliery Co. ...	692
Aspinal v. Kempson	875	— v. Cory	670
— v. Wake	1003	— v. Davison	177, 181
Asplen v. Pullin 927, 932,	941	— v. Dorking Guardians ...	720
Assicurazioni Generali v. S.S.		— v. Emerson ... 49, 52, 807,	811
Bessie Morris Co.	362	— v. Esher Linoleum Co. ...	713
Assop v. Yates	682	— v. Ewelme Hospital 37	
Astbury v. Astbury	604, 1017	— v. Gaskill	955
Astey v. Emery	414	— v. G. E. Ry.	986
Astley v. Essex (Earl)	936	— v. Hemingway	713
— v. Fisher	106	— v. Hitchcock 145, 163,	164
— v. Johnson	315	— v. Horner	37, 713
— v. Reynolds	500, 593	— v. Horner (No. 2) 46, 88	
— v. Younge	744	— v. Hotham	186
Aston, <i>Ex parte</i>	151	— v. Hull	139
— v. Heaven	660	— v. Jones	107
— v. Kelsey	42, 47	— v. Leonard	1068
Astrakhan, The	667	— v. Lewes Cor.	991
Asylum for Idiots v. Handy-		— v. Logan	639
sides	111	— v. Lonsdale (Earl) 720	
Atcheson v. Everitt	143	— v. Manchester Co.	653
Atchinson v. Baker	383	— v. Margate Pier & Har-	
Atkins v. Curwood	450	bour Co. 977, 991	
— v. Drake	91	— v. Mersey Ry.	954
— v. Hatton	91	— v. Metropolitan Ry. 654	
— v. Humphrey	258	— v. Meyrick	46
— v. Kilby	994	— v. Newcastle-upon-Tyne	
Atkinson v. Baker	868	Cor.	141
— v. Bell 413, 438, 473,	827	— v. Nottingham Cor. ... 76,	653
— v. Bradford, &c., Build-		— v. Odell	382, 980
ing Society	487, 568, 1005	— v. Oldham	112
— v. Denby	500, 505	— v. Parker	25
— v. Hawdon	315	— v. Parsons	941
— v. Morris	130	— v. Ray	102, 337, 724
— v. Stephens	365	— v. Roe	644, 655
— v. Teasdale	704	— v. R. College of Physi-	
— v. Warne	817	cians	402
Atlantic Mutual Insur. Co. v.		— v. Scott	639, 644, 673
Huth	365	— v. Sewell	711
Atlas Metal Co. v. Miller 226		— v. Shrewsbury Bridge Co.	
Atlee v. Backhouse	501 639, 653	
Attack v. Bramwell	778, 785	— v. Terry	720
Attenborough v. Mackenzie ... 321		— v. Thames Conservators... 714	
— v. St. Katherine's Dock		— v. Theakstone	167
Co.	831	— v. Tomline	815, 937
— v. Solomon	1004	— v. Warren Smith	566
— v. Thompson	1053	— v. Warwick Corpn. ... 50,	193
Attenborough's Case 1045, 1051		— v. Windsor (Dean) 32	
Atterbury v. Fairmanner 378			

	PAGE		PAGE
Att-Gen. for Australia v. Adelaide S.S. Co.	769	BABBAGE v. Coulburn	269, 545
Att-Gen. to Prince of Wales v. Collom	60	Baber v. Harris	487
Att-Gen. of Straits Settlements v. Wemyss	717	Bach v. Owen	413
Attree v. Hawe	235	Backhouse v. Bonomi	692
Attwater, <i>Ex parte</i>	1052	— v. Hall	369
Attwood v. Chapman	745	Bacon v. Chesney	64
— v. Griffin	279	Badcock v. Hunt	623
— v. Rattenbury	294	Baddeley v. Granville (Earl)	678, 685
— v. Taylor	100, 510	— v. Mortlock	384
Atwood v. Ernest	868	Badeley v. Consolidated Bank	445, 446
Aubert v. Maze	483, 504	Badische Anilin und Soda Fabrik v. Levinstein	209
— v. Walsh	504	Badkin v. Powell	786
Audain, <i>Ex parte</i>	962	Badman, <i>Ex parte</i>	233
Auerbach v. Nelson	236	Badman & Bosanquet, <i>Ex parte</i>	962
August, The	346	Baerselman v. Bailey	362
Augustien v. Challis	2, 1069	Bagel v. Miller	448, 1007
Auriferous Properties Co., <i>In re</i>	969	Bagge v. Mawby	776
Austerberry v. Oldham Cor. ...	712	— v. Whitehead	1071
Austin v. Beddoe	920	Baglan Hall Colliery Co., <i>In re</i>	962
— v. Bethnal Green Guardians	954	Baglehole v. Walters	429, 729
— v. Dowling	798	Bagnall v. Carlton	490
— v. Evans	141	Bagot v. Arnott	551
— v. Gt. W. Ry.	538, 657	— v. Chapman	547, 597
— v. Llewellyn	940	— v. Williams	172
— v. Newham	887	Bagot Tyre Co. v. Clipper Tyre Co.	972
Austin Friars S.S. Co. v. Strack	476	Bagshawes v. Deacon	839
Australasian St. Navi. Co. v. Morse	365, 852	Baguley v. Hawley	374
Australian Agricultural Co. v. Saunders	344	Bahia & San Francisco Ry., <i>In re</i>	961, 979
Australian Newspaper Co. v. Bennett	734	Baildon v. Walton	71, 572
Australian Steam Navigation Co. v. Marzetti	954	Bailee v. Vivash	817
Auty v. Hutchinson	471	Bailey v. Appleyard	704, 949
Averline v. Whisson	124	— v. Bidwell	60, 120
Avery v. Bowden	217, 354	— v. Bodenham	326
Aveson v. Kinnaird (Lord) ...	48	— v. De Crespigny	244
Ayles v. Cox	250	— v. Edwards	323
— v. S. E. Ry.	659	— v. Finch	589
Aylesbury Ry. v. Mount	984	— v. Gill	223, 870
Aylesford (Earl) v. Morris ...	512	— v. Harris	552
Aylesford Peerage	43, 48, 917	— v. Holborn & Frascati ...	701
Ayliff v. Archdale	558	— v. Jamieson	711
Aylmer, <i>In re</i>	555	— v. Macaulay	57, 449, 450
Aynsley v. Beddington Coal Co.	694	— v. Sweeting	418
— v. Glover	696, 699, 702	Baillie v. Kell	792
Ayr v. St. Andrew's Ambulance Assoc.	990	Baily v. Clark	158, 717
Ayre v. Craven	732	Baily's Case	961
Ayrey v. Brit. Legal, &c., Assur. Co.	338	Bain v. Fothergill	254
Ayscough v. Bullar	82	— v. Sadler	1016
Azémar v. Caselar	428	— v. Whitehaven & Furness Junction Ry.	983
		Bainbridge v. Chertsey Urban Council	644
		— v. Pickering	559, 560
		— v. Postmaster-General	537, 652, 813

	PAGE		PAGE
Bainbridge v. Wade	17	Ball v. Dunsterville	66, 122
Baines v. Bromley	226, 588	— v. Ray	641, 642
— v. Ewing	23	Ballacorkish Silver Co. v. Harrison	719
— v. Lumley	937	Ballantyne v. Mackinnon	181
— v. Swainson	833	Ballard v. Tomlinson	719, 720
— (or Barnes) v. Toye	560	— v. Way	167, 249
Baird v. Fortune	18	Balls v. Westwood	263
— v. Robertson	495	Bally v. Wells	617
— v. Williamson	670, 720	Balme v. Hutton	802, 805, 854
Bake v. French	391	Bamfield v. Goole, &c., Trans- port Co.	359, 536
Baker, <i>In re</i>	603	— v. Massey	78, 789
— v. Ambrose	1054	Bamford v. Turnley	643, 654
— v. Bolton	664	Banbury v. Bank of Montreal	730
— v. Carrick	749	— v. White	1050
— v. Cartwright	385	Banbury Peerage Case ...	31, 42, 43, 47, 85, 176, 917
— v. Cave	975	Banco de Lima v. Anglo- Peruvian Bank	348
— v. Courage	497, 566	Bandy v. Cartwright	629
— v. Dalglish S.S. Co. ...	691	Bank Line v. Capel	350
— v. Davis	266	Bank of Africa v. Salisbury Gold Mining Co.	959
— v. Dening	131, 238	Bank of Australasia v. Clan Line	361
— v. Dewey	61	— v. Harding	185, 186
— v. Ellison	539	— v. Nias	184
— v. Firminger	423	Bank of Bengal v. Macleod ...	318
— v. Gostling	257	Bank of Brazil, <i>Ex parte</i>	312
— v. Gray	828	Bank of British North America v. Strong	751
— v. Gt. Northern Ry.	650	Bank of England, <i>Ex parte</i> ...	168
— v. Greenhill	484, 623	— v. Anderson	92
— v. Holme Cultram Urban Council	955	— v. Cutler	382
— v. Holtzapfell	260, 265	— v. Vagliano	70, 272, 281, 496
— v. Ingall	556	Bank of Hindostan, <i>In re</i>	168
— v. James	682	— v. Smith	546
— v. Jardine	201	Bank of Ireland v. Evans' Trustees	979
— v. Keen	454	Bank of London, &c., Insur. Assoc., <i>In re</i>	974
— v. Lawrence	221	Bank of Montreal v. Exhibit & Trading Co.	314
— v. Reynolds	267	Bank of New South Wales v. O'Connor	869
— v. Snell	668	— v. Owston	762, 957
— v. Walker	315	Bank of New Zealand v. Simpson	27
— v. White	874, 875	Bank of Scotland v. Dominion Bank (Toronto)	321
— v. Wicks	786	— v. Morrison	371
Baker's Case	969	Bankes v. Jarvis	588, 589
Balcetti v. Serani	76	Bannatyne v. MacIver	486
Balck v. Pilcher	331	Banner, <i>Ex parte</i>	316, 348
Baldey v. Parker	413	— v. Berridge	564, 574, 940
Baldney v. Ritchie	8	Bannerman v. White	428, 431
Baldock v. Westminster City Council	652	Bannister, <i>In re</i>	250
Baldwin v. Casella	668	— v. Hyde	778
— v. Cole	847		
— v. Elphinstone	735		
— v. London, C. & Dover Ry.	536		
— v. Richardson	308		
Balfour v. Balfour	451		
— v. Ernest	33, 976		
Balkis Consolidated Co. v. Tomkinson	979		
Ball, <i>Ex parte</i>	503, 791		
— v. Cullimore	882		

	PAGE		PAGE
Banwen Iron Co. v. Barnett ...	975	Barnett, <i>In re</i>	75
Barber v. Brown	498	— v. Allen	738
— v. Holmes	188	— v. Cohen	690, 691
— v. Lamb	186	— v. Guildford (Earl)	809, 821, 822
— v. Meyerstein	347, 349	— v. Howard	1027
— v. Nottingham & Grant-		— v. Javeri	426
ham Ry.	175	— v. Poplar Cor.	649
— v. Penley	642	— v. South London Tram-	
— v. Pott	496	ways Co.	956
— v. Richards	291, 294	Barnett's Case	969
— v. Whiteley	950	Barney v. United Telephone	
— v. Wood	138	Co.	759
Barber's Case	963	Baruscombe v. Scarborough ...	636
Barclay, <i>Ex parte</i>	1047	Barnsley v. Taylor	409
—, <i>In re</i>	511	Baron v. Husband	490
— v. Bailey	299	— v. Portslade District	
— v. Gooch	478	Council	652
— v. Harris	511	Baron Aberdare, The	667
— v. Pearson	504, 551	Barque Quilpué v. Brown ...	20, 353
Barden v. Keverberg	1021	Barraclough v. Greenhough ...	7, 123, 135
Bardwell v. Lydall	370	— v. Johnson	46, 712
Barfoot v. Sadler	920	Barratt v. Kearns	40, 745
Barford v. Barford	107	Barrell, <i>Ex parte</i>	252
Baring v. Ahingdon	705	Barrett, <i>In re</i>	1014
— v. Corrie	591	— v. Day	759
Barker v. Allan	410	— v. Deere	579, 592
— v. Angell	765	— v. Long	740
— v. Birt	513	Barrett's Case (No. 2)	969
— v. Braham	812	Barrington, <i>In re</i>	843
— v. Furlong...148, 842, 852,	855	Barron v. Potter	1054
— v. Greenwood	580	Barrow, <i>Ex parte</i>	864
— v. Hempstead	230	— v. City Bank	833
— v. Herbert	644, 663	— v. Dyster	23
— v. Keat	808	— v. Isaacs	613, 908
— v. Lewis	231	Barrow's Case	512, 965
— v. Ray	51	Barry v. Bebbington	52
— v. Richardson	36	— v. Croskey	727
— v. Stead	449	— v. Glover	899
— v. Windle	350	— v. Midlaud Ry.	957
Barkshire v. Grubb	716	— v. Nesham	445
Barkworth v. Young	235, 238	— v. Nugent	884
Barling v. Bishopp	1038	— v. Rush	1011
Barlow v. Bishop	292	— v. Van den Hurk	437
— v. Teal	888	Barrymore (Lord) v. Taylor ...	57
Barnard, <i>In re</i>	279	Barsham v. Bullock	1035
— v. Faber	343	Bartholomew v. Markwick ...	457
— v. Foster	463	— v. Stephens	2
Barnardiston v. Chapman	852	Bartlett v. Baker	648
Barned's Banking Co., <i>In re</i> ...	118	— v. Emery	514
Barnes v. Foley	537	— v. Purnell	421
— v. Fox	788	— v. Smith	127, 203
— v. Glenton	564, 603	Barton v. Bricknell	997
— v. Kyffin	266	— v. Carew	149
— v. Loach	701, 718	— v. Dawes	30
— v. London, Edinburgh,		— v. Gainer	829, 868
&c., Insur. Co.	337	— v. L. & N. W. Ry. ...	978, 979
— v. Lucas	128	— v. North Staffordshire Ry.	979
— v. Lucile	668		
— v. Ward	644, 645, 705		

	PAGE		PAGE
Barton v. Piggott	550	Baumwoll Manufacturing Co.	
Barwell v. Adkins	740	v. Furness	345, 473
Barwick v. English Joint Stock		Bavins v. L. & S. W. Bank	
Bank	547, 725, 727		502, 853
Barzillay v. Lewis	180	Bawden v. London, Edinburgh	
Baseh v. Matthews	761	& Glasgow Assur. Co. ...	338, 340
Baseley v. Clarkson	817	Baxendale v. Bennett ...	70, 288, 317
Baskerville v. Brown	590	— v. Eastern Counties Ry.	520
Bass v. Gregory	36, 700, 702	— v. Gt. E. Ry. Co. ...	524, 526, 530
Bassett v. Collis	378	— v. G. W. Rail. Co.	488, 500, 520
Bastable v. N. B. Ry.	519	— v. Hart	525
Bastard v. Smith	160, 213, 215, 719	— v. London, Chatham &	
Basten v. Carew	183	Dover Ry.	536
Baster v. L. & County Printing		— v. L. & S. W. Ry. Co. ...	500, 520
Works	406	— v. Murray	719
Bastifell v. Lloyd	352, 353	— v. N. Lambeth, &c. Club	706
Batard v. Hawes	482	Baxter v. Browne	884
Batchelor v. Fortescue	678	— v. Nurse	403
— v. Middleton	941	— v. Portsmouth (Earl) ...	562
Bate v. Cartwright	504	— v. Taylor	640
— v. Hill	789	Baxter's Leather Co. v. Royal	
— v. Kinsey	11	Mail Steam Packet Co.	516
— v. Payne	481	Bayley v. Bradley	69, 258, 261
Bateman v. Bailey	48	— v. Chadwick	475
— v. Bluck	711	— v. Fitzmaurice	237
— v. Green	827	— v. Gt. W. Ry.	716, 718
— v. Hunt	62, 507, 508	— v. Homan	544
— v. Joseph	308	— v. Manchester Ry.	957
— v. Mid Wales Ry. ...	286, 986	— v. Rimmell	408
— v. Pinder	576	— v. Wilkins	479
Bater v. Bater	173, 185, 918	— v. Wylie	101, 166
Bates v. Batey	680	Bayliffe v. Butterworth	23, 479
— v. Burchell	229	Baylis, <i>Ex parte</i>	391
— v. Donaldson	613	—, <i>In re</i>	391
— v. Pilling	793, 813	— v. A.-G.	29
— v. Townley	485, 515	— v. Jiggins	624
Bateson v. Gosling ...	323, 371, 586	— v. Lawrence	732, 733
Bath v. Sutton ...	1053, 1054, 1056	— v. Le Gros	905
Bath's Case	967	— v. Tyssen-Amhurst	703
Bather v. Day	542	— v. Usher	770
Bathurst Borough v. Mac-		Bayliss v. Usher (or Fisher) ..	785
pherson	651	Baynes v. Lloyd	629
Batson v. Donovan	536	Baynton v. Morgan	263, 607
— v. King	367	Baynton v. Cattle	551
— v. Meggat	1033	Bazeley v. Forder	452, 454
Batt v. Metropolitan Water		Bazett v. Morgan	230
Board	652	Beacon Life Assur. Co. v. Gibb	343
Batten v. Gedye	705	Beal v. S. Devon Ry. Co.	529
Batten-Poole v. Kennedy ...	256, 879	Beale v. Moulds	427
Battersby v. Lawrence	402	— v. Nind	575
Bathyan v. Walford	1007	— v. Sanders	270
Battie's Case	964	Beales v. Tennant	1053
Battishill v. Reed ...	641, 653, 701	Bealey v. Shaw	36
Battley v. Faulkner	566	Bealy v. Greenslade	571
Bauer v. Milford	42	Beamish v. Beamish	912
Bauerman v. Radenius	62	Beard v. Knight	1065
Baugh v. Cradocke	153		
Baumann v. James	236		

	PAGE		PAGE
Beard v. London General Omnibus Co.	656	Beeman v. Duck	291
— v. Moira Colliery Co. ...	694	Beer v. Bell	1027
Beardman v. Wilson	257, 606	Beeston v. Beeston	319, 504
Beardsley v. Beardsley	135	— v. Collyer	403, 405
Beare v. Garrod	51	— v. Weate	718
Bearn, The	373, 651, 671, 679	Begbie v. Levi	555
Beasley v. Clarke	709, 715	— v. Phosphate Sewage Co.	494, 505, 551
— v. Roney	1020, 1026	Behn v. Burness	350, 548
Beasley's Trusts, <i>In re</i>	38	Behrens v. Gt. N. Ry. Co. ...	525
Beatson v. Skene	154, 155, 747	— v. Richards	712, 816
Beattie v. Ebury, Ltd.	382	Belaysse v. Burbridge	886
Beauchamp, <i>In re</i>	1020	Belbin v. Skeates	132
— v. Parry	63, 316	Belcher v. M'Intosh	84, 618
— v. Powley	522	— v. Patten	1072
Beaufort (Duke) v. Smith ...	53, 167, 174	Belding v. Read	830
— v. Swansea (Mayor)	25	Belfast & Ballymena Ry. v. Keys	540
Beaumont v. Brengeri ...	415, 416, 554	Belfast, &c. Ry. v. Strange ...	982
— v. Field	27	Belfast Ropework Co. v. Bushell	516
— v. Greathead	320	Belham, <i>In re</i>	1015
— v. Kaye	1020	Bell, <i>In re</i>	564
Beavan, <i>In re</i> ...	562, 573, 576, 1015	— v. Ansley	62
— v. M'Donnell	562	— v. Balls	239, 240
Becher v. Gt. E. Ry.	538, 541	— v. Banks	578
Bechuanaland Exploration Co. v. L. Trading Bank	458, 837	— v. Buckley	321
Beck v. Cleaver	394	— v. Hayden	620
— v. Denbigh	779	— v. Ingestre	294
— v. Pierce	170, 397, 1020	— v. Love	693
Becker v. Riebold	785	— v. Midland Ry. ...	640, 653, 815
Beckett, <i>In re</i>	388	— v. Oakley	993
— v. Addyman	369	— v. Parke	757
— v. Leeds Corporation	809	Bellairs v. Tucker	723, 725
— v. Midland Ry.	196, 714	Bellamy v. Davey	827
— v. Tasker	1027	— v. Debenham	237, 244
— v. Tower Assets Co.	1046	— v. Saull	197
Beckford v. Montague	1067	— v. Wells	642
Beckh v. Page	426	Bellcairn, The	171
Beckham v. Drake	285, 1006	Beldon v. Tankard	480
— v. Knight	84	Bellerby v. Rowland S.S. Co. ...	967
Beckhuson v. Hamblett	467	Belmore (Countess) v. Kent County Council	713
Beckwith v. Philby	800, 994	Belshaw v. Bush	581, 584
— v. Shordike	814	— v. Marshall	1037
— v. Sydebotham	157	Belvedere Fish Guano Co. v. Rainham Chemical Works ...	642
Beccuet v. MacCarthy	185	Bence v. Shearman	508
Beddall v. Maitland	588	Bendle v. United Kingdom Alliance	732
Beddington v. Attlee	697	Benett v. Peninsular & Oriental Steamboat Co.	516
Bede S.S. Co. v. R. Wear Comms.	373, 671, 966	— v. Wyndham	483
Bedford v. Deakin	321	Benfieldside Local Board v. Consett Iron Co.	694
— v. McKnowl	789	Benham v. Gray	806
Bedingfield v. Onslow	640	Benington v. Benington	817
Bedwell v. Wood	230	Benjamin, <i>In re</i>	39
Beech v. Eyre	987	— v. Portens	445
— v. Jones	158, 159	— v. Storr	639, 714
Beechey v. Brown	385		
Beeching v. Gower	333		

	PAGE		PAGE
Bennett v. Allcott	787	Berry v. Goodman	808
— v. Bayes	785, 951	— v. Greene	921
— v. Bennett	756	— v. Halifax, &c. Banking Co.	327
— v. Blain	235	— v. Heard	843
— v. Deacon	748	— v. Humm	691
— v. Francis	438	— v. Storey	513
— v. Henderson	438	— v. Young	244, 245
— v. Parker	595	Berryman v. Wise	40, 62
— v. Stepney Corporation..	990	Berthon v. Loughman	157
— v. Stone	247	Bertie v. Beaumont	91, 806
— v. Watson	386	Berwick v. Horsfall	4
— v. White	507, 589	Besant v. Cross	14
Bennetts v. McIlwraith	81	Besford v. Saunders	576
Benning v. Ilford Gas Co.	226	Besley v. Besley	82, 252
Bennison v. Cartwright ...	47, 710	Bessela v. Stern	59, 383
Bensley v. Bignold	550	Bessell v. Landsberg	259
Benson v. Duncan	365	— v. Wilson	997
— v. Lamb	246	Best v. Best	114
— v. Marshall	316	— v. Hamand	243
Bentall v. Burn	414	— v. Hayes	1073
Bentinck, <i>In re</i>	1013	— v. Osborne	378
— v. London Joint Stock Bank	462, 838	Betham v. Benson	64
Bentley v. Griffin	451	Bethell, <i>In re</i>	910
— v. Vilmont	836	— v. Clark	863, 864
Bentley Bros. v. Metcalfe	375	Betjemann v. Betjemann	566
Bentsen v. Taylor	350	Betteley v. Reed	855
Benzon, <i>In re</i>	567	Betterbee v. Davis	593
Beresford v. A.-G.	102	Bettesworth & Richer, <i>In re</i> .	626
Bergheim v. Blaenavon Iron, &c. Co.	434	Bett's Patent, <i>In re</i>	90
— v. Gt. E. Ry.	540	Betts v. Betts	159
Berkeley v. Elderkin	181	— v. Gibbins	483
— v. Hardy	123	Bevan v. Waters	153, 858
Berkeley Peerage Case ...	41, 44, 50, 163	Bevans v. Rees	593
Bermondsey Vestry v. Brown...	712	Beveridge v. Beveridge	287
Bernadi v. Motteux	181	— v. Bnrgis	308
Bernard, <i>In re</i>	192	Beverley (Mayor) v. Craven ...	87
Bernasconi v. Anderson	488	Beverley v. Lincoln Gas Co. ...	438
— v. Argyle (Duke)	294	Beverley's Case	829
Berne (City) v. Bank of Eng- land	72	Bevins v. Hulme	579
Berney v. Bickmore	880	Bew v. Bew	225
— v. Read	385	Bewley v. Atkinson	52, 53, 699
Bernina, The	663	Bexwell v. Christie	548
Bernstein v. Baxendale	524	Beynon v. Godden	227
Berolles v. Ramsay	560	Bianchi v. Nash	438
Berresford v. Montgomerie	359	— v. Offord	1058
Berrey v. Lindley	267, 887, 890	Bibby v. Carter	695
Berridge v. Berridge	482	Bickerdike v. Bollman	307
— v. Fitzgerald	304	Bickerton v. Walker	62
— v. Ward	809	Bickett v. Morris	720, 810
Berriman v. Peacock	811	Bickford v. Parson	271
Berringer v. Gt. E. Ry. ...	538, 657	Bickmore v. Dimmer	623
Berry v. Adamson	799	Bicknell v. Hood	885
— v. Alderman	317	— v. Keppel	575
— v. Berry	874	Biddell v. Dowse	208
— v. Da Costa	384	Bidder v. Bridges	544
		Biddle v. Bond	855
		— v. Hart	686
		— v. Levy	438

	PAGE		PAGE
Biddulph v. Ather	170	Birkenhead, &c. Ry. v. Cotes-	
Bideford Parish, <i>In re</i>	180	worth	982
Biden v. Loveday	39	— v. Pilcher	984
Biederman v. Stone	459, 461	Birkenhead, Lancashire, &c.	
Bieten v. Burrige	799	Ry. v. Brownrigg	982
Biffin v. Bignell	452	Birkmyr v. Darnell	366
Bigg v. Whisking	417	Birrell v. Dryer	74
Biggar v. Rock Life Assur. Co.	338, 340	Birt v. Barlow	111
Biggerstaff v. Rowatt's Wharf	971, 973	Bishop, <i>Ex parte</i>	481
Biggs v. Evans	832	— v. Balkis Consolidated Co.	460, 961, 980
Bignell v. Clarke	774	— v. Elliott	844
— v. Harpur	1008	— v. Howard	261, 883
Bigsby v. Dickinson	165	— v. Rowe	301
Bikker v. Beeston	221	— v. Shillito	827
Bilbee v. L. & Brighton Ry. ...	674	Biss v. Hygate	240
Bilbie v. Lumley	496	Bissell v. Fox	324, 329
Bilborough v. Holmes	447	Bissicks v. Bath Colliery Co. ...	1070
Bill v. Bament	419	Bitteley v. M'Leod	138
— v. Darenth Valley Ry. ...	985	Bize v. Dickason	497
Billing v. Coppock	390	Blachford v. Kirkpatrick	241
Bingham v. Allport	592	Black v. Christchurch Finance	
— v. Garnault	802	Co.	649
Binks v. S. Yorkshire, &c. Ry.	645	— v. Homersham	459
Co.	645	— v. Smith	593
Birch, <i>In re</i>	1014	Black & Co.'s Case	961, 969
— v. Clifford	621	Blackborne v. Blackborne	146
— v. Depeyster	19	Blackburn v. Liverpool, Brazil,	
— v. Ridgway	127	&c. S. Nav. Co.	362
— v. Wright ... 264, 872, 882, 922		— v. Smith	244, 252
Birchall v. Bullough	198, 199	Blackburn Bobbin Co. v. Allen	476
Bird v. Astock	848	Blackburn Building Soc. v.	
— v. Baker	890	Cunliffe Brooks & Co.	986
— v. Boulter	240, 420	Blackburn Union v. Brooks ...	166
— v. Brown	865	Blacker v. Lake	680
— v. Crabb	1073	Blackett v. Ridout	941
— v. Davey	1058	— v. Royal Exchange Assur.	
— v. Elwes	625	Co.	22
— v. Gammon	574	Blackham v. Doren	307
— v. Gt. N. Ry.	659	— v. Pugh	749
— v. Gunston	999	Blackham's Case	172, 179
— v. Higginson ... 214, 267, 610		Blackie v. Pidding	277, 313
— v. Holbrook	669	Blackledge v. Harman	506
— v. Jones	792, 798	Blacklock v. Dobie	555
— v. Samuel	636	Blackman v. Simmons	669
— v. Standard Oil Co.	226	Blackmore v. Mile End Old	
Birmingham, &c. Banking Co.		Town Vestry	651
v. Ross	698	— v. N. Australasian Co. ...	494
Birmingham City Tramways		— v. White	268, 269, 1007
Co. v. Law	537, 649	— v. Yates	1072
Birmingham Cor. v. Allen	692	Blackstone v. Wilson	67
Birmingham Estates Co. v.		Blackwell v. England	1053
Smith	587	Blacquiere v. Hawkins	75
Birmingham Excelsior Mining		Blades v. Free	1017
Society v. Lane	1027	— v. Higgs	793, 803
Birmingham Land Co. v. L. &		— v. Lawrence	73
N. W. Ry.	906	Blagden v. Bradbear	235, 239
Birk v. Guy	575	Blagg v. Sturt	738, 739

	PAGE		PAGE
Blagrove v. Bristol Waterworks Co.	714	Blore v. Giuliani	622
Blaiherg, <i>Ex parte</i>	1051, 1073	Blount v. Harris	1053
— v. Beckett	1060	— v. Layard	190, 712
— v. Parke	1052	Blow, <i>In re</i>	1018
— v. Parsons (or Parsons v. Hargreaves)	1060	Blower v. Gt. W. Ry. Co.	518
Blaikie v. Stenbridge	360	— v. Hollis	100, 177
Blair v. Cordner	394	Bloxam v. Hubbard	83
— v. Ormond	198, 604	— v. Sanders	842
Blake v. Albion Life Assur. Co.	727	Bloxsome v. Williams	554
— v. Appleyard	229	Blundell v. Catterall	818
— v. Beaumont	280	— v. Gladstone	28
— v. Blake	132	— v. Howard	76
— v. Done	219, 873	Blyth v. Birmingham Water-works	656, 659, 680
— v. Midland Ry.	690	— v. Dennett	895
— v. Nicholson	856, 858	— v. Fladgate	397, 398, 399
— v. Pilfold	155, 747	Blythe v. Smith	621
— v. Stevens	753	Boaler v. Mayor	578
— v. Woolf	670	Board v. Board	877
Blake's Case	544	Boardman v. Sill	861
Blakemore v. Bristol & Exeter Ry.	678	Boast v. Firth	407
— v. Glamorgan Canal Co.	169, 183	Bobbett v. Pinkett	325, 330
Blaker v. Hawes	462	— v. S. E. Ry.	933
Blamires v. Lancashire & Yorkshire Ry.	660, 677	Bock v. Gorrissen	856
Blanchet v. Powell's Llantivit Colliery Co.	357	Boddington, <i>In re</i>	1054
Bland v. Bland	146	Bodega Co., <i>In re</i>	963
— v. Lipscombe	704	Boden v. Roscoe	813, 950
— v. Yates	641	— v. Smith	990
Blandy v. De Burgh	392	Bodenham v. Bennett	532
Blandy-Jenkins v. Dunraven (Earl)	50, 55	— v. Purchas	582, 585
Blane, <i>Ex parte</i>	492	Bodger v. Arch	1004
— v. Francis	604, 605	Bodlewel, The	667
Blaney v. Hendricks	510	Bodley v. Reynolds	854
Blankenstein v. Robertson	1059	Bodman v. Bodman	911
Blatch v. Archer	1034	Bodmin United Mines, <i>In re</i>	75, 952
Blatchford v. Cole	631	Boggett v. Frier	1021
Blaymire v. Haley	787	Boileau v. Rutlin	42, 61, 71, 176, 179
Bleaden v. Hancock	858	Boks & Peter, Rushton & Co., <i>In re</i>	386
Bleakley v. Smith	236, 238	Bolch v. Smith	645, 646
Bleasby v. Crossley	34	Bolckow, Vaughan & Co. v. Campania Minera de Sierra Minera	476
Blenkarn v. Hodges' Distillery Co.	406	Bold v. Rayner	20, 422
Blenkinsop v. Clayton	416, 417	Boldero v. London & Westminster Discount Co.	1038, 1047
Blessard v. Hirst	297	Bolingbroke v. Kerr	1003
Blessing, The	409	— v. O'Rorke	512
Blessley v. Sloman	798	— v. Swindon Local Board ..	957
Blewitt, <i>In re</i>	131, 132, 238	Bolitho v. Gidley	1027
— v. Gordon	987	Bolland, <i>Ex parte</i>	1049, 1054
— v. Tregonning	37, 165	— v. Bygrave	856
— v. Tritton	204	Bolton v. Arlson, or Hillersden	441
Bloomenthal v. Ford	965, 979	— v. Buckenham	371
Bloomer v. Bernstein	432	— v. Carlisle (Bishop)	546
Blore v. Ashby	217, 227	— v. Gladstone	180

	PAGE		PAGE
Bolton v. Lancashire, &c. Ry.	865	Bostock v. Jardine	493
— v. L. School Board	243	— v. Nicholson	375, 380
— v. Sherman	67	— v. Ramsey Urban Council	224, 225, 764, 992
— v. Tomlin	158, 267	Boston v. Boston	235
Bolton Partners v. Lambert	233, 237	Boston Deep Sea, &c. Co. v.	
Bonacina, <i>In re</i>	555	Ansell	406, 489
Bonar v. Mitchell	305, 988	Bosville v. A.-G.	39, 48, 917
Bond v. Rosling	886	Boswell, <i>In re</i>	571
Bone v. Ekless	504	— v. Smith	34
Bonelli, <i>In re</i>	108	Bosworth-Smith v. Gwynnes	644
Bonfield v. Smith	213	Bott v. Ackroyd	997
Bongiovanni v. Société		Bottings v. Firby	182
Générale	462	Bottomley v. Brougham	744
Bonnard v. Dott	401, 553	— v. Fisher	332
— v. Perryman	743	— v. Nuttall	444, 584
Bonner v. Gt. W. Ry.	702	Bottomley's Case	965
— v. Tottenham, &c. Build-		Bottrell v. Summers	61
ing Soc.	480	Boughey v. Boughey	107
Bonnewell v. Jenkins	237	Boulding v. Tyler	229
Bonomi v. Backhouse	655	Boulter v. Arnott	439
Boodle v. Cambell	947	— v. Peplow	59, 482
Boor, <i>In re</i>	626	Boulston's Case	814
Boorman v. Nash	466	Boulton v. Crowther	651
Boosey v. Davidson	1	— v. Jones	438
— v. Wood	755	— v. Prentice	452
Booth v. Alcock	697	— v. Pritchard	79, 80
— v. Arnold	732	— v. Reynolds	951
— v. Briscoe	731, 742	Bound v. Lawrence	684
— v. Charlton	787	Bourdin v. Greenwood	574
— v. Cooke	19	Bourke v. Davis	711, 712
— v. Howard	80	Bourne v. Fosbrooke	842
— v. Millns	213	— v. Gatcliffe	22, 365, 532, 533
— v. Ratte	720	— v. Salmon	623
Booth S.S. Co. v. Cargo Fleet		Bovill v. Hammond	508
Iron Co.	863	Bow v. Hart	229
Bootle, <i>In re</i>	130	Bowcher v. Noidstrom	666
— v. Blundell	132	Bowden v. Henderson	38
Bordenave v. Gregory	465	— v. Waithman	1034
Boreham v. Hall	643	Bowditch v. Balchin	994
Borough, &c. Building Soc.,		— v. Fosberry	995
<i>In re</i>	971	Bowen v. Anderson	650, 888
Boroughe's Case	899	— v. Ashley	201
Borries v. Hutchinson	434, 436	— v. D'Orléans (Duc)	238
— v. Imperial Ottoman Bank	590	— v. Hall	786, 789
Borrodaile v. Lowe	311	— v. Owen	595
Borrowman v. Drayton	426	Bower v. Hett	1066
— v. Free	424	— v. Hill	715
— v. Rossel	19	— v. Peate	649
Borrows v. Ellison	939	— v. Woodman	602
Borthwick v. Elderslie S.S. Co.	509	Bowerbank v. Monteiro	319
Bos v. Helsham	252	Bowers v. Nixon	616
Bosanquet v. Anderson	292, 293, 332	Bowes, <i>In re</i>	860, 1011
— v. Shortridge	988	— v. Foster	61
— v. Woodford	988, 1072	— v. Shand	428, 429
Boschoek Proprietary Co. v.		Bowes & Partners v. Press	406
Fuke	963	Bowey v. Bell	225
Bostock v. Hume	34	Bowker v. Burdekin	124
		Bowlby v. Bell	413

	PAGE		PAGE
Bowman v. Hodgson ...	120, 133,	Bradley v. James	54, 572, 1004
— v. Manzelman	6	— v. Newcastle (Pilots)	25
— v. Secular Society	266	— v. Newsam	360
Bowring v. Shepherd	461	— v. Ramsay	826
Bowry v. Bennet	557	— v. Ricardo	157
Bowsher v. Calley	1035	— v. Wallace	667, 689
Bowyear v. Pawson	589	— v. Waterhouse	536
Bowyer v. Cook	815	Bradley and Essex & Suffolk Accident Co., <i>In re</i>	340
Box v. Jubb	670	Bradshaw v. Beard	485, 1008
Boxer v. Rabeth	120	— v. Bennett	128
Boxsius v. Goblet	735, 746,	— v. Waterlow	763, 764
Boyce v. Green	235	— v. Widdington	601
— v. Warburton	425	Bradshaw v. Lancashire & Yorkshire Ry.	1002
Boyd, <i>Ex parte</i>	1027	Bradworth v. Foshaw	219
— v. Bilham	783	Brady v. Giles	658
— v. Brooks	1015	— v. Jones	593, 595
— v. Croydon Ry.	977	— v. Oastler	435
— v. Emmerson	327	— v. Todd	377
— v. Hind	544	Braemount S.S. Co. v. Weir ...	349
— v. Lett	423	Bragg v. Cole	438
— v. Profaze	778	Brailey v. Rhodesia Consoli- dated	108
— v. Siffkin	426	Brain, <i>In re</i>	897
Boydell v. Drummond	236, 411	— v. Preece	56, 306
Boyers v. Duke	232, 233,	Braithwaite v. Cooksey	943
Boyle v. Tamlyn	949, 950	— v. Foreign Hardwood Co.	423
— v. Wiseman ... 4,	127, 156,	— v. Skofield	470
Boys v. Pink	524	Bramah v. Roberts	286
Boyse, <i>In re</i>	272, 326	Bramble v. Moss	188
— v. Colclough	186	— v. Spiller	83
Boyter v. Dodsworth	502	Bramley v. Chesterden	630
Bozelli's Settlement, <i>In re</i> ...	910	Bramston v. Robins	61, 585
Brace v. Calder	407	Bramwell v. Eglinton	584
Bracegirdle v. Heald	411, 412	— v. Lacy	615
— v. Orford	791, 815	— v. Lucas	153
Bracey v. Carter	395	Branckelov S.S. Co. v. Lam- port	351
Bracken, <i>In re</i>	1012	Brancker v. Molyneux	841
Bradburn v. Foley	271	Brandao v. Barnett ... 22, 75,	590,
— v. Gt. W. Ry.	664	856, 857	
Bradburne v. Botfield	598	Brandon v. Hibbert	1034
Bradbury v. Morgan	369	— v. Old	554
— v. Wright	623	Brandon Hill, Ltd. v. Lane ...	1058
Braddick v. Thompson	387	Brandt v. Bowlby	827
Bradford v. Freeman	214	— v. Dunlop Rubber Co. ...	508
— v. Young	919	— v. Lawrence	424
Bradford Banking Co. v. Briggs	959	Branford v. Branford	152
Bradford Corporation v. Fer- rand	719	Branley v. S. E. Ry. Co.	531
— v. Myers	991	Brannagan v. Robinson	685
Bradford (Mayor) v. Pickles ...	719	Branscombe (Lady) v. Bridges	771
Bradford Old Bank v. Sutcliffe	372, 568,	Branscombe v. Scarborough ...	634
	602	Branwhite, <i>Ex parte</i>	969
Bradlaugh v. Clarke	636	Brashier v. Jackson	630
— v. De Rin	198, 203,	Brass v. Maitland	359
— v. Gossett	744	Brassington v. Llewellyn	933
— v. Newdegate	72, 550	Brasyer v. Maclean	1071
Bradley v. Arthur	75, 167		
— v. Baylis	806		
— v. Carr	797		
— v. Copley	842, 1036		

	PAGE		PAGE
Braunstein v. Accidental Death Insur. Co.	339	Briggs v. Evelyn	1000
Bravo, The	667	— v. Oliver	677
Braybrooks v. Whaley	254	— v. Sowry	783
Brayshaw v. Eaton	559	— v. Wilkinson	473
Braythwayte v. Hitchcock	883	Briggs and Spicer, <i>In re</i>	242
Brazier v. Bryant	387	Bright v. Hutton	449
— v. Hudson	920	— v. Legerton	55
— v. Jones	385	— v. Walker	708, 710
Brazier's Case	145	Brightman v. Tate	550
Brazilian Rubber Plantations, <i>In re</i>	973	Brighton Arcade Co. v. Dowling	966, 969
Breckon v. Smith	514	Brighton (Mayor) v. Brighton (Guardians)	933
Breeze v. Hawker	106	Brighty v. Norton	830
Brembridge v. Latimer	732	Brigstocke v. Smith	570
Bremer v. Freeman	107	Brind v. Dale	516
Bremner v. Hull	50	— v. Hampshire	490
Brenan, <i>In re</i>	106	Brinc v. Bazalgette	739
Brenda S.S. Co. v. Green ...	19, 353	Brinkley v. Att.-Gen. ...	116, 910, 914
Brereton v. Chapman	352	Brinkman v. Matley	819
— v. Evans	256, 880, 947	Brinsmead v. Harrison ...	171, 839
Breton v. Cope	69, 189	Brinson v. Davies	474
— v. Knight	196	Brintons v. Turvey	340
Brett, <i>Ex parte</i>	506	Brisbane v. Dacres	496
— v. Beales...45, 46, 50, 167, 193		Brisco v. Lomax	46, 77
— v. Rogers	16, 250, 252, 624, 706	Briscoe v. Stephens	182
Brettel v. Williams	514	Bristol, &c., Bank v. Midland Ry.	347, 824, 854
Brewer v. Broadwood	244	Bristol, &c., Bread Co. v. Maggs	237
— v. Eaton	905	Bristol Corporation v. Cox ...	140
— v. Palmer	257	— v. Westcott	611
Brewerton v. Parker	510	Bristol & Exeter Ry. Co. v. Collins	521
Brewster v. Kitchell	623	Bristol (Lord) v. Wilsmore ...	831
— v. Sewell	5	Bristol Tramways, &c., Co. v. Fiat Motors	375
Brice v. Wilson	1008	Bristow v. Cormican	49, 77
Brickell (or Brickhill) v. Hulse	61, 178	— v. Eastman	558
Briddon v. Gt. N. Ry.	517	— v. Sequeville	108, 202
Bridge v. Gd. Junction Ry. ...	662	— v. Wright	1065
— v. Wain	435	Bristowe v. Needham	486
Bridger v. Huett ... 41, 43, 106,	909	Britain v. Rossiter	411, 412
— v. Savage	504	British & American Telegraph Co. v. Albion Bank	490
Bridger's Case	961, 967	— v. Colson	40
Bridges, <i>In re</i>	1015	British Asbestos Co. v. Boyd	963
— v. Garrett	580	British Cash, &c., Conveyors v. Lamson Store Service Co.	550
— v. Hawkesworth	841	British Columbia Electric Ry. v. Gentile	689
— v. N. London Ry.	675	— v. Loach	662
— v. Smyth	264	British Columbia, &c., Co. v. Nettleship	366, 532, 535
Bridgett v. Coyney	799, 999	British Dominions General Insurance Co. v. Duder ...	343, 481
Bridgman v. Jennings	50	British Equitable Assur. Co. v. Gt. W. Ry.	338
Bridgwater Trustees v. Bootle-cum-Linacre	321, 810		
Brilport Old Brewery Co., <i>In re</i>	971		
Brierley v. Brierley	113, 194		
Brierly v. Cripps	514		
— v. Kendall	804		
Briggs v. Boss	1053, 1054		
— v. Briggs	918		

	PAGE		PAGE
British Homes Assur. Cor. v. Paterson	399, 447	Brooks v. Hodgkinson	794, 798
British Museum Trustees v. Finnis	711	— v. Israel	225
British Mutoscope Co. v. Horner	785	— v. Jennings	596
British Mutual Banking Co. v. Charnwood Forest Ry.	956	— v. Mason	391
British Railway Traffic, &c., Co. v. Kahn	1046	— v. Warwick	765
British South Africa Co. v. Companhia de Moçambique	805	Brooks, Jenkins & Co. v. Torquay Cor.	955
— v. De Beers Consolidated Mines	954	Brooksbank v. Smith	566
— v. Lennon	679	Broome v. Speak	726
British Union & National Insurance Co. v. Rawson	480	Broomfield v. Williams ..	698, 706
British Waggon Co. v. Lea ...	469	Brough v. Perkins	74
British Workman's, &c., Assur. Co. v. Cunliffe	505	Broughton v. Langley	874
Brittain v. Kinnaird	183	Broun v. Kennedy	471
— v. Lloyd	484	Brounker v. Atkyns	117, 192
Britannic Merthyr Coal Co. v. David	652	Brown, <i>Ex parte</i> ..	1047, 1048, 1051
Britten v. Gt. N. Ry.	541	— v. Accrington Cotton Spinning Co.	682
Britton v. Jones	1010	— v. Alabaster	716
— v. R. Insur. Co.	343	— v. Arundell	779
Broad v. Ham	763	— v. Black	392
Broadbent v. Ramsbotham ...	719	— v. Blunden	617
Broadwood v. Granara	857	— v. Brown	115, 130, 147, 568, 602
Brocas v. London (Mayor) ...	111	— v. Byers	487
Brock v. Copeland	669	— v. Byrne	20
Brocklebank v. Thompson ..	32, 707	— v. Capel	189
Brockley v. Midland Ry.	676	— v. Chapman	797
Brode's Case	744	— v. Croft	406
Broder v. Saillard	641	— v. Dean	173
Brodie v. Cardiff Cor.	469, 470	— v. De Winton	333
Brodrick v. Scalé	1052, 1053	— v. Dimbleby	1027
Brogden v. Metropolitan Ry. Co.	237, 238, 410	— v. Duncan	552
Bromage v. Lloyd	294	— v. Dunstable Corporation	720
— v. Prosser	739, 745	— v. Eastern & Midland Ry.	647
Bromley v. Frazier	311	— v. Elkington	378
— v. Holland	123	— v. Foster	154
— v. Smith	556, 558	— v. Glenn	778
— v. Tams	684	— v. Gt. W. Ry.	857
Brook, <i>Ex parte</i>	843	— v. Hare	440
— v. Brook	910	— v. Hawkes	762, 763
— v. Carpenter	183	— v. Hodgson	485
— v. Hook	287, 319	— v. Jarvis	1067
— v. Rawl	758	— v. Johnson	351
Brooke, <i>In re</i>	1047	— v. Kidger	487
— v. Enderby	582	— v. London Cor.	193
Brooker v. Scott	560	— v. Mackenzie	574
— v. Wood	553	— v. M'Kinally	501
Brookes v. Drysdale	596	— v. Maffey	307
Brookman v. Mather	508	— v. Manchester, &c., Ry. Co.	529
Brooks v. Blanchard	748	— v. Metropolitan Counties Insurance Soc.	946
— v. Bockett	390	— v. Muller	434, 436
		— v. Notley	806
		— v. Peto	923
		— v. Powell, &c., Coal Co.	364
		— v. Robins	692, 693
		— v. Skirrow	132
		— v. Symons	405, 886

	PAGE		PAGE
Brown v. Tanner	355	Bucclench Duke, The	82
— v. Tapscott	482	Bucclough (Duke) v. Metropolitan Board of Works...147,	387,
— v. Thornton	4, 192		714
— v. Tibbits	588	Buchan's Case	960
— v. Watts	79	Buchanan v. Andrew	694
— v. Windsor	693	— v. Glasgow Corp'n.	677
— v. Wootton	171	— v. Poppleton	190
— v. Wren	57	— v. Rucker	184
Brown's Case	921, 963	Buck v. Hurst	486, 513
Browne v. Barber	389	— v. Robson	564, 965
— v. Brandt	543	Buckhurst's (Lord) Case	869
— v. Croome	739, 750	Buckland v. Gibbins	878
— v. Dawson	805	— v. Johnson	503, 839
— v. Flower	628, 630	Buckle v. Bewes	1070
— v. Joddrell	562	— v. Fredericks	614
— v. La Trinidad	971	— v. Knoop	357
— v. Murray	205	Buckley v. Buckley	671
— v. Powell	950	— v. Gross	841
— v. Thomson	738	— v. Jackson	311
Browne's Policy, <i>In re</i>	335	Buckman v. Levi	532
Brownell v. Bonney	303	Buckmaster v. Harrop	241
Browning v. Kinnear	308	— v. Meiklejohn	79
Brownlie v. Campbell	724	— v. Russell	573
Brownlow v. Metropolitan Board of Works	651	Buckworth v. Simpson	261, 271
— v. Tomlinson	818	Budd v. Fairmaner	376
Brownsword v. Edwards	150	— v. Lucas	375
Bruce v. Caulfield	642	— v. Marshall	624
— v. Helliwell	704	Budd's Case	964
— v. Hunter	511	Budden v. Wilkinson	141
— v. Hurly	48	Budding v. Murdoch	219
Brucker v. Fromont	656	Buddle v. Green	434
Bruff v. G. N. Ry.	65	Budd-Scott v. Daniell	629, 630
Brumfitt v. Roberts	723	Budgett v. Binnington	352
Brune v. Thompson	37, 53, 75	Buerger v. Barnett	387
Bruner v. Moore	16, 232	Bugg, <i>Ex parte</i>	606, 964
Brünner, <i>In re</i>	179	Bulkeley v. Butler	122
Brunsdon v. Humphrey ..	171, 655, 664	Bull, <i>Ex parte</i>	770
Brunswick (Duke) v. Harmer	735, 737, 738, 756	— v. Sibbs	258
— v. Slowman	1037	Bullen v. Michel	12, 54, 92, 174, 175
Brunt v. Midland Ry. Co. ...	524	— v. Sharp	445
Brunton v. Hall	818	— v. Ward	555
Bryan v. Clay	1013	Buller v. Burt	121, 133
— v. Wagstaff	10	— v. Harrison	489
— v. White	132	Bulley v. Bulley	57, 909
Bryant v. Foot	37, 74	Bulli Coal Mining Co. v. Osborne	526, 821
— v. Hancock	609, 615	Bullivant v. Att.-Gen. for Victoria	152, 154
— v. Herbert	230, 870	Bullock v. London General Omnibus Co.	226
— v. Lefever	700	Bulman v. Fenwick	352
— v. Quebec Bank	287	Bulmer v. Bulmer	690
— v. Richardson	560	— v. Gilman	396
— v. Wardell	842	— v. Norris	235
Bryant & Barningham's Contract, <i>In re</i>	242	Bulwer v. Bulwer	808
Brydges v. Walford	1067	Bunbury v. Hewson	1008
Brydon v. Stewart	681	Bunch v. Gt. W. Ry.	540
Bubb v. Yelverton	552		

	PAGE		PAGE
Bunn, <i>Ex parte</i>	606	Burr v. Theatre Royal	683
Bunney v. Poyntz	865	Burrell v. Nicholson	212, 214
Bunning v. Lyric Theatre ...	405	Burridge v. Haines	340
Bunting v. Lepingwell	179	— v. Sussex (Earl)	174
— v. Sergeant	938	Burrough v. Martin	158, 188
Burbidge v. Morris	449	— v. Moss	313
Burch v. Farrow's Bank	887	— v. Skinner	253
Burchard v. Macfarlane	139	— v. Martin	188
Burchell v. Clark	598	Burroughes v. Bayne...823, 845,	849
— v. Gowrie, &c., Collieries	475	Burrows v. Jemino	184
— v. Thompson	1052, 1059	— v. Lang	698, 709, 718
Burden v. Halton	458	— v. March Gas Co. ...	536, 673
Burdett v. Doe d. Spilsbury ...	136	— v. Rhodes	483, 725
— v. Withers	618	Bursill v. Tanner	141, 153
Burdick v. Garrick	564, 1005	Burt v. Bull	443
— v. Lordan	473	— v. Gray	907
Burge v. Ashley & Smith	504	— v. Haslett	621
Burges v. Wickham	22	— v. Walker	119
Burgess v. Clements	542	Burton v. Gray	368
— v. De Lane	587	— v. Hughes	841
— v. Eve	369	— v. Plummer	158
— v. Gray	649	Bury v. Thompson	893
Burgess's Case	973	Bush v. Martin	390, 576
Burgh v. Legge ... 300, 306, 307,	312	— v. Parker	792
Burghart v. Angerstein	194	— v. Rogers	225
— v. Hall	559	— v. Steinman	648
Burgoine v. Taylor	218	Bushby v. Dixon	909
Burke v. Lechmere	981	Bushel v. Wheeler	415
— v. S. E. Ry.	538	Bushell v. Hammond	93
Burkinshaw v. Nicholls ... 965,	979	Busk v. Walsh	504
Burkitt v. Blanchard	80	Buskin v. Edmunds	399
Burleigh v. Stibbs	3, 6	Busst v. Gibbons	765
Burley v. Bethune	762, 998	Bustros v. White	140
Burling v. Read	816	Butcher v. Butcher	809
Burls v. Smith	471	— v. L. & S. W. Ry.	540
Burmester v. Norris	487	— v. Porter	942
Burmester v. Barron	303	Butler v. Allnutt	40
— v. Hogarth	312	— v. Butler	179, 1028
Burn v. Boulton	570	— v. Butler (No. 2)	179
— v. Miller	468	— v. Fife Coal Co.	682
— v. Morris	824	— v. Ford	40
— v. Phelps	264	— v. Knight	398, 399
Burnaby v. Baillie	43, 88, 147, 917, 918	— v. Manchester, &c., Ry.	539
Burnand v. Haggis	558	— v. Mountgarret	44
— v. Nerot	87, 101, 160	— v. Swinerton	627
— v. Rodocanachi	343, 481	— v. Woolcott	856
Burne v. Richardson	822	Butler and Baker's Case	829
Burnett v. Lynch	128	Butt v. Gt. W. Ry. Co.	526
— v. Samuel	636	— v. Newman	796, 993
Burnley, &c., Society v. Casson	408	Butterknowle Colliery Co. v.	
Burns, The	991	Bishop Auckland, &c., Soc.	694
Burns v. Cork & Bandon Ry.	660	Butterley Co. v. New Hucknall	
— v. Johnston	798	Colliery Co.	694
— v. Nowell	992	Button v. O'Neill	1053
— v. Poulson	656	— v. Thompson	406
Burnside v. Dayrell	65, 494	Buxton v. Cornish	3, 200, 469
Burnyeat v. Hutchinson	554	— v. Jones	299
Burr v. Smith	744	— v. N. E. Ry.	537, 675
		— v. Rust	27, 418, 419

	PAGE		PAGE
Bwlch-y-Plwm Lead Mining Co. v. Baynes	968	Calton v. Bragg	510
Byam v. Booth	101	Calvert v. Flower	11
Byerley v. Prevost	1046	— v. Joliffe	1066
— v. Windus	722	— v. Thomas	1060
Byne v. Moore	760, 764	Calye's Case	541
Bynoe v. Bank of England	680, 761	Camberwell, &c., Building Soc. v. Holloway	242, 243
Byrd v. Nunn	221, 248	Cambrian S. Packet Co., <i>Ex</i> <i>parte</i>	434
Byrne, <i>Ex parte</i>	1048, 1059	Camden (Marquis) v. Batter- bury	262
— v. Boadle	677	Cameron v. Nystrom	683
— v. Brown	82	— v. Smith	510
— v. Harvey	10	— v. Young	265, 650
— v. M'Evoy	229	Camfield v. Bird	740
— v. Schiller	355	— v. Gilbert	251
— v. Van Tienhoven	233	Camidge v. Allenby ...	334, 583, 584
Bywater v. Richardson	377	Camell, <i>Ex parte</i>	962, 963
Bywell Castle, The	666	— v. Sewell	173
CABLE v. Bryant	702	Campanari v. Woodburn ...	474, 1017
Cadby v. Martinez	893	Campbell, <i>In re</i>	553
Caddy v. Barlow	760, 762	— v. Campbell	2, 31, 43, 910, 914
Cadge, <i>In re</i>	130	— v. Hewlitt	502
Cadle v. Moody	922	— v. Liverpool Corporation	37, 180
Cadogan v. Kennett	1038	— v. Loader ...	182, 204, 206, 821
Cahill v. Dawson	221	— v. Mersey Docks & Har- bour Board	826
— v. L. & N. W. Ry.	540	— v. Paddington Borough Council	639, 644
Cahn v. Pockett's Bristol, &c., Co.	348, 834	— v. Rickards	157
Cain v. Moon	828	— v. Spottiswoode...733, 752,	753
Caine v. Coulton	578, 593	— v. Thompson	365
Caird v. Sime	753	— v. Twenlow	195
Calcroft v. Guest	4, 140	— v. Webster	303, 306
Calcutta Co. v. Weir	346	— v. Wenlock (Lord)	264
Calder v. Dohell	16, 442	— v. Wilson	35
— v. Halket	795	Campbell-Davys v. Lloyd	639
— v. Rutherford	84	Campion v. Bentley	1016
Caldwell v. Becke	598	Canada Southern Ry. Co. v. International Bridge Co.	530
— v. Hunter	74	Canadian Pacific Ry. v. Fr�chet�te	681
Caledonian Insur. Co. v. Gilmour	341	— v. Parke	654
Caledonian Ry. v. Guild	857	Canham v. Barry	548
— v. Mulholland	656, 679	Cann v. Facey	213
— v. Sprot	692, 694	Cannam v. Farmer	212, 213
— v. Walker's Trustees ...	714	Cannan v. Bryce	504, 551
Calisher's Case	969	— v. Hartley	263
Call v. Dunning	59, 118	— v. Wood	585
Callaby v. Callaby	1023	Cannee (or Counce) v. Spanton	850
Calland v. Loyd	84, 491	Cannell v. Curtis	40, 731
Callendar v. Dittrich	185	Canning v. Farquhar	335, 338
Calley v. Richards	153	Cannon v. Villars	706
Calliford v. Blawford	637	Cannon Brewery v. Nash	886
Calliope, The	671, 679	Canot v. Hughes	850
Callisher v. Bischoffsheim	316	Canterbury (Viscount) v. Att- Gen.	671
Calmady v. Rowe	25, 187		
Calmenson v. Merchants' Ware- housing Co.	690		
Calthorpe v. Threchman	726		

	PAGE		PAGE
Canterbury (Archbishop) v. Robertson	633	Carr v. Jackson	83, 380, 443
Cape Breton Co., <i>In re</i>	490	— v. Lambert	703
Capel v. Buzzard	777	— v. Lancashire & York-	
— v. Powell	1020	shire Ry. Co.	518
Capital & Counties Bank v. Henty	733, 738, 739	— v. L. & N. W. Ry.	70
— v. Rhodes	881	— v. Lynch	236
Capp v. Topham	485	— v. Martinson	489
Capper v. Forster	356	— v. Mostyn	45, 175
Capron v. Balmund	789	— v. Smith	514
Car v. King	453	Carratt v. Morley	182
Careless v. Careless	27	Carron Park, The	362
Carew v. Duckworth	307, 326	Carruthers v. Sheddon	29
Cargo ex Argos	355	Carstairs v. Taylor	670
Cargo ex Laertes	361	Carter, <i>Ex parte</i>	17, 1045
Cariss v. Tattersall	314	— v. Boehm	157
Carleton v. Herbert	893	— v. Carter	948
Carlill v. Carbolic Smoke Ball Co.	410, 503	— v. Clarke	686
Carling's Case	963	— v. Crick	376
Carlsh v. Salt	249	— v. Drysdale	688
Carlisle (Mayor) v. Blamire ...	609	— v. Ely (Dean)	245
Carlisle v. Orr	503, 791, 835	— v. Johnson	802
— v. Orr (No. 2)	503	— v. Seaton	132
Carlisle & Cumberland Banking Co. v. Bragg	70, 597	— v. White	288, 372
Carlton Illustrators v. Coleman	222	Cartmell's Case	964
Carlton S.S. Co. v. Castle Mail Packets Co.	352	Cartwright, <i>In re</i>	269
Carlyon v. Lovering	719	— v. Hoogstoel	233
Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.	477, 584	— v. Regan	1061
Carmichael's Case	962	— v. Smith	944
Carnarvon (Earl) v. Villebois	45, 46, 167, 170, 807	— v. Wright	732
Carne v. Brice	1072	Carvick v. Blagrave	607
— v. Nicoll	52, 909	Cary v. Gerrish	485, 486
— v. Steer	60	— v. Stephenson	1005
Carnegie v. Conner	360	Cary & Lott's Contract	1012
Carnell v. Harrison	558	Casamajor v. Strode	244
Carney v. Plimmer	487, 504	Casdagli v. Casdagli	910
Carnforth, &c., Co., <i>Ex parte</i>	432	Case v. Barber	545
Carpenter v. Buller	69, 201	Casement v. Fulton	132
— v. Deen	1055, 1057, 1061	Cashill v. Wright	542
— v. Finsbury Borough Council	652	Cass v. Fitzgerald	11
— v. Parker	264, 627	Cassaboglou v. Gibb	437
— v. Wall	163, 790	Cassidy v. Connochie	747
Carpmael v. Powis	152	— v. Firman	573
Carpue v. L. B. & S. C. Ry.	659, 977	Casson v. Churchley	1052, 1056
Carr v. Allatt	830	Casswell v. Cheshire Lines Committee	525, 541
— v. Burdiss	128, 1038	Castellain v. Preston	341, 343, 344
— v. Clarke	787	— v. Thompson	858, 860
— v. Foster	703, 709	Castellan v. Hobson	461
— v. Fracis Times & Co. ...	797	Castle v. Downton	1053
— v. Hinchliff	590	— v. Parker	645
— v. Hood	733, 753	— v. Playford	427, 430
		— v. Sworder	416
		Castleman v. Hicks	632, 638
		Castrique v. Behrens	173, 761
		— v. Imrie ...	173, 183, 185, 186
		Caswell v. Coare	378
		Catchpole v. Minster	669
		Cates v. Hardacre	150
		— v. Winter	9

	PAGE		PAGE
Catherina Maria, The	189	Chamber Colliery Co. v. Roch-	
Catherwood v. Caslon	915	dale Canal Co.	695
Catley v. Wintringham	365	Chamberlain v. Boyd	742
Catling v. King	236	— v. Bradford Cor.	991
— v. Skoulding	577	— v. Williamson	382, 1002
Cato v. Thompson	242	— v. Young	273, 280, 310
Caton v. Caton	233, 241, 419	Chamberlain's Wharf v. Smith	556
Catt v. Howard	66, 158, 161	Chamberlaine v. Pickering ...	1017
— v. Tourle	614	Chambers v. Bernasconi	57, 61
Catterall v. Hindle	580	— v. Davidson	857, 860
Catterall v. Kenyon	850	— v. Goldthorpe	470
Cattle v. Thorpe	556	— v. Griffiths	244
Cattley v. Arnold	884	— v. Irwin	789
Catlin v. Barker	165	— v. Manchester & Milford	
Caulfield v. Whitworth	746	Ry.	986
Caunt v. Thompson	300	— v. Mason	210
Cavalier v. Pope	265, 650	— v. Miller	498
Cavallotti v. Carruthers	214	— v. Robinson	762
Cavan v. Stewart	90, 184	Chamier v. Clingo	821
Cave v. Mills	490	Champ v. Stokes	393
— v. Mountain	795	Champion v. Atkinson	77
Cavell v. Prince	1022	— v. Plummer	418
Cavendish Bentinck v. Fenn ...	490	— v. Short	426
Cavey v. Lidbetter	643	Champneys v. Peck	55, 392
Cawkwell v. Russell	220	Chan Kit San v. Ho Fung	
Cawley, <i>In re</i>	964, 966	Hang	1005
Cawthorn v. Cordrey	412	Chandler v. Broughton	813
— v. Trickett	353	— v. Doulton	770, 771
Cazenove v. British Equitable		— v. Grieves	408
Assur. Co.	338	— v. Horne	142
— v. Vaughan	102	— v. Thompson	700
"Celia" (Owners) v. "Vol-		— v. Webster	262, 476
turno" (Owners)	437	Chaney v. Payne	998
Central Bank of London,		Channon v. Patch	843
<i>Ex parte</i>	447	Chant, <i>In re</i>	572
Central Ry. of Venezuela v.		Chanter v. Leese	243, 457
Kisch	547	Chantler v. Robinson	693
Century Bank of New York		Chapcott v. Curlewis	308
v. Young	345	Chapel v. Hickers	475
Ceylon Coaling Co. v. Goodrich		Chapleo v. Brunswick Building	
.....	279, 308	Society	381, 955
Chad v. Tilsed	25	Chaplin v. Clarke	410, 494
Chadburn v. Moore	233, 240	— v. Hicks	535
Chadwick v. Burnley	27	— v. Levy	278
— v. Clarke	262	— v. Reid	32
— v. Dublin Packet Co.	665	— v. Rogers	415, 416, 440
— v. Herapath	757	— v. Westminster Cor.	714
— v. Trower	693	Chapman v. Auckland Union	248, 653
Challender v. Royle	759	— v. Beard	62, 925
Challenge, The, and The Duc		— v. Black	885
d'Aumale	185	— v. Cowlan	187
Challinor, <i>Ex parte</i>	1049	— v. De Tastet	475
Challoner v. Robinson	780	— v. Gt. W. Ry.	533
Chalmers, <i>Ex parte</i>	842	— v. Gwyther	377
—, <i>Ex parte</i>	432	— v. Heslop	763
— v. Payne	752	— v. Jones	722, 807
Chaloner v. Bolckow	266, 625	— v. Knight	1051
Chamber Colliery Co. v. Hop-		— v. Leach	746
wood	709	— v. Milvain	987

	PAGE		PAGE
Chapman v. Monmouthshire Ry. & Canal Co.	175	Chesham Automobile Supply v. Beresford Hotel	857
— v. Paynton	138	Cheshire v. Bailey	656
— v. Pole	343	Cheslyn v. Dalby	574
— v. Rawson	212, 213	Chesmer v. Noyes	192, 306
— v. Rothwell	646	Chesterfield, &c., Colliery Co. v. Hawkins	599
— v. Shepherd	459, 479	Chesterman v. Lamb	379
— v. Smethurst	332	Chesworth v. Hunt	1051
— v. Smith	616	Chetham v. Hoare	940
— v. Speller	374	Chetti v. Chetti	910
— v. Walton	157	Chetwynd v. Linton	150
— v. Withers	377	Cheveley v. Fuller	410
Chappel v. Comfort	364	Chichester v. Donegal (Marquis)	141
Chappell v. Harrison	782	— v. Hall	934
— v. Poles	495	— v. Hill	838
— v. Purday	101	Chichester Corporation v. Foster	644
Chapple v. Cooper	559	Chidell v. Galsworthy	830
Chaproniere v. Lambert	241	Child v. Affleck	748
Charing Cross, &c., Bank, <i>Ex parte</i>	1050	— v. Chamberlain	775
Charing Cross, &c., Co. v. London Hydraulic Power Co.	655, 670	— v. Edwards	777
Charles v. Blackwell	324, 580, 584	— v. Hardyman	453
Charlesworth v. Mills	1045, 1046	— v. Hearn	662, 669, 674
Charlter v. Barret	740	— v. Morley	479
Charlton v. Watton	757	— v. Stenning	82, 216, 629
Charlwood v. Greig	668	Chillingworth v. Chambers	483
Charman v. S. E. Ry.	674	Chilton v. Carrington	870
Charnley v. Grundy	277	— v. London Corpn.	37
Charnock v. Dewings	142	China Mutual Steam Navigation Co. v. MacLay	471
Charter v. Charter	27, 28, 29	Chinery v. Viall	853
Chartered Mercantile Bank of India v. Dickson	297, 334	Ching v. Surrey County Council	647
— v. Netherlands India Steam Navigation Co.	346	Chinn v. Morris	799, 801
Chasca, The	361	Chinnery v. Evans	601
Chase v. Goble	1072	Chinneck v. Ely (Marchioness)	237
— v. Westmore	858, 860	Chippendale v. Masson	216
Chasemore v. Richards	717, 719	Chisholm v. Grant	732
— v. Turner	573, 574, 577	Chivers v. Hand	555
Chatfield v. Cornford	763	Cholmeley's School v. Sewell	908
— v. Sedgwick	226, 229	Cholmondeley v. Clinton	871
Chatterton v. Secretary of State for India	155, 744	Chorley v. Bolcot	402
Chaurand v. Angerstein	20, 157	Chorley Cor. v. Nightingale	713
Cheator v. Cater	642, 950	Chown v. Parrott	210, 211
Cheek v. Roper	297	Chowne v. Baylis	503, 835
Cheesman v. Exall	850	Christ's Hospital v. Harrild	623
Cheetham v. Hampson	650	Christie v. Davey	642, 644
Chelsea Waterworks Co. v. Cowper	127	— v. Fonsic	567
Cheltenham, &c., Ry. v. Daniel	982	— v. Griggs	537, 659, 662
Chenoweth, <i>In re</i>	75	— v. Taunton	589, 970
Cherry v. Burton	761	Christineville Rubber Estates, <i>In re</i>	726
— v. Colonial Bank of Australasia	381	Christopherson v. Bare	790, 791
— v. Heming	123, 124	— v. Burton	1069
		Christy v. Tancred	630
		Chubb v. Salomons	155
		— v. Westley	740
		Church, <i>Ex parte</i>	192

	PAGE		PAGE
Church v. Imperial Gas Light & Coke Co.	74	Clarke v. Holford	772
Churchill (Lord), <i>In re</i>	1012	— v. Imperial Gas Co. ...	118, 983
Churchward v. Ford	255	— v. King	245
Churton v. Frewin	722	— v. L. & County Banking Co.	329
Citizens' Bank of Louisiana v. First National Bank of New Orleans	70	— v. Main	743
Citizens' Life Assur. Co. v. Brown	734, 740, 762, 956	— v. Millwall Dock Co.	780
Cito, The	360	— v. Postan	761
City Bank v. Sovereign Life Assur. Co.	339	— v. Ramuz	252
City Discount Co. v. McLean... ..	583	— v. Roche	199
City of Lincoln, The	667	— v. Roystone	24
City of London Brewery Co. v. Tennant	701, 702	— v. Saffery	149
Civil Service Co-op Socy. v. Chapman	970	— v. St. Helens Corporation ..	991
— v. General Steam Nav. Co. 224, 262, 476, 493		— v. Sharpe	303
Clabbon, <i>In re</i>	566	— v. Smith	563
Clack v. Clack	214	— v. Spence	828
Clapham v. Langton	22	— v. Tinker	703
Clare v. Dobson	620, 622	— v. Watson	470
— v. Joseph	391	— v. West Ham Corporation ..	539
— v. Lamb	493	— v. Willott	242
Clarence Hotel, Ilfracombe, <i>In re</i>	127	Clarkson v. Musgrave	688
Claridge v. Dalton	307	— v. Woodhouse	49
— v. Hore	150	Clay v. Jones	876
— v. Mackenzie	947	— v. Ray	555
Clark, <i>Ex parte</i>	408	— v. Shackeray	709
—, <i>In re</i>	131	— v. Southern	83
— v. Balm Hill	1062	— v. Yates	413, 468, 550
— v. Bulmer	438	Claydon v. Green	93, 94
— v. Chamberlain	849	Clayton v. Blakey	883
— v. Chambers	664	— v. Corby	709, 710, 716
— v. Clark	152, 596	— v. Gosling	280
— v. Gaskarth	783	— v. Gregson	20
— v. Hooper	572	— v. Leech	252
— v. London General Omnibus Co.	664, 691	— v. Le Roy	835, 849
— v. Molyneux	739	— v. Nugent (Lord)	29
— v. Newsam	800	Clayton's Case	582
— v. Sonnenschein	210	Cleary v. Booth	793
— v. Woods	799, 994	— v. L. & N. W. Ry.	691
Clarke v. Army & Navy Co-operative Soc.	680	— v. M'Andrew	358
— v. Birley	371	Cleather v. Twisden	399
— v. Bradlaugh	637	Cleave v. Jones	152, 572
— v. Callow	248, 425, 549	Cleaver v. Mutual, &c. Life Assur.	335, 339
— v. Clarke	848, 933, 940	Cleeve v. A.-G.	103
— v. Cuckfield Union	954	Clegg v. Dearden	655
— v. Davey	1000	— v. Hands	614, 898
— v. Dickson	499, 725	— v. Levy	107, 202
— v. Fell	859	— v. Rowland	1012
— v. Gilbert	848	Clemens, Horst & Co. v. Biddell Bros.	432, 440, 455
— v. Hart	70, 952	Clements v. L. & N. W. Ry. ...	559
		— v. Matthews ...	830, 843, 854, 874
		Clennel v. Read	948
		Cleve v. Powel	153
		Cleveland Iron Co. v. Stephenson	968
		Cleverley v. Brett	1011
		Clifden, <i>In re</i>	600, 601

	PAGE		PAGE
Cliff v. Midland Ry.	674	Cobbett v. Hudson ...	142, 207, 215
Clifford v. Purton	66	— v. Kilminster	127
— v. Hoare	627, 705	Cobden v. Kendrick	153
— v. Holt	697	Coburn v. Colledge ...	397, 566, 1046
— v. Hunter	162	Cochran v. Leckie's Trustee ...	341
— v. Laton	452	— v. Rethger	19, 351
— v. Parker	314	Cochrane v. Entwistle	1059
— v. Turrill	17	— v. Green	506, 589
— v. Wicks	722	— v. Moore	17, 828
Cliff v. Schwabe	338	— v. Rymill	852
Clifton v. Hooper	1035	Cock v. Coxwell	315
— v. Walmesley	26	— v. Wortham	814, 820
Climie v. Wood	844	Cockburn v. Alexander	356
Climpson v. Coles	1048	— v. Edwards	399
Clinan v. Cooke	236	Cocke v. Jennor	586
Clink v. Radford	354	Cocker v. Musgrove	1064, 1068
Clinton v. Lyons	667	Cockerell v. Aucombe	426, 441
Clippens Oil Co. v. Edinburgh Water Trustees	36	Cocking v. Ward	234, 247, 513
Clissold v. Cratchley	794, 813	Cockle v. S. E. Ry.	675
Clode v. Bayley	302, 327	Cockman v. Mather	193
Close, <i>Ex parte</i>	1045, 1047	Cockran v. Welbye	1066
— v. Phipps	500	Cockrill v. Sparkes	576
— v. Waterhouse	856	Cocks v. Borrodale	293
Closmadeuc v. Carrel	198	— v. Masterman	496
Clough, <i>Ex parte</i>	1038, 1047	— v. Nash	586
— v. L. & N. W. Ry. ...	221, 536,	Codd v. Brown	270
	831	Coddington v. Paleologo	429
Clouston & Co. v. Corry	406	Codling v. Mowlem	689
Clover, Clayton & Co. v. Hughes	340	Codrington v. Lloyd	793
Clow v. Brogden	622	Coe v. Clay	630
Clowes v. Hilliard	82	— v. Wise	650
— v. Hughes	946	Coffee v. Brian	508
Clubb v. Hutson	319	Coggs v. Barnard	516
Clun's Case	265	Cohen v. Hale	584
Clunnes v. Pezzey	456	— v. Kittell	504
Clutton v. Attenborough	281	— v. Popular Restaurants ...	612
Clydebank Engineering Co. v. Don Jose, &c. y Castaneda ...	247,	— v. S. E. Ry. Co. ...	530, 539,
	248		541
Clydesdale Bank v. Paton	730	— v. Tannar	627
— v. Schröder	501	Cohn v. Boulkon	273
Coaker v. Willcocks	950	— v. Davidson	363
Coasters, <i>In re</i>	961	Colbourn v. Dawson	17
Coates v. Bainbridge	64	Colchester (Mayor) v. Brooke...	662
— v. Hatton	550	Coldrick v. Partridge	682
— v. Lewes	579	Cole v. Bishop	499
— v. Moore	1052, 1061	— v. Boker	550
— v. Mudge	153	— v. Coulton	636
— v. Railton	863	— v. De Trafford	1020, 1021
— v. Stephens	378	— v. Francis	140
— v. Wilson	559	— v. Hadley	179
Coats v. Chaplin	532	— v. Kelly	604, 605
Cobb v. Carpenter	255	— v. Kernot	830
— v. Great W. Ry.	677	— v. Meek	356
— v. Stokes	631	— v. N. W. Bank	832, 833
Cobban v. Downe	532	— v. Sberard	73, 192
Cobbe v. Becke	491	Colebeck v. Girdlers' Co.	270
Cobbett v. Grey	796	Colegrave v. Dias Santos	850
		Coleman v. S. E. Ry.	676
		Coles v. Bank of England	850

	PAGE		PAGE
Coles v. Bristowe	460, 461	Coltman v. Chamberlain	830
— v. Bulman	438, 465	Columbus Co. v. Clowes	680
— v. Coles	133, 149, 156	Colvin v. Buckle	566
— v. Pack	367, 368	Colwell v. S. Pancras Council	640, 654
— v. Pilkington	241		1065, 1066
— v. Trecothick	238, 239	Colyer v. Speer	1065, 1066
— v. Wright	489	Combined Weighing Co. v.	
Collard v. S. E. Ry. Co.	535	Automatic Weighing Co. ...	759
Colledge v. Horn	67	Comfort v. Betts	507
Collen v. Wright	83, 380, 381	Commercial Bank of Australia	
Collett v. Curling	946	v. Wilson (Official Assignee)	583
— v. Foster	793	Commercial Bank of South	
— v. Keith (Lord)	58	Australia, <i>In re</i>	312
— v. L. & N. W. Ry.	663	Commercial Bank of Tasmania	
Colley v. Hart	759	v. Jones	372
Collie's Claim	971, 985	Commercial S.S. Co. v. Boulton	351
Collier v. Clarke	213	Commings v. Heard	195
— v. Nokes	162	Commings v. Scott	236
— v. Walters	875	Commissioners of Stamps v.	
Colling v. Treweek	3, 7, 392	Hope	578
Collingbourne v. Mantell	544	Compania Naviera, &c. v.	
Collingridge v. R. Exchange		Churchill	347, 365
Assur. Co.	341	Compton, <i>In re</i>	1015
Collingwood v. Berkeley	449	— v. Bagley	246
Collins, <i>Ex parte</i>	1055	— v. Chandless	176
— v. Bayntum	128	— v. Richards	698
— v. Blantern	18	Compton's Case	375
— v. Carnegie	731	Concha v. Concha	170, 172, 180
— v. Crouch	1012	— v. Murrieta	107, 1007
— v. Garbon	11	Condon v. Gt. S. & W. Ry. ...	691
— v. Locke	545, 555	Conelly v. Steer	1051
— v. Middle Level Com-		Confians Stone Quarry Co. v.	
missioners	650, 671	Parker	277
— v. Rose	994	Conington v. Gilliat	205
— v. Rybot	634	Conlan v. Carlow County Coun-	
— v. Sillye	897	cil	507
— v. Slade	716	Connors v. Pearson	995
— v. Welch	225	Conolly v. Baxter	258
Collinson v. Margesson	570	Conquest v. Ebbetts	620
Collis v. Laughler	698	Conradi v. Conradi	179
— v. Selden	646	Consett, The	667
— v. Stack	574	Consolidated Company v. Curtis	
Colls v. Home & Colonial Stores		842, 852	
653, 696, 701,	702	Consolidated Credit, &c. Co. v.	
Collum, <i>Ex parte</i>	967	Gosney	1060, 1061
Collyer v. Isaacs	830	Consolidated Exploration, &c.	
— v. Willock	571	Co. v. Musgrove	505, 552
Colonial Bank v. Cady	837	Consolidated Goldfields of South	
— v. Exchange Bank of Yar-		Africa v. Spiegel	463, 464
mouth, Nova Scotia	490	Consolidated Tea, &c. Co. v.	
Colonial Bank of Australasia v.		Oliver's Bonded Wharf	516
Marshall	496	Constable v. Andrew	584
Colonial Insurance Co. of New		Contract Corporation, <i>Ex parte</i>	
Zealand v. Adelaide Marine		118, 966	
Insurance Co.	426, 440, 826	—, <i>In re</i>	954, 971
Colsell v. Bndd	34	Conway v. Wade	768, 787, 918
Colstone v. Hiscobbs	212	Conybeare v. Farries	9
Coltherd v. Puncheon	378	Cooch v. Goodman	598
Coltman, <i>In re</i>	553	Cook v. Bath (Mayor)	700, 715

	PAGE		PAGE
Cook v. Beal	791	Cooper v. Simmons	559
— v. Cook	1065	— v. Smith	418
— v. Fowler	509, 510	— v. Stephenson	397
— v. Gillard	393	— v. Straker	698
— v. Gregson	1011, 1016	— v. Tatham	830
— v. Guerra	265	— v. Taylor	1018
— v. Leonard	999	— v. Turner	38
— v. Lister	321	— v. Walker	713
— v. Metropolitan Tramways		— v. Whittingham	224
Co.	684	— v. Willomatt ... 803, 842,	1036
— v. Moylan	265	Cooper-King v. Cooper-King ...	108
— v. Palmer	1033	Coore v. Callaway	579, 595
— v. Sherwood	407	Coote v. Ford	69
— v. Ward	733, 736	— v. Jecks	1047
— v. Wright	316	Copal Varnish Co., <i>In re</i>	966
Cook's Case	151	Cope v. Cope	43, 194, 917
Cooke v. Banks	190	— v. Rowlands	551
— v. Eshelby	590, 591	— v. Sharpe	817
— v. Gill	182	— v. Thames Dock Co.	162
— v. Hughes	744	— v. Thames Haven Ry. Co.	476
— v. Loxley	255	Copestake v. West Sussex	
— v. Maxwell	154	County Council	45, 713
— v. Midland Great Western		Copin v. Adamson	185
Ry.	663	Copper Miners' Co. v. Fox ...	954, 955
— v. Rickman	168	Coppock v. Bower	199
— v. Riddellieu	428	Corbet v. Brown	1033
— v. Sholl	172	Corbett v. Hill	811
— v. Tanswell	125	— v. Lewin	870
— v. Tonkin	449	— v. Pearce	684
— v. Wildes	746, 749	Corby v. Hill	646
— v. Wilson	74	Cordery v. Colville	300, 306
Cookson v. Swire	1039, 1056	Corea v. Peiris	763
Coole v. Braham	1072	Cork v. Baker	383
Coombs, <i>In re</i>	471, 500	Cork & Bandon Ry. v. Cazenove	982
— v. Bristol & Exeter Ry.		— v. Goode	564, 984
Co.	532	Cork Distilleries Co. v. Gt. S.	
— v. Coether	109, 191	& W. Ry. Co.	533
Coope v. Ridout	237	Cork & Youghal Ry., <i>In re</i> ...	986
Cooper, <i>Ex parte</i> ... 862, 865,	1046	Corkling v. Massey	319, 363
—, <i>In re</i>	140	Corn v. Matthews	559
— v. Bill	828, 867	Cornelius v. Phillips	553
— v. Blandy	947	Corner v. Shew	1008
— v. Bockett	130, 132	— v. Sweet	586
— v. Cooper	106	Cornfoot v. Fowke	547, 724
— v. Crabtree	640, 808	Cornford v. Carlton Bank ...	762, 956
— v. Dawson	127	Cornforth v. Smithard	574
— v. Elston	417	Cornhill v. Hudson	568
— v. Gibbons	11	Cornish, <i>In re</i>	565
— v. Harding	798	— v. Abington	70
— v. Hubbuck	698, 700	— v. Accident Insur. Co. ...	340
— v. Kendall	574	— v. Cleife	617
— v. Lands	877	— v. Hockin	563
— v. Lloyd	146, 453	— v. Rowley	244, 245
— v. Marsden	56	— v. Searell	256
— v. Marshall	814	— v. Stubbs	271
— v. Moon	103	Cornman v. E. Counties Ry. ...	676
— v. Neil	464	Cornwall v. Henson	245
— v. Parker	544	— v. Richardson	78, 766
— v. Shepherd	839	Cornwall Minerals Ry., <i>In re</i>	603

	PAGE		PAGE
Corpus Christi College v. Rogers	935	Cowan v. Braidwood	185
Corringan v. Woods	261	— v. Truefitt	19
Corry v. Gt. W. Ry.	675	Coward v. Baddeley	790
Corsellis v. London County Council	712	— v. Gregory	606, 620, 621, 622, 906, 1019
Cort v. Ambergate Ry. Co.	423, 424	Cowasjee v. Thompson	865
Cory v. Scott	307	Cowell v. Edwards	481
— v. Thames Iron Works Co.	434, 534	— v. Watts	1003
Cosh's Contract, <i>In re</i>	903	Cowern v. Nield	558
Costa Rica Ry. Co. v. Forwood	490	Cowie v. Remfrey	422
Costar v. Hetherington	794	— v. Stirling	333
Coster v. Headland	775	Cowles v. Gale	245
Cottam v. Partridge	564, 577	— v. Potts	745, 750
Cotterell v. Apsey	438, 473	Cowley v. Newmarket Local Board	651, 652
— v. Dutton	569	— v. Sunderland Cor.	956
— v. Jones	767	Cowling v. Ely	63, 64
Cotes v. Davis	292	— v. Higginson	818
Cotesworth v. Spokes	899, 905	Cowper v. Fletcher	257, 946
Cothay v. Fennell	83	— v. Laidler	653
Cottle v. Aldrich	1010	— v. Smith	372, 586
Cotton, <i>Ex parte</i>	1058	Cowper Essex v. Acton Local Board	714
— v. James	212	Cox v. Allingham	105
— v. Kadwell	993	— v. Bennett	1027
— v. Thurland	504	— v. Bent	883, 945
— v. Wood	660, 661, 677	— v. Bishop	609
Cottrell v. Hughes	875, 876	— v. Bruce	364
Couchman v. Sillar	407	— v. Burbidge	668, 669
Coughlan v. Monks	660	— v. Couveless	3, 206
Coughlin v. Gillison	678	— v. English, Scottish & Australian Bank	762
Coulson v. Dickson	1058	— v. Glue	807, 808
Coulthart v. Clementson	369	— v. Gt. W. Ry.	686
Coulthurst v. Sweet	357	— c. Harper	1065
Counsell v. London & Westminster Loan, &c., Co.	1055	— v. Hickman	445
County Life Assurance, <i>In re</i>	118, 971	— v. Leach	395
County of Gloucester Bank v. Rudry Merthyr, &c., Colliery	971	— v. Lee	733
County of Lancaster S.S. v. Sharp	364	— v. Leigh	1065, 1066
Coupé Co. v. Maddick	656	— v. Midland Counties Ry. Co.	402, 657
Coupland v. Arrowsmith	236, 239	— v. Painter	774
— v. Hardingham	645	— v. Prentice	489, 498
Courage v. Carpenter	614	— v. Reid	473
Court v. Berlin	447	— v. Thomason	731
Courtauld v. Legh	698	— v. Troy	297
— v. Sanders	332	— v. Walker	379
Courteen v. Touse	65, 149	— c. Watson	246
Courtney v. Taylor	487, 596	Coxhead v. Mullis	385, 561
Coutts v. Gorham	697	— v. Richards	749
Couturier v. Hastie	366, 367	Coxon v. Gt. W. Ry. Co.	521
Covell v. Laming	803	Cozens v. Graham	393
Coventry v. Gladstone	864	Crahtree v. Robinson	778
— v. G. E. Ry.	70	Crace, <i>In re</i>	369
— v. Windal	408	Cracknell v. Thetford (Mayor)	654
Coventry's Case	961	Craft v. Boite	78
Coverdale v. Charlton	807	Crafter v. Metropolitan Ry.	676
		Cragoe v. Jones	371
		Craig, <i>In re</i>	1064

	PAGE		PAGE
Craig v. Cox	574	Cromwell v. Hynson	301, 305
Craignish, <i>In re</i>	910	Cronin v. Dennehy	601
Cramb v. Goodwin	475	Crook v. Seaford Corporation	955
Cramer v. Mott	771	— v. Whitbread	632
Crampton v. Ridley	471	— v. Wright	813
Cranch v. White	851	Crockewit v. Fletcher	350, 546
Crane v. London Dock Co. ...	835	Crooks v. Allan	362, 366
— v. Ormerod	839	Cropper v. Cook	15, 23, 422
— v. South Suburban Gas Co.	645	— v. Smith	219
Crank v. Frith	119	Crosby v. Percy	49, 119, 243
Cranston v. Mallow	377	— v. Wadsworth ..	233, 267, 807
Craven v. Ryder	865	Crosfield v. Manchester Ship Canal Co.	220
Crawcour, <i>Ex parte</i>	1046	Cross v. Eglin	22, 426
Crawford v. Allan Line	365	— v. Jordan	900
— & Lindsay Peerages	126	— v. Lewis	36
— v. Newton	618	— v. Rix	991
Crawley v. Price	897	— v. Warter	630
Crawley's Case	962	Crosse v. Raw	624
Crawshaw v. Harrison	1069	— v. Smith	306
Crawshay v. Eades	865	Crossfield v. Kyle Shipping Co. ...	364
— v. Homfray	860	— v. Such	869
Craythorne v. Swinburne	482	Crosskey v. Mills	489
Crears v. Burnyeat (or Hunter) ...	367	Crossley v. Lee	779
— v. Hunter	316	— v. Lightowler	700, 719, 720, 721
Crease v. Barrett	46, 47, 51, 52, 55, 69	— v. Magniac	580
Credit Co. v. Pott	1050	— v. Maycock	237
Crediton (Bishop) v. Exeter (Bishop)	122, 545	Cresthwaite v. Gardner	1004
Cree v. St. Pancras Vestry	990, 991	Crotty v. Hodges	314, 315
Green v. Wright	403	Crouch v. Credit Foncier ...	458, 837
Creevy v. Carr	757	— v. Fastolfe	611
Crerar v. Sodo	215	— v. Gt. N. Ry.	520, 535, 845, 846
Cresswell v. Davidson	907	— v. Gt. W. Ry. Co.	533
— v. Jackson	127	— v. London & N. W. Ry. ...	517
Crew v. Cummings	1056	— v. Tregonning	261, 480
Creyke's Case	967	Croughton v. Blake	92, 177
Cribh v. Kynoch	680	Crowder v. Austin	250, 548
Crimes v. Smith	31	— v. Long	1033
Crippen, <i>In re</i>	96, 183	— v. Self	770
Cripps v. Davis	574	— v. Shee	391
— v. Hartnoll	367	— v. Stewart	1015, 1016
— v. Judge	685, 686	Crowe v. Barnicot	587
Crisp v. Anderson	198	— v. Clay	277, 584
— v. Churchill	266	Crowhurst v. Amersham Burial Board	642
— v. Martin	722, 723	Crowley's Claim	479
Crispin v. Doglioni	4, 43, 184	Crowther v. Appleby	141
Critical Manufacturing Co. v. L. C. C.	472	— v. Ramshottom	772
Crockford v. Winter	499	— v. Solomons	198
Croft v. Alison	656	Croxon v. Worthen	299, 302
— v. Blay	890	Croydon Commercial Gas Co. v. Dickinson	371
— v. Lumley	612, 904	Croydon Hospital v. Farley ...	118
— v. Pawlett	133	Crozer v. Pilling	592
Crofts v. Waterhouse	660, 661	Crozier v. Cundey	993
Crompton v. Lea	670	Cruden v. Fentham	661
Cromwell v. Andrews	265	Cruickshanks v. Rose	583

Table of Cases Cited.

	PAGE		PAGE
Cruise v. Burke	762	Curtis v. Marsh	74
Crumbie v. Wallsend Local Board	655	— v. Mathews	343
Crump v. Lambert	641, 644	— v. Peek	19
— v. Temple	944	— v. Spitty	609
Crumplin v. London Joint Stock Bank	329	— v. Vernon	1016
Cruse v. Paine	461	— v. Wheeler	213, 942
Crusoe d. Blencowe v. Bugby	611, 612	— v. Williamson	442
Cubitt v. Gamble	594, 804	Curtis's & Harvey (Canada) v. North British, &c., Merc. Insur. Co.	343
— v. Maxse	713, 818	Curwen v. Milburn	574
— v. Porter	811, 812, 817	Cusack v. Robinson	414, 415
Cuckson v. Stones	408	Cuthbert v. Cumming	20
Cuenod v. Leslie	1020	Cuthbertson v. Irving	605, 879
Cuff v. Penn	26	— v. Parsons	648
Cullen, <i>Ex parte</i>	121	Cuts v. Pickering	153
— v. Knowles	82	Cutter v. Powell	468
— v. Thomson's Trustees ..	725	Cutts v. Thodey	246
Culley v. Doe d. Taylerson ..	878, 932	Cuxon v. Chadley	506
Culling v. Culling	915	Cyclists' Touring Club v. Hopkinson	972
Cumber v. Wane	61, 544	Czech v. General Steam Navigation Co.	361, 659
Cuming v. Brown	866		
— v. French	303	DA COSTA v. Pym	126
— v. Sibley	638	Dacre (Lord) v. Tebb	807
Cumming v. Bedborough	265	Dagenham Thames Dock Co., <i>In re</i>	245
— v. Shand	327	Daglish, <i>Ex parte</i>	1047
Cummings v. Ince	208	Dails v. Lloyd	515
Cumpston v. Haigh	855	Daimler Co. v. Continental Tyre Co.	557
Cunard v. Van Oppen	474	Daines v. Hartley	738
Cundell v. Pratt	150, 151	Daintree v. Fasulo	132
Cundiff v. Fitzsimmons	255	Daintrey, <i>In re</i>	58
Cundy v. Lindsay	831, 837	Daintry v. Brocklehurst ..	640, 872, 879
— v. Marriott	199, 458	Dakhyl v. Labouchere ..	734, 752, 753
Cunliffe v. Sefton	59, 119, 120	Dakin v. Lee	468, 475
Cunningham v. Dunn	353	— v. Oxley	359
Cuninghame v. City of Glasgow Bank	964	Dalby v. India & L. Assur. Co.	337
Cuno, <i>In re</i>	1028	Dale v. Birch	1066
Curfew, The	355	— v. Hamilton	240, 241
Curlew v. Corfield	304	— v. Sollet	590
— v. Mornington	1018	— v. Wood	792
Curling v. Flight	466	Dalglish v. Hodgson	181
— v. Innes	590	Dalison v. Stark	3
— v. Matthey	619	Dallas v. Walls	481
— v. Mills	884	Dallman v. King	470
Currey v. Walter	751	Dalrymple v. Dalrymple	914
Currie v. Anderson	415	Dalton v. Angus ..	35, 36, 648, 649, 692, 693, 708
— v. Child	119	— v. Fitzgerald	877, 935
— v. Misa	325	— v. Gib	559
Curtice v. London City & Midland Bank	324	— v. Midland Counties Ry.	985, 1021
Curry v. Walter	151		
Curtis v. Beaney	140		
— v. B. U. R. T. Co.	411		
— v. Drinkwater	659		
— v. Greated	3		
— v. Hannay	375		

	PAGE		PAGE
Dalton v. S. E. Ry.	690	Dauncey v. Holloway	732
— v. Whittham	779	Davenport v. Nelson	1022
Dalyell v. Tyrer	658	— v. Reg.	903, 904
Dalzell v. Mair	61	Davey v. Chamberlain	657
Damerell v. Protheroe	45	— v. L. & S. W. Ry. ...	217, 659, 662, 674
Dames & Wood, <i>In re</i>	251	— v. Mason	524
Damper v. Bassett	709	— v. Shannon	411
Dampont v. Sympson	729	David v. Ellice	514
Dance v. Robson	99	— v. Sabin	626, 628
Dancer v. Hastings	946	Davidson v. Bower	987
Dand v. Sexton	803	— v. Carlton Bank ...	1052, 1056, 1057
Dane v. Mortgage Insur. Co.	345, 373	— v. Cooper	545, 988
Danford v. M'Anulty	871, 926	— v. Hill	690
Daniel, <i>In re</i>	254	— v. Seymour	1035
— v. Bowles	383	— v. Stanley	292, 295
— v. Metropolitan Ry. ...	217, 659	— v. Wood	486
— v. North	36	Davies, <i>Ex parte</i>	855
— v. Pitt	64	— v. Bristow	895
— v. Rogers	841	— v. Davies ...	160, 227, 268, 619
— v. Stepney	947	— v. Ebbw Vale Urban Council	408
— v. Wilkin	174	— v. Humphreys	481
Daniell v. Sinclair	498, 511	— v. Jenkins ...	1050, 1057, 1059
Daniels v. Daniels	114	— v. Jenkinson	1023
— v. Fielding	767	— v. London & Provincial Marine Insur. Co.	370
— v. Potter	63	— v. Lowndes	41, 44, 177
— v. Trefusis	238	— v. Makuna	400
Danks, <i>Ex parte</i>	594	— v. Mann	662
Dansev v. Richardson	543	— v. Morgan	43, 45, 47, 193
Danube II., <i>The</i>	990	— v. Owen	682
D'Aranda v. Houston	547	— v. Powell Duffryn, &c., Co.	694
Darby v. Boucher	560	— v. Price	386
— v. Harris	779	— v. Rees	1058
— v. Ouseley	7, 193, 205, 215, 740	— v. Ridge	63
— v. Waterlow	197	— v. Scott Lewis	69
D'Arc v. L. & N. W. Ry. ...	519	— v. Sear	706
Darcy v. Ashwith	617	— v. Smith	576
— v. Sharpe	545	— v. Snead	746, 748
— v. Tamar & Callington Ry.	118, 985	— v. Solomon	742
Dare v. Heathcote	710, 818	— v. Stacey	946
Darke v. Grosvenor Hotel Co.	404	— v. Stephens	818
Darley Main Colliery Co. v. Mitchell	171, 655, 664, 695	— v. Thomas	769
Darling v. Raeburn	357	— v. Treharris Brewery Co.	1028
Darlington Joint Stock Bank- ing Co., <i>Ex parte</i>	285	— v. Underwood	620
Darlington Wagon Co. v. Harding	210	— v. Vernon	850
Darlow v. Bland	1050	— v. Williams	788, 819
Darnley (Earl) v. L. C. & Dover Ry. Co.	386	— to Jones	874
Darrell v. Tibbitts	344	Davis v. Bomford	385, 587
Dartmouth (Lady) v. Roberts	101, 176	— v. Bromley Urban Council	815
Dartnall v. Howard	100	— v. Bryan	492
Darvill v. Terry	1038	— v. Burrell	625
Dashwood v. Magniac	24, 269	— v. Burton ...	1058, 1059, 1061
		— v. Capper	795
		— v. Clarke	281
		— v. Dagos	824

	PAGE		PAGE
Davis <i>v.</i> Danks	803, 806	Dawson <i>v.</i> Wood	1036
— <i>v.</i> Dodd	277	Dax <i>v.</i> Ward	395
— <i>v.</i> Duncan	744, 753	Day <i>v.</i> Day	936
— <i>v.</i> Garrett	363	— <i>v.</i> McLea	543
— <i>v.</i> Goodman	1051	— <i>v.</i> Porter	815
— <i>v.</i> Gyde	578, 584, 948	— <i>v.</i> Singleton	254
— <i>v.</i> Harris	783	— <i>v.</i> Waldron	623
— <i>v.</i> Hedges	456	— <i>v.</i> Williams	876
— <i>v.</i> Howard	479	— <i>v.</i> Woolwich, &c., Build- ing Society	579
— <i>v.</i> Humphreys	52	Deacle <i>v.</i> Hancock	47
— <i>v.</i> James	871	Dean <i>v.</i> Branthwaite	657
— <i>v.</i> Jones	14	— <i>v.</i> Hogg	793
— <i>v.</i> Lancashire and York- shire Bank	887	— <i>v.</i> James	593
— <i>v.</i> Lloyd	57	— <i>v.</i> Peel	787
— <i>v.</i> Marrable	701	Deane <i>v.</i> Clayton	669
— <i>v.</i> Nest	172, 184	— <i>v.</i> Thomas	913
— <i>v.</i> Noake	760	Dear <i>v.</i> Knight	157
— <i>v.</i> Oswell	854	Dearle <i>v.</i> Petersfield Union ...	577
— <i>v.</i> Phillips, Mills & Co. ...	417	De Beauvoir <i>v.</i> Owen	934
— <i>v.</i> Reilly	458	De Begnis <i>v.</i> Armistead	550
— <i>v.</i> Reynolds	867	Debenham <i>v.</i> Mellon	451
— <i>v.</i> Russell	994	— <i>v.</i> Sawbridge	252, 724
— <i>v.</i> Shepstone	753	De Berkom <i>v.</i> Smith	444
— <i>v.</i> Smyth	456, 510	De Bernardy <i>v.</i> Harding	474
— <i>v.</i> Town Properties In- vestment Cor....	604, 605, 628, 697	De Beville's Case	962
— <i>v.</i> Treharne	693, 694	De Bode's Case	52, 107, 178
— <i>v.</i> Usher	1061	De Braam <i>v.</i> Ford	1060
— <i>v.</i> Williams	105, 201	Dehter, <i>In re</i>	93, 371
Davis' Trusts, <i>In re</i>	192	De Busche <i>v.</i> Alt	489, 491
Davison <i>v.</i> Donaldson	442	De Cadaval (Duke) <i>v.</i> Collins ...	502
— <i>v.</i> Duncan	747	De Cosse Brissac <i>v.</i> Rathbone ...	184
— <i>v.</i> Farmer	987	De Crespigny <i>v.</i> Wellesley ...	756
— <i>v.</i> Gent	259, 871	Dee Estates, <i>In re</i>	856
Davy <i>v.</i> Garrett	724	Deeks <i>v.</i> Strutt	1009
Davys <i>v.</i> Buswell	367	Deeley <i>v.</i> Lloyds Bank	582
— <i>v.</i> Richardson	592	Deep Sea Fisheries Co.'s Claim	300, 974
Dawes <i>v.</i> Harness	548	Deering <i>v.</i> Winchelsea (Earl)	481, 482
— <i>v.</i> Hawkins	818	Deffell <i>v.</i> Brocklebank	629
— <i>v.</i> Peck	531	— <i>v.</i> White	120, 1054
— <i>v.</i> Pinner	511	De Francesco <i>v.</i> Barnum ...	558, 559, 786
Dawkins <i>v.</i> Paulet ...	745, 747, 998	Defries <i>v.</i> Davis	740
— <i>v.</i> Rokeby (Lord) ...	154, 732, 744, 745, 998	— <i>v.</i> Milne	269
Dawson <i>v.</i> African Consoli- dated & Co.	963	De Gasquet James <i>v.</i> Mecklen- burg-Schwerin (Duke)	919
— <i>v.</i> Chamney	541, 542	Degg <i>v.</i> Midland Ry.	681
— <i>v.</i> Cropp	776	De Gruchy <i>v.</i> Wills	1020
— <i>v.</i> Dyer	629	De Hart <i>v.</i> Campania, &c., Aurora	107
— <i>v.</i> Fitzgerald	269, 545	D'Hormusgee <i>v.</i> Grey	226
— <i>v.</i> Gregory	104, 1019	De Keyser's Royal Hotel <i>v.</i> Spicer	641
— <i>v.</i> Isle	294	De la Bere <i>v.</i> Pearson	680
— <i>v.</i> Linton	484	Delacroix <i>v.</i> Thevenot	735
— <i>v.</i> Macdonald	197	Delaney <i>v.</i> Fox	879, 880, 948
— <i>v.</i> McClelland	743, 800	— <i>v.</i> Metropolitan Ry.	676
— <i>v.</i> Midland Ry.	675		
— <i>v.</i> Morgan	485		
— <i>v.</i> Shepherd	227		

	PAGE		PAGE
Delany v. Jones	750	De Rosaz v. Anglo-Italian	
De la Rosa v. Prieto	401	Bank	387
De Lassalle v. Guildford ...	235, 252	Derry v. Handley	741
De la Warr (Earl) v. Miles		— v. Peek	723, 725
	231, 703	— v. Sanders	706, 707
Delegal v. Highley	751, 764	De Soysa v. De Pless Pol	248
Delhasse, <i>Ex parte</i>	446	De Thorn v. Att.-Gen. ...	108, 910, 914
Delisser v. Towne	765		
Delta, The	185	Devala Provident Gold Mining	
De Mautort v. Saunders	84	Co., <i>In re</i>	65, 968
De Medina v. Grove	501	Devaux v. Conolly	492
— v. Norman	246	— v. Steinkeller	730
— v. Polson	262	Devereux v. Barclay	846
Demer v. Cook	796, 797	Deverges v. Sandeman	848
De Mesnil v. Dakin	797, 799	Devine v. Holloway	939
De Montaigu v. De Montaigu	910	Devon's (Earl) Settled Estates	
De Moranda v. Dunkin	1033		932, 934, 936, 940
Denaby, &c., Collieries v. York-		Devonald v. Rosser	24, 405
shire Miners Assoc.	769	Devonshire (Duke)	177
Denaby Colliery Co. v. Man-		— v. O'Connor	94, 704
chester, &c., Ry.	520, 527	— v. Pattinson	18, 810
Denby v. Moore	265	Dew v. Parsons	500
Dench v. Dench	130	De Waal v. Adler	465
Dendy v. Evans	907	De Wahl v. Braune	1021
— v. Nicholl	264, 904	Dewar v. Goodman	609, 617
— v. Simpson	77, 810	— v. Mintoft	236, 239, 420
Denew v. Daverell	476	Dewey v. Bayntum	1068
De Nicholls v. Saunders	265	De Wilton, <i>In re</i>	910, 913
Denn v. Fearnside	881	Dews v. Riley	797
— v. Fulford	87	Dey v. Mayo	318, 506
— v. Rawlins	881	— v. Pullinger Engineering	
— v. Spray	44, 186	Co.	970
— v. Walker	893	Deybel's Case	74, 75
— v. White	66, 821	Diamond, The	362
Dennett v. Atherton	627, 629	Dibb v. Walker	508, 603, 604
— v. Grover	820	Dibbins v. Dibbins	233
Dennis v. Good	711	Dibble v. Bowater	944
— v. Whetham	1068	Dibdin v. Swan	753
Denny v. Conklin	507	Dicas v. Brougham (Lord)...74,	795
Dent v. Dunn	509	Dick v. Lumsden	867
— v. Maguire	788	— v. Norton	616
— v. Smith	184	Dickenson v. Naul	439
Dent's Case	962	— v. N. E. Ry.	690
Denton v. Gt. N. Ry. Co....538,	539	Dickeson v. Hilliard	747
— v. Macneil	968	Dickinson v. Barrow	240
— v. Peters	291, 294, 310	— v. Bowes	279
De Pass Case	964	— v. Dodds	233
D'Epineuil (Count), <i>In re</i>		— v. Follett	378
	1015, 1051	— v. Grand Junction Canal	
Deposit Life Assur. Co. v.		Co.	720
Ayscough	967	— v. Hatfield	574
Derby (Earl) v. Taylor ...	609	— v. Jardine	23
Derby Canal Co. v. Wilmot ...	117	— v. Sbee	594
Derby Motor Cab Co. v.		— v. Valpy	286, 952
Crompton & Evans' Union		Dicks v. Brooks	758
Bank	615	— v. Yates	224
Derecourt v. Corbishley	995	Dickson v. Gt. N. Ry.	527, 530
Derisley v. Custance	626	— v. Hygienic Institute ...	402
Dermatine Co. v. Ashworth ...	332	— v. Reuter's Telegraph Co.	515

	PAGE		PAGE
Dickson v. Swansea Vale, &c., Ry. Co.	589	Dobson v. Collis	411
Diederichsen v. Farquharson ...	364	— v. Sotheby	342
Diestel v. Stevenson	248	Dockwray v. Dickenson	82
Di Ferdinando v. Simon, Smits & Co.	437	Dodd v. Acklom	259
Digby v. Atkinson	270, 883	— v. Churton	469
— v. Financial News	752	— v. Holme	693
Diggle v. Higgs	504	— v. Norris	78, 789, 790
— v. London & Blackwall Ry.	953	Dodsley v. Varley	416
— v. Ogston Motor Co.	405	Dodson v. Wentworth	864
Dike v. Polhill	42	Doe v. —	894
Dimes v. Petley	639, 662	— v. Abbot	882
— v. Wright	393	— v. Alexander	900
Dimmock v. N. Staffordshire Ry.	672	— v. Allen	18, 28, 130, 904
Dines v. Wolfe	489	— v. Amey	270, 883
Dingle v. Coppen	603	— v. Andrews	38, 112, 113, 153, 194
Dirks v. Richards	861	— v. Angell	935, 937, 938
Discount Banking Co. v. Lam- barde	489	— v. Archer	892, 894
Disderi, <i>In re</i>	963	— v. Arkwright	48, 190
D'Israeli v. Jowett	188	— v. Ashburner	885
Ditcham v. Bond	819	— v. Askew	187
— v. Worrall	385, 561	— v. Austin	879
Ditton, <i>Ex parte</i>	394	— v. Baines	40
Dixon, <i>Ex parte</i>	590	— v. Bancks	903
—, <i>In re</i>	509, 571, 634	— v. Barnard	871, 933
— v. Baldwin	864	— v. Barnes	194, 214
— v. Baty	880	— v. Barthrop	875
— v. Bell	789	— v. Barton	43, 880
— v. Birch	542	— v. Bateman	897
— v. Bradford, &c., Supply Soc.	887, 888	— v. Batten	895
— v. Clark	592, 593	— v. Baytup	877, 880
— v. Evans	975	— v. Beckett	879, 937
— v. Fawcus	483, 725	— v. Bell	267, 883, 890
— v. Gayfere	933	— v. Benham	937
— v. Gt. W. Ry.	674	— v. Benjamin	204, 884
— v. Henderson, Craig & Co.	476	— v. Benson	25
— v. Hewetson	831	— v. Bevan	612
— v. Kennaway	70, 979	— v. Beviss	25, 53, 54
— v. Lee	138	— v. Beynon	28, 127
— v. Metropolitan Board of Works	671	— v. Biggs	874
— v. Nuttall	289	— v. Billyard	871
— (or Dickson) v. Reuter's Telegram Co.	380	— v. Birch	904
— v. Smith	742	— v. Birchmore	880, 926
— v. Stanfield	856	— v. Bird (11 East, 49) ...	878
— v. Steel	372	— v. Bird (6 C. & P. 195)...	68, 621
— v. Yates	865	— v. Bliss	906
Dobell v. Green	353	— v. Bluck	97, 878, 887
— v. Hutchinson	236, 249	— v. Bold	937
— v. Stevens	729	— v. Boulton	882
Dobson v. Bell	74	— v. Bowditch	900
— v. Blackmore	640, 714	— v. Bower	206
		— v. Bramston	939
		— v. Bray	193, 194, 214
		— v. Brayne	214
		— v. Brindley	904, 905
		— v. Broad	616
		— v. Brookes	25
		— v. Brown	879
		— v. Browne	884

	PAGE		PAGE
Doe v. Brydges	94	Doe v. Forster	890
— v. Burdett	133, 136	— v. Foster	885, 892, 894
— v. Burt	30	— v. Fowler	111
— v. Burton	877	— v. Francis	883
— v. Cadwallader	922	— v. Franks	900
— v. Calloway	106	— v. Frowd	896
— v. Calvert	129, 890, 895	— v. Fuchau	900
— v. Carter	612, 925, 926,	— v. Gascoigne	191
	933, 936	— v. Geekie	890
— v. Cartright	3, 53, 886	— v. Giles	922
— v. Catomore	121, 127,	— v. Gladwin	906
	130, 546	— v. Goldsmith	879
— v. Cawdor	897	— v. Goldwin	891, 893, 922
— v. Chambers	118, 120	— v. Goodier	922
— v. Chaplin	891	— v. Gore	137
— v. Chichester	27	— v. Gower	938
— v. Church	894	— v. Grafton	889
— v. Clare	885	— v. Grant	873
— v. Clarke	885	— v. Grazebrook	2
— v. Cleveland	39, 128	— v. Green	886
— v. Clifford	872, 909	— v. Grey	10
— v. Crago	59, 883	— v. Griffin	38, 909
— v. Crick	892, 894	— v. Groves	885
— v. Cole	2	— v. Grubb	896
— v. Cooke	871, 876	— v. Guy	920
— v. Coombes	937	— v. Haddon	40, 184
— v. Coombs	203	— v. Hales	922
— v. Cooper	896	— v. Hall	106, 872, 921
— v. Corbett	214	— v. Hamilton	873
— v. Coulthred	52, 909	— v. Hampson	809, 810
— v. Cox	884	— v. Hardy	130
— v. Culliford	893	— v. Hare	823
— v. Date	141	— v. Harlow	169, 822
— v. Davies	41, 43, 44, 126,	— v. Harvey	2, 43, 821
	133, 875	— v. Hazell	888
— v. Davis	133	— v. Heakin	909
— v. Day	201, 877, 922	— v. Hellier	187, 921
— v. Deakin	38	— v. Heming	128
— v. Derby (Earl)	169, 177	— v. Hertford (Marquis) ..	141
— v. Dobell	890	— v. Hicks	78
— v. Dodd	52	— v. Hilder	875
— v. Donovan	888	— v. Hiscocks	28
— v. Dunbar	894	— v. Hodgson	11
— v. Dyeball	871	— v. Hogg	612
— v. Dyson	900	— v. Homfray	874
— v. East London Water-		— v. Hopkinson	25
works	123	— v. Horn	878, 883
— v. Edgar	881	— v. Horne	922
— v. Edmonds	939	— v. Horsley	900
— v. Edwards	52, 877, 897, 947	— v. Howard	890
— v. Egremont (Earl)	142	— v. Hubbard	30
— v. Evans	612	— v. Huddart	821
— v. Eyre	938	— v. Hughes	891
— v. Fairclough	894	— v. Humphreys	895
— v. Fenn	873	— v. Huthwaite	27
— v. Filliter	822	— v. Inglis	895
— v. Fleming	31, 910	— v. Jackson	621, 881, 893
— v. Flynn	897	— v. James	141
— v. Ford	18	— v. Jesson	38

Table of Cases Cited.

	PAGE		PAGE
Doe v. Johnson	35, 119, 257,	Doe v. Palmer (16 Q. B. 47) ...	130
	889, 905	— v. Parker	879, 896
— v. Jones	269, 621, 880,	— v. Pasquali	896
	906, 924, 939	— v. Passingham	874
— v. Keeling	92, 127	— v. Paul	121, 899
— v. Kemp	77, 809	— v. Payne	613
— v. Kendrick	890	— v. Peach	136
— v. Kennard	878	— v. Pearsey	809, 811
— v. Kightley	893	— v. Pembroke	42
— v. Knight	125	— v. Perkins	158
— v. Lamb	891	— v. Phillips	92, 935
— v. Lambly	891	— v. Pittman	896
— v. Laming	611, 612	— v. Plowman	875
— v. Langdon	141	— v. Porter	884
— v. Langfield	30, 50, 189	— v. Powell	26, 612, 871,
— v. Langton	900		877, 885
— v. Lawden	882	— v. Price	98, 876, 882
— v. Lawder	882	— v. Prosser	878
— v. Lea	25, 893	— v. Pullen	882
— v. Leach	872	— v. Pulman	49
— v. Levi	894	— v. Pye	60
— v. Lewis	6, 906	— v. Quayley	882
— v. Lines	888, 890	— v. Read	873, 891
— v. Litherland	63, 897	— v. Reed	37, 876
— v. Lloyd	74, 127, 129	— v. Rees	904
— v. Lucas	894	— v. Rhodes	890
— v. Ludlam	920	— v. Rickarby	613
— v. Maisey	922	— v. Ries	885
— v. Marchetti	897	— v. Roberts	109, 174, 175
— v. Martin	9, 28	— v. Robinson	892
— v. Mason	72, 117	— v. Robson	897
— v. Massey	938	— v. Roe	67, 207,
— v. Masters	899		899, 900
— v. Matthews	888	— v. Rollings	896, 897
— v. Mee	106	— v. Rose	822
— v. Meux	905	— v. Ross	12, 67, 142
— v. Mew	105	— v. Rosser	195, 872
— v. Michael	38, 52, 54	— v. Rouse	28
— v. Miles	59, 887	— v. Rowe	906
— v. Millett	37	— v. Rowlands	84, 617, 620
— v. Mills	134, 877, 879	— v. St. Helen's Ry.	923
— v. Mizem	892	— v. Samples	92
— v. Moffat	883, 887	— v. Samuel	889, 891
— v. Moore	937	— v. Sayer	882
— v. Morgan	27	— v. Scott	875, 894
— v. Morphett	893, 894	— v. Seaton	50, 53, 151,
— v. Morris	3, 6, 7		169, 190
— v. Mouldsdales	876	— v. Selwyn	889
— v. Murless	173, 924	— v. Shawcross	899
— v. Meeds	29, 206	— v. Shelton	69
— v. Nepean	38	— v. Skinner	44, 55, 57
— v. Nicholls	875	— v. Skirrow	880
— v. Olley	922	— v. Sleeman	44, 47
— v. Ormerod	42	— v. Smaridge	886
— v. Owen	923	— v. Smart	214
— v. Oxenden	29	— v. Smith	173, 612, 885,
— v. Oxenham	935		893, 921, 924
— v. Page	937	— v. Snowdon	890
— v. Palmer (16 East, 53)...	895	— v. Somerton	7, 887

	PAGE		PAGE
Doe v. Somerville	883	Doe v. Wittcomb	13, 57
— v. Spence	890	— v. Wolley	127, 134, 909
— v. Spiller	894	— v. Wood	884
— v. Spitty	10	— v. Woodbridge	906
— v. Stacey	872, 879	— v. Woodman	892
— v. Stanion	881, 896	— v. Woombwell	890
— v. Stapleton	889	— v. Wright	816
— v. Steel	895	— v. Wrighte	875
— v. Stennett	881	— v. Wrightman	893
— v. Stevens	130	— v. Wrcot	873, 921
— v. Stratton	883, 887	— v. Young	31
— v. Suckermore	126	Doey v. L. & N. W. Ry. Co.	524
— v. Summersett	891	Doggett v. Waterloo Taxicab	
— v. Sumner	933	Co.	658
— v. Sybourn	176	Doherty v. Allman ...	268, 269, 621
— v. Taniere	884	Dolby v. Iles	256
— v. Tarver	44, 126	Dolcini v. Dolcini	1058
— v. Thomas	38, 141, 882	Doloret v. Rothschild	245, 465
— v. Thompson ...	896, 921, 922	Domett v. Beckford	357
— v. Tidbury	201, 880	Dominion Natural Gas Co. v.	
— v. Timothy	892	Collins	680
— v. Tindal	216	Don, <i>In re</i>	918
— v. Tresidder	872	Donald v. Suckling	848, 853
— v. Trye	1033	Doncaster (Mayor) v. Day	103
— v. Tucker	214	Donellan v. Read	412
— v. Turford	55, 56	Donohoe v. L. & N. W. Ry. ...	517
— v. Turner	936	Donovan v. Laing, &c., Syndi-	
— v. Tyler	169	cate	658
— v. Ulph	617	Dooby v. Watson	397
— v. Vardill	918	Doolan v. Midland Ry. Co.	
— v. Vickers	922		526, 528
— v. Vince	25, 893	Dormay v. Borradaile	338
— v. Wainwright ...	39, 62, 128	Dorret v. Meux	105
— v. Walker	133, 921	Doss v. Doss	785, 804
— v. Walters	891	Dost Aly, <i>In re</i>	108
— v. Wandlass	900	Doswell v. Impey	795
— v. Watkins	152, 890, 894	Doubleday v. Musket	449
— v. Watson	59	Doucet v. Geoghegan	910
— v. Waft	397	Dougal v. McCarthy	261, 270
— v. Watts	883	Doughty v. Bowman	617
— v. Webber...169, 196, 871, 873		— v. Firbank	686
— v. Webster	26, 30	Douglas v. Corbett	763
— v. Weller	889	— v. Douglas	828
— v. Wells	896, 897	— v. Forrest	1009, 1018
— v. Westlake	29	— v. Holme	486
— v. Wheeler	873	— v. Patrick	592, 593, 594
— v. Whitaker	921	— & Powell's Contract, <i>In</i>	
— v. Whitcomb	821	<i>re</i>	251
— v. White	897	— v. Rhyl Urban Council ...	954
— v. Whitehead...11, 85, 86, 897		Doulton v. Matthews	805
— v. Whittick	896	Dovaston v. Payne	713, 807
— v. Wiggins	879	Dover v. Maestaer	199
— v. Wilford	28	Dowdell v. Australian Mail Co.	138
— v. Wilkinson	894	Dowden v. Fowle	1069
— v. Willan	875	Dowden & Pook v. Pook	556
— v. Williams ... 608, 613, 875,		Dowley v. Winfield	38
879, 892, 904,		Dowling v. Betjemann	853
938, 943		Dowman v. Williams	83
— v. Wilson	32, 214, 900	Down v. Halling	837

	PAGE		PAGE
Downes v. McCreeman	109	Dudley, <i>In re</i>	139
— v. Ship	968	— v. Folliott	626
Downing v. Butcher	766, 802	— v. Smith	661
— v. Capel	801	Duero, The	349
Downs v. Cooper	947	Duff v. Budd	532
— v. Salmon	1053	Duffield v. Creed	34
Dowse v. Call	617	— v. Scott	483
— v. Earle	617	Duffit v. James	402
— v. Gorton	483	Dufourcet v. Bishop	534
Doyle v. Falconer	794	Dufresne v. Hutchinson	847
Drabble v. Donner	10	Duke v. Andrews	410
Dracachi v. Anglo-Egyptian Navigation Co.	348	— v. Ashby	879
Drake, <i>Ex parte</i>	840	Dukes v. Gostling	721
— v. Beckham	84, 444	Dulaney v. Merry	1064
— v. Maryatt	188	Dulieu v. White	664, 729
— v. Mitchell	448	Dumbleton v. Williams	69
— v. Shorter	848	Dumergue v. Rumsey	844, 1036
— v. Smyth	175	Dumphy v. Montreal Light, &c. Co.	654
— v. Sykes	64, 1034, 1035	Dumpor's Case	903, 907
Drakeford v. Piercy	580	Duncan, <i>In re</i>	1007
Draper v. Crofts	260	— v. Cafe	253
Drapner, The	346	— v. Cashin	1073
Drax, <i>In re</i>	509	— v. Dixon	561
— v. Scroope	390	— v. Hill	480
Draycott v. Harrison	1022, 1027	— v. Louch	706
Dresel v. Ellis	1028	— v. N. & S. Wales Bank	323, 372
Dresser v. Bosanquet	860	— v. Scott	166, 292
— v. Norwood	591	— v. Surrey Canal Co. ...	851, 956
Drew v. Drew	114, 914	— v. Topham	409
— v. Guy	615	Duncombe v. Brighton Club, &c. Co.	512
— v. Nunn,	443, 562	— v. Deniel	67, 756
— v. Prior	126	Dundonald (Earl) v. Master- man	398, 399
Dreyfus v. Peruvian Guano Co.	653, 869, 870	Dunham v. Clare	340
Driffeld Cake Co. v. Waterloo Mills Co.	758	Dunk v. Hunter	944
Drinquier v. Wood	81, 726	Dunlop v. Balfour	354
Driscoll, <i>In re</i>	621	— v. Higgins	409, 425
Driver v. Broad	235	— v. Lambert	531
— v. Burton	480	Dunlop Pneumatic Tyre Co. v. Maison Talbot	758, 759
Drue v. Baylye	947	— v. New Garage Motor Co.	247
Drummond v. Sant	935, 936	Dunman v. Bigg	748
Drury v. Macnamara	630	Dunn v. Aslett	156
— v. N. E. Ry.	676	— v. Birmingham Canal Co.	694
Du Barré v. Livette	151	— v. Bucknall Bros. ...	360, 361, 535
Du Belloix v. Waterpark	34	— v. Di Nuovo	264
Duherly v. Gunning	139	— v. Dunn	120
Dublin City Distillery v. Doherty	1045	— v. Large	823
Dublin & Wicklow Ry. v. Black	969	— v. Macdonald	382, 471
Dubois v. Keats	766	— v. Reg.	408
Du Bost v. Beresford...733, 738,	804	— v. Slee	49
Duck v. Mayeu	586	— v. Murray	195
— v. Tower Galvanizing Co.	971	Dunne v. Anderson	753
Duckett v. Gover	82	Dunphy v. Moore	800
— v. Williams	337	Dunraven (Earl) v. Llewellyn	45
Duckworth v. Johnson	690, 691		
Dudden v. Clutton Union	719		

	PAGE		PAGE
Dunster v. Hollis	623	East India Co. v. Tritton ...	297, 299
Dunwich (Bailiffs) v. Sterry ...	802	East Indian Ry. v. Mukerjee	537, 677
Du Pasquier v. Cadbury, Jones & Co.	230	East London Harbour Board v. Caledonian Shipping Co. ...	666
Dupays v. Shepherd	74	East London Ry. Co., <i>In re</i> ...	175
Durham (Mayor) v. Fowler...370,	371	East London Union v. Metro- politan Ry Co.	247, 387
Durham v. Legard	249	East & South African Telegraph Co. v. Cape Town Tramways Co.	654, 671
— v. Robertson	507	East Stonehouse Council v. Willoughby	937, 940
Durrant v. Eccl. Comrs.	497	Eastern Counties Ry. v. Broom	956
Durrell v. Evans	238, 419, 420	— v. Marriage	93
Duthie v. Hilton	354	Eastern Telegraph Co. v. Dent	613, 908
Dutton v. Marsh	83, 332	Eastern Union Ry. v. Symonds	56, 984
Duval & Co. v. Gans	592	Eastes v. Russ	556
Duxberry v. Barlow	229	Eastland v. Burchell	452
Dwyer v. Collins	6, 7, 10, 153	Eastmure v. Laws	171
— v. Rich	810	Easton v. Hitchcock	373
Dye v. Leatherdale	773	— v. Isted	699
Dyer v. Best	637	— v. London	869
— v. Bowley	610	— v. London Joint Stock Bank	960
— v. Munday	791, 795	— v. Pratt	618, 621
Dyers' Co. v. King	701	Eastwood v. Ashton	626
Dyke v. Aldridge	63	— v. Bain	279
— v. Duke	1067	— v. Kenyon	367
— v. S. E. & C. Ry. Co. ...	525	— v. McNab	623
Dykes v. Blake	244, 250	Eaton v. Basker	955
Dynen v. Leach	682	— v. Swansea Waterworks	183, 698, 709, 721
Dyson v. Collick	806	— v. Western	407, 408
— v. Forster	599	Eaves v. Dixon	378
EADEN v. Titchmarsh	455	Ebbett's Case	969
Eadon v. Jeffcock	694	Ebbetts v. Conquest	622
Eagar v. Dyott	761	Ehbv Vale Steel, &c. Co. v. Macleod	476
Eager v. Grimwood	788, 789	Eberle's Hotels Co. v. Jonas ...	972
Eaglesfield v. Londonderry (Marquis)	724	Ebsworth v. Alliance Marine Insurance Co.	342
Eaglesham v. McMaster	470	Eccles v. Louisville, &c. Rail- road Co.	141
Eagleton v. Gutteridge ... 775,	778, 785	Ecclesiastical Commissioners v. Kino	702
Eales v. Dicker	295	— v. Merral ... 267, 270, 884,	955
Eardley v. Granville	808, 812	— v. Parr	934
Eardly v. Price	403	— v. Rowe	935, 941
Earl v. Lewis	91	— v. Tremer	935
— v. Lubbock	657	Eckstein v. Reynolds	595
Earle v. Kingscote	1020, 1021	Economic Life Assur. Soc. v. Usborne	509
Early v. Bowman	289	Edan v. Dudfield	416
East v. Chapman	156, 757	Edden v. Read	491
East Anglian Ry. v. East Counties Ry.	986	Edelstein v. Schuler ... 75, 458,	837
East of England Banking Co., <i>In re</i>	510	Eden v. Blake	15, 26, 421
East Fremantle Corporation v. Annois	650		
East Gloucestershire Ry. v. Bartholomew	962, 981		
East India Co. v. Glover	71		
— v. Paul	566		
— v. Pullen	532		

	PAGE		PAGE
Eden v. Ridsdale's Ry. Lamp, &c. Co.	490	Edwards v. Mallan	230
Edevain v. Cohen	219, 220	— v. Marens	1055
Edgar v. Lamont	402	— v. Marston	1059
Edge v. Boileau	627, 629	— v. Matthews	214, 1072
— v. Pemberton	615, 621	— v. Midland Ry.	762
— v. Strafford	234, 258, 267	— v. Stone	634
Edgell v. Curling	137	— v. Towels	60
— v. Day	489	— v. Walters	322, 586
Edgelow v. MacElwee	553	— v. Yeates	596
Edgington v. Fitzmaurice ...	723, 725	Edwick v. Hawkes	614
Edie v. Kingsford	54, 57, 469	Edwin v. Lancaster	323
Edinburgh, &c. Ry. v. Hebble- white	984	Efford v. Burgess	266
Edinburgh United Breweries v. Molleson	729	Egan v. Kensington Union ..	471
Edis v. Bury	280	Egbert v. Northern Crown Bank	369
Edison Electric Light Co. v. Holland	227	Egerton v. Brownlow (Earl) ...	552
Edleston v. Crossley	810	Egg v. Barnett	34
Edmonds v. Blaine Furnaces Co.	1062	— v. Blaney	626
— v. Challis	11, 125	Eggington v. Cumberledge ...	392
— v. Prudential Assur. Co. ...	38	— v. Mayor of Lichfield	207
— v. Rowe	143	Eggleston v. Speke	64
— v. Walter	149	Egler v. Marsden	255
Edmondson v. Birch	735, 746, 749, 750	Egmont (Earl) v. Smith	246
— v. Machell	788	Egyptian, The	666
— v. Nuttall	853	Ehrensperger v. Anderson ...	10, 488, 495
— v. Stevenson	747	Eicke v. Nokes ...	153, 390, 392, 513, 576
Edmonstone v. Plaisted	99	Elbinger Actien-Gesellschaft v. Armstrong	434, 436, 534
Edmunds v. Bushell	287, 442	Elden v. Keddell	105
— v. Edmunds	1038	Elderslie S.S. Co. v. Borth- wick	360
— v. Prudential Assurance Co.	217	Eldridge v. Stacey	778
— v. Wallingford	484	Eley v. Positive Assur. Co. ...	411, 971
Edward v. Towels	453	Elford v. Teed	298
Edwardes v. Barrington	611	Elias v. Snowden Slate Quarries Co.	268
Edwards, <i>Ex parte</i> ..	51, 491, 775	Eliot v. Allen	800
— v. Aberayron, &c. Insur. Soc.	545	Elkin v. Janson	85
— v. Bates	487	Elleu v. Gt. N. Ry.	544
— v. Brewer	861, 863	Ellesmere Brewery Co. v. Cooper	482, 546
— v. Bridges	1036	Elliman v. Carrington	556
— v. Carter	558	Ellinger v. Mutual Life Insur. Co. of New York	339
— v. Edwards ...	1013, 1049, 1051	Elliot v. N. E. Ry.	692, 694
— v. Farebrother	1036	Elliotson v. Feetham	641, 655
— v. Godfrey	688	Elliott v. Crutchley	262, 476
— v. Great W. Ry. Co. ...	500, 509, 511	— v. Edwards	242
— v. Hall	235	— v. Elliott	34, 920
— v. Harben	1010, 1038	— v. Hall	679
— v. Hodding	253	— v. Johnson	270, 271
— v. Hodges	220, 221	— v. Kemp	802
— v. Hooper	847	— v. Liggins	409
— v. Jevons	17	— v. Nicklin	789
— v. Lawless	392	— v. Richardson	555
— v. L. & N. W. Ry.	957	— v. Roberts	411, 412, 647

	PAGE		PAGE
Elliott v. Royal Exchange Assur. Co.	341, 545	Emblen v. Myers	653, 693, 815
— v. Thomas	416	Embrey v. Owen	717, 719, 720
Ellis v. Abrahams	765	Emerson v. Blonden	66
— v. Bedford (Duke)	81	— v. Maddison	941
— v. Cross	1064	Emery, <i>In re</i>	1056
— v. Ellis	486, 560, 1006	— v. Barnett	263
— v. Emmanuel	370	— v. Day	576
— v. Glover and Hobson ...	845	Emly v. Lye	285
— v. Goulton	253	Emma Silver Mining Co. v. Grant	490
— v. Gt. W. Ry.	674	— v. Lewis	490
— v. Hamlen	468	Emmens v. Pottle	736
— v. Hunt	864	Emmerson v. Heelis	239, 420
— v. Kelly	401	Emmott (or Halkett) v. Marchant	1056, 1071
— v. Kerr	597	Empress Engineering Co., <i>In re</i>	489, 971
— v. Loftus Iron Co. ...	669, 813	Energie, The	359
— v. L. & S. W. Ry.	675	Engall v. Druce	9
— v. M'Henry	184	Engel v. Fitch	254, 436
— v. Manchester Carriage Co.	219, 697	Engelhart v. Farrant	657
— v. Manson	588, 590	England, <i>In re</i>	483, 601
— v. Pond	479, 480	— v. Cowley	823, 845
— v. Rogers	243	— v. Downs	1022
— v. Rowbotham	257	— v. Marsden	484
— v. Rowles	819	— v. Roper	121
— v. Sheffield Gas Consumers Co.	649	— v. Slade	875
— v. Taylor	950	Engleheart v. Moore	393
— v. Torrington	620	English v. Darley	320, 323
— v. Wilmot	373	— v. Metropolitan Water Board	692, 719
Ellison, <i>In re</i>	131	English, &c. Assur. Society, <i>In re</i>	445
— v. Collingridge	280	English Chartered Bank, <i>In re</i>	202
Elliss v. Elliss	873	English, &c. Produce Co., <i>In re</i>	972
Elmhirst v. Spencer	720	Ennis v. Donisthorpe	103
Elmore v. Kingscote	418	Enoch & Zaretsky, <i>In re</i>	162
— v. Stone	416, 440	Enthoven v. Hoyle	486
Elmville, The	279, 308	Equitable Fire, &c. Office v. Ching Wo Hong	344
Elphick v. Barnes	377, 438	Erlanger v. New Sombrero Phosphate Co.	490
Elphinstone v. Monkland Iron, &c. Co.	248	Erskine v. Adeane	16, 235, 950
Elsam v. Denny	321	Erskine & Co. v. Sachs	479
Elsee v. Smith	797	Ertel Bieber & Co. v. Rio Tinto Co.	557
Elson v. Crookes	505	Erving v. Peters	1018
Elston v. Wood	66	Esdaile v. Sowerby	298
Elswick S.S. Co. v. Montaldi	353	Espley v. Wilkes	706
Elton v. Brogden	378	Esposito v. Bowden	557
— v. Larkins	68	Essex v. Daniell	247
Elwes v. Brigg Gas Co.	843	Este v. Smyth	915
— v. Mawe	843	Estwick v. Cooke	74
Elworthy v. Sandford..	92, 869, 1006	Etherington and Lancashire & Yorks. Accident Insur. Co., <i>In re</i>	340
Ely (Dean) v. Bliss	934	European, The	665
— v. Caldecott	187	Evans' Case	962
— v. Cash	934	Evans, <i>Ex parte</i>	924
— v. Stewart	106		
Emanuel v. Bridger	1048		
— v. Roberts	24, 327		
— v. Symon	185		
Embiricos v. Anglo-Australian Bank	279, 840		

	PAGE		PAGE
Evans v. Beattie	64	Exchange Telegraph Co. v.	
— v. Bicknell	875	Gregory	786
— v. Bignold	337	Exeter (Mayor) v. Warren ...	53
— v. Birch	33	Exton v. Scott	125
— v. Cook	689	Eyles v. Ellis	585
— v. Davis	905	Eynon, <i>Ex parte</i>	1050
— v. Edmonds	548	Eyre v. Eyre	130
— v. Elliott	922	— v. Palsgrave	109
v. Enever	904, 907	Eyres v. Sedgewicke	729
— v. Evans	147, 803	Eyton v. Jones	903
— v. Harlow	734	— v. Littledale	588
— v. Harries	741, 759		
— v. Heathcote	556	FAGAN v. Dawson	96
— v. Hoare	238, 419	Fair v. L. & N. W. Ry.	664
— v. Jones	1038	Fairburn v. Evans	555
— v. Judkins	595	Fairclaim d. Empson v.	
— v. Levy	613	Shackleton	878
— v. Liverpool Cor.	678	Fairlie v. Denton	60, 506
— v. Matthias	946	— v. Fenton	83
— v. Merthyr Tydfil Council		— v. Hastings	64
44, 174, 178		Fairman v. Ives	747
— v. Morgan	2, 43	— v. Oakford	403, 404
— v. Nichol	840	Faith v. Richmond	285
— v. Powis	543	Falck v. Williams	410
— v. Pratt	20	Falk, <i>Ex parte</i>	865
— v. Prosser	590	— v. Fletcher	846
— v. Prothero	200	Falmouth v. Moss	141
— v. Rees ... 46, 92, 106, 127,	187, 196	— v. Roberts	119
— v. Roberts	234, 807	Famatina Development Cor-	
— v. Roe	403	poration, <i>In re</i>	483
— v. Smallcombe	975	Fanshawe v. Peet	284
— v. Sweet	8, 10	Farebrother v. Simmons 239, 420,	421
— v. Taylor	174	Farewell v. Dickenson	610
— v. Vaughan	627	Farhall v. Farhall	1008
— v. Verity	513	Farina v. Home	414
— v. Walton	787, 789	Farley v. Danks	767
— v. Ware	559	Farlow v. Stevenson	624
— v. Wright	501, 846	Farmeloe v. Bain	827
Evanson v. Crooks	505	Farmer v. Russell	506
Evelyn v. Chichester	559	— v. Waterloo & City Ry. ...	818
Everest v. Ritchie	386	Farmers' Mart v. Milne	549
Everett v. Collins	584	Farnsworth v. Garrard .. 476,	477
— v. London Assur. Co. ...	343	Farquhar v. Farley	251, 253
— v. Robertson	573, 576	— v. Morris	634
— v. Youells	221	Farquharson v. King	826, 832
Everingham v. Ivatt	921	Farr v. Newmann	1036
— v. Roundell	12	— v. Price	198, 333
Evershed v. L. & N. W. Ry.	520	— v. Ward	456, 510
Every v. Smith	807	Farrall v. Hilditch	596
E. W. A., <i>In re</i>	586	Farrance v. Elkington	633
Ewart v. Chubb	453, 1021	Farrant v. Barnes	679
— v. Graham	704	— v. Thompson	843
Ewbank v. Nutting	852, 854	Farrar v. Definne	447
Ewer v. Ambrose	156, 160, 164	— v. Hutchinson	581
— v. Jones	816, 817	Farrelly v. Robins	877, 882
Exall v. Partridge	478, 480, 484	Farrer v. Lacy	580
Exchange Telegraph Co. v.		Farrington v. O'Donohoe	411
Central News	786	Farrow v. Blomfield	59

PAGE	PAGE		
Farrow <i>v.</i> Wilson	407, 1007	Fenwick <i>v.</i> Laycock	1036
Fassett <i>v.</i> Brown	120	— <i>v.</i> Thornton	63
Faulder <i>v.</i> Silk	173	Feret <i>v.</i> Hill	548, 611, 880
Faulds <i>v.</i> Jackson	132	Ferguson <i>v.</i> —	269
Faulkner <i>v.</i> Brine	157	— <i>v.</i> Aberdeen Parish Coun- cil	344
Faviell <i>v.</i> East Counties Ry. Co.	208, 953	— <i>v.</i> Carrington	457
— <i>v.</i> Gaskoin	270, 271	— <i>v.</i> Mahon ..	80, 107, 184, 185
Fawcett <i>v.</i> Cash	403	Fergusson <i>v.</i> Fyffe	510, 511
— <i>v.</i> Fearn	1051	Fermor <i>v.</i> Phillips	1034
— <i>v.</i> Smethurst	560	Fernandez, <i>Ex parte</i>	149
— <i>v.</i> York, &c., Ry.	674	Fernley <i>v.</i> Worthington	5
— & Holmes, <i>In re</i>	249	Ferns <i>v.</i> Carr	407
Fawke <i>v.</i> Miles	53	Ferrand <i>v.</i> Milligan	818
Fawkes <i>v.</i> Lamb	22	Ferrer <i>v.</i> Owen	385
Fay <i>v.</i> Prentice	641	Ferrers <i>v.</i> Arden	171
Fayle <i>v.</i> Bird	284	Ferro, The	361
Fazakerly <i>v.</i> McKnight	586	Fesenmeyer <i>v.</i> Adcock	486, 513
Fearn <i>v.</i> Filica	292	Fettes <i>v.</i> Robertson	575, 576
— <i>v.</i> Lewis	575	Feuerheerd <i>v.</i> London General Omnibus Co.	140
Fearnside <i>v.</i> Flint	602	Few <i>v.</i> Perkins	905, 906
Fearnside and Dean's Case ..	961	Fewings, <i>Ex parte</i>	479, 509
Fearon <i>v.</i> Aylesford (Earl) ..	1028	— <i>v.</i> Tisdal	403
Feast <i>v.</i> Robinson	1054	Fidgett <i>v.</i> Penny	515
Featberston <i>v.</i> Hutchinson ...	549	Field <i>v.</i> Adams	783
— <i>v.</i> Wilkinson	535	— <i>v.</i> Lelean	21, 23, 466
Featherstonhaugh <i>v.</i> Johnston	847	— <i>v.</i> Megaw	506
Fechter <i>v.</i> Montgomery	405	— <i>v.</i> Mitchell	771, 772
Federal Supply, &c., Co. <i>v.</i> Angehrn	406	— <i>v.</i> Musgrove	801
Feilden <i>v.</i> Slater	614	— <i>v.</i> Newport, &c., Ry. ...	857
Feise <i>v.</i> Wray	862	— <i>v.</i> Receiver for Metropolitan Police District	1032
Felgate, <i>Ex parte</i>	963	— <i>v.</i> Woods	203
Felix, The	364, 365	Fielden (or Fielding) <i>v.</i> Morley Cor.	93, 990, 991, 992
Felix, Hadley & Co. <i>v.</i> Hadley	584	Fielder <i>v.</i> Marshall	281
Fell <i>v.</i> Goslin	370	— <i>v.</i> Ray	199, 257
— <i>v.</i> Knight	543	— <i>v.</i> Starkin	376
— <i>v.</i> Whittaker ...	770, 771, 772	Fielding <i>v.</i> Corry	302
Fellowes <i>v.</i> Williamson	48	Figgins <i>v.</i> Cogswell	731
Feltham <i>v.</i> England	682	Figlia Maggiore, The	348, 365
— <i>v.</i> Terry	503	Filburn <i>v.</i> People's Palace & Aquarium Co.	668
Felthouse <i>v.</i> Bindley	60	Filby <i>v.</i> Hounsell	236
Femings <i>v.</i> Jarrat	1010	Filliter <i>v.</i> Phippard	671
Fengl <i>v.</i> Fengl	198, 199	Filmer <i>v.</i> Delber	208
Fenn <i>v.</i> Bittleston	842, 1036	— <i>v.</i> Gott	17
— <i>v.</i> Griffiths	1	— <i>v.</i> Lynn	441, 454
— <i>v.</i> Harrison	377, 583	Finance, &c., Issue <i>v.</i> Cana- dian Produce Cor.	962
— <i>v.</i> Johnson	214	Finch <i>v.</i> Blount	852, 868
— <i>v.</i> Smart	897	— <i>v.</i> Boning	592
Fennell <i>v.</i> Ridler	554	— <i>v.</i> Brook	594
— <i>v.</i> Tait	139	— <i>v.</i> Gt. W. Ry.	716
Fenner <i>v.</i> Blake	260	— <i>v.</i> Miller	595
— <i>v.</i> Duplock	947	Finchett <i>v.</i> How	392
Fennings <i>v.</i> Grenville (Lord)	852	Finck <i>v.</i> Tranter	498
Fentiman <i>v.</i> Smith	705	Finden <i>v.</i> Westlake	750
Fenton <i>v.</i> Blythe	1056		
— <i>v.</i> Livingstone	910, 914		
— <i>v.</i> Thorley & Co.	340		
Fenwick <i>v.</i> Bell	157		

	PAGE		PAGE
Findlay, <i>In re</i>	465	Fleming v. Hector	441
Findon v. M'Laren	779	Fletcher, <i>Ex parte</i>	1048, 1049
Fine Art Society v. Union Bank of London	502, 838	—, <i>In re</i>	140
Finlay, <i>In re</i>	479	— v. Bealey	653
— v. Bristol & Exeter Ry. 884, 955		— v. Birkenhead Cor.	93
— v. Chirney	382, 1007	— v. Braddyll	109
— v. Mexican Invest. Co. ...	345	— v. Collis	483
Finnerty v. Tipper	740	— v. Crosbie	216
Firbank's Executors v. Hum- phreys	381	— v. Gillespie	349
Firkin v. Edwards	10	— v. Jubb, Booth & Helli- well	398
First National Reinsurance Co. v. Greenfield	968	— v. London & N. W. Ry. ...	218
Firth, <i>Ex parte</i>	1049, 1050	— v. Marshall	465, 495
— v. Bowling Iron Co.	642	— v. Nokes	902
— v. Tbrush	302, 308	— v. Rylands	668, 791
Fish v. Kempton	580, 590	— v. Tayleur	434
Fisher v. Algar	770	— v. Wilkins	993
— v. Bridges	552	Flight v. Booth	248
— v. Drewitt	475	— v. Reed	319, 455, 512
— v. Fallows	485	— v. Thomas	698
— v. Laue	104	Flinn v. Calow	15
— v. Owen	737	Flitters v. Allfrey	181, 182, 230
— v. Prowse	645, 713	Flood v. Patterson	569
— v. Samuda	12	Florence v. Jennings	509
— v. Smith	856, 858, 860	Flory v. Denny	829
— v. Tayler	486	Flower v. Adam	662
— v. Wainwright	79	— v. L. & N. W. Ry. ...	537, 559
Fisher's Case	961	— v. Sadler	317, 552
Fishmongers' Co. v. Dimsdale	120	Flowers v. S. E. Ry. Co. ...	524, 528
Fitch v. Jones	278, 317, 319	Flude v. Goldberg	1073
— v. Sutton	61	Fludyer, <i>In re</i>	1015
Fitton v. Accidental Death Insur. Co.	339	Flureau v. Thornhill	254
Fitz v. Isles	614	Flynn v. Connell	788
Fitzgerald v. Dressler	366	Foakes v. Beer	544
— v. Dublin United Tram- ways Co.	652	— v. Webb	154
— v. Elsee	120	Foley v. Addenbrooke	598
— v. Firbank	717	— v. Hill	567
— v. Watson	746	Foley's Charity Trustees v. Dudley Corporation	255
Fitzjohn v. Mackinder	766	Folkes v. Chadd	76, 157
Fitzpatrick v. Evans	684	Folkestone Corporation v. Brockman	712
Fitzroy v. Cave	507	Foote v. Greenock Hospital ..	678
Fitzwalter Peerage Case	126	— v. Hayne	151, 385
Fladong v. Winter	34	Forbes' Claim	342
Flanagan v. Fahy	163	— v. Samuel	636, 638
— v. Shaw	633	— v. Watt	26
Fleet v. Murton	23	— & Judd's Case	962
— v. Perrins	58, 101, 102, 166, 178	Ford v. Ager	938
Fleetwood v. Hull	898	— v. Beech	586
Fleming v. Bank of New Zealand	233, 327	— v. Cotesworth	353
— v. Gooding	256	— v. Elliott	49
— v. Hislop	641, 653	— v. Fothergill	558
— v. Snook	616	— v. Grey	69
		— v. Kettle	1054
		— v. Leche	1033
		— v. Metropolitan Ry.	714
		— v. Receiver for Metropoli- tan Police District	1032

	PAGE		PAGE
Ford v. Yates	14	Foulger v. Arding	624, 625
Forde v. Skinner	790	— v. Newcomb	732
Forder v. G. W. R.	519	— v. Taylor	1052, 1065
Fordes v. Johns	804	Foulkes, <i>Ex parte</i>	797
Fordham v. L., Brighton & S. C. Ry.	676	— v. Metropolitan District Ry.	657
Foreman v. Canterbury Cor. ...	651	— v. Sellway	49, 78, 384
Fores v. Johns	557	Foundling Hospital Governors v. Crane	124, 125
— v. Wilson	787, 788	Fountain v. Boodle	739, 755
Forgan v. Pearl Life Assur- ance Co.	337	— v. Young	153
Forget v. Ostigny	464	Fontaine, <i>In re</i>	51, 570
Forgiõne v. Lewis	241	Fowke v. Berington	193
Forman v. Jacob	279	Fowkes v. Manchester, &c., Assur. Assoc.	338
— v. "Liddlesdale" ...	468, 474, 476	Fowler v. Down	840
— v. Wright	316	— v. Foster	1047
Formby v. Barker	1002	— v. Hollins	831, 851
Forrer v. Nash	244	— v. Knoop	349
Forsdick v. Collins	845	Fowles v. Gt. W. Ry.	521
Forshaw v. Lewis	151	Fox, <i>In re</i>	602, 933
Forster v. Baker	507	— v. Bearblock	111
— v. Clowser	1062	— v. Broderick	735
— v. Farquhar	224, 225	— v. Clarke	811
— v. Mackreth	286, 325	— v. Clifton	444, 449, 450
— v. Patterson	939	— v. Cutworth	488
Forsyth v. Bristowe	573, 603	— v. Gaunt	994
— v. Jervis	439	— v. Jolly	902
Forte v. Vine	626	— v. Morrish, Grant & Co. ...	680
Forth v. Simpson	858	— v. Slaughter	261
— v. Stanton	367	— v. Star Newspaper Co. ...	218
Fortune v. Young	368	— v. Swann	612
Forty v. Imber	943	— v. Waters	58, 63, 1017
Forward v. Pittard	517	Foxall v. Barnett	800, 804
Foss v. Wagner	203	— v. International Land Credit Co.	22, 404
Foster v. Allanson	514	Foy v. Bell	61
— v. Bates	440, 1004	— v. L. B. & S. C. Ry. ...	675
— v. Blakelock	1011	Fragano v. Long	531
— v. Compton	173	France v. Clark	960
— v. Crabb	869	— v. Gaudet	853, 854
— v. Frampton	864	Francesco v. Massey	354
— v. Globe Venture Syndi- cate	72	Francis v. Cockrell	373, 537, 660, 679
— v. Great W. Ry.	224, 519	— v. Dodsworth	590
— v. Green	490	— v. Hawkesley	575
— v. Hilton	1066	— v. Hayward	803
— v. Jolly	14, 316	— v. Neave	1034
— v. Ley	481	Frank v. Frank	173, 212
— v. Mackinnon ..	310, 316, 597	Frank Mills Mining Co., <i>In re</i> ...	952
— v. Mentor Life Ins. Co. ...	70	Frankenberg v. Great Horse- less Carriage Co.	81, 1007
— v. Oxford, Worcester, &c. Ry.	985	Franklin v. Dawson	464
— v. Parker	307	— v. Hosier	858
— v. Pearson	838	— v. S. E. Ry.	690
— v. Redgrave	560	Fraser v. Berkeley	753
— v. Stewart	471	— v. Hopkins	189
— v. Warblington Urban Council	642, 805	— v. Jordan	323, 371
Fouldes v. Willoughby ...	802, 823	— v. Pendlebury	501

	PAGE		PAGE
Fraser v. Witt	863	Frost v. King Edward VII. Welsh National Memorial	615, 641
Fraunce's Case	898	— v. Knight	383, 405, 433
Fray v. Blackburn	998	— v. Oliver	473
— v. Fray	773	Froude v. Hobbs	8
— v. Voules ... 210, 211, 398,	399	Frowd, <i>Ex parte</i>	968
Frayes v. Worms	185	Frühling v. Schroeder	510
Frazer v. Cuthbertson	473	Fry v. Cheltenham Cor.	992
Frean v. Watley	207	— v. Smellie	960
Frederick v. Att.-Gen.	44	— v. Wood	127
— v. Lookup	638	Fryer v. Brown	277
Free v. Hawkins	334	— v. Ewart	903
Free Fishers of Whitstable v. Foreman	38	— v. Gathercole	31
Freedom, The	348	— v. Kinnersley	749
Freeman v. Appleyard	832	Fuller v. Potch	109, 172
— v. Arkell	5, 761	— v. Glyn, Mills, Currie & Co.	70
— v. Birch	532	— v. Lane	722
— v. Cooke	70, 168	— v. Smith	495
— v. Gainsford	235	Fullerton v. Provincial Bank of Ireland	367
— v. Inland Rev. Comrs. ...	201	Furber, <i>Ex parte</i>	1056
— v. Jeffries	271, 497	— v. Cobb	1058, 1060, 1061
— v. Jury	261	Furley d. Canterbury (Mayor) v. Wood	25
— v. Phillipps	43, 47	Furneaux v. Fotherby	785
— v. Pope	1038	Furness v. Cope	55
— v. Read	174, 282, 392, 563, 1000	— v. Meek	125
— v. Rosher	785	Furness, Withy & Co. v. W. N. White	359
Freemantle v. L. & N. W. Ry.	672	Furnivall v. Coombes	599
Freeth v. Burr	429	— v. Grove	607
French v. French	514	— v. Hudson	1061
— v. Gerber	354	Fursdon v. Clogg	55, 939
— v. Gething ... 1028, 1046,	1049	Fyfe's Case	964
— v. Howie	447, 451		
— v. Phillips	770	GABARRON v. Kreeft	348, 440
— v. Styring	482	Gabay v. Lloyd	76
French Hoek (Commissioners) v. Hugo	716	Gadd v. Houghton	83
Friend v. Buckley	243	— v. Thompson ... 556, 558,	559
Freshney v. Wells	854	Gaden v. Newfoundland Sav- ings Bank	325, 584
Freston, <i>In re</i>	139	Gadsden v. Barrow	1073
Frewen v. Phillips	697	Gaetano and Maria, The	346
Fricker v. Van Grutten	82	Gaffney v. Dublin United Tramways	662
Fried, Krupp v. Orconera Iron Ore Co.	557	Gage v. Acton	578
Friedlander v. London Assur. Co.	156, 342	Gainsford v. Grammar	67
Friend v. London, Chatham & Dover Ry.	140	Gaitskill v. Greathead	554
— v. Young ... 448, 564, 570,	582	Galbraith v. Neville	181
Friend's Case	151	— v. Poynton	269
Frisby, <i>In re</i>	601	Gale, <i>In re</i>	1018
Frith v. Frith	17, 18, 112, 124	— v. Bates	616
— v. McLutyre	213	— v. Williamson	1038
Fritz v. Hobson	714	Gall v. Slessor	747
Fromant v. Ashley	79	Gallagher v. Humphrey	646
Fromont v. Coupland	514, 657	— v. Piper	682
Frost v. Aylesbury Dairy Co.	375		

	PAGE		PAGE
Galland, <i>In re</i>	856	Garton v. Gt. W. Ry.	977, 986
Gallin v. L. & N. W. Ry. ...	537	Gartside v. Silkstone & Dod-	
Galloway v. Hallé Concerts		worth Coal Co.	118, 121
Society	966	Garvin v. Carroll	100, 160
— v. London Cor.	390	Gaskell v. Marshall	1036
Gallway (Lord) v. Mathew...	285	Gaskell v. Gaskell	39
Gallwey v. Marshall	732	— v. Skene	60
Galula v. Pintus	582	Gaslight & Coke Co. v. Hardy	780
Gambrell v. Falmouth (Lord)		— v. St. Mary Abbots,	
	772, 777	Kensington	654
Games, <i>Ex parte</i>	1038	— v. Turner	552
Gandell v. Pontigny	409	Gasson v. Cole	497
Gandy v. Gandy	81, 599	Gates v. Bill	658
Ganer v. Lanesborough (Lady)		— v. Jacobs	901
	108, 1022	Gath v. Howarth	226
Gann v. Free Fishers of Whit-		Gathercole v. Miall	753
stable	37	— v. Smith	588, 590
Gapp v. Bond	1047	Gaunt v. Fynney	641, 644
Garbutt v. Simpson	790	Gausson v. Morton	123, 820
Garcias v. Ricardo	184	Gautret v. Egerton	645
Garden v. Bruce	567	Gaved v. Martyn ...	75, 709, 718, 719
Garden Gully, &c., Mining Co.		Gavin v. Carroll	102
v. McLister	965	Gawley v. Belfast Cor.	991
Gardiner Peerage Case	39, 48	Gay v. Lunder	339
Gardiner v. Williamson's ..	610	Gayford v. Moffatt	706, 709
Gardner v. Hodgson's, &c.,		— v. Nicholls	648, 692
Brewery Co. 36, 696, 699, 707,	709	Gaylard v. Morris	793
— v London, Chatham &		Gaze v. Gaze	132
Dover Ry.	923	Geach v. Ingall	212
— v. Moulton	61, 178	Geake v. Jackson	582
— v Slade	748	Geary v. Bearcroft	808
— v Trechmann	364	G.E.B., <i>In re</i>	588
— v Wainfur	561	Geddis v. Bann Reservoir Co.	
— v Walsh	314		654, 671
— v. Wright	9	Gedding v. Marsh	375
Gargrave v. Smith	773	Gedge v. Royal Exch. Assur.	
Garland v. Jacob	291, 293	Co.	549
— v. Mead	921	Gedye, <i>In re</i>	390
— v. Scoones	173	Gee, <i>In re</i>	131
Garment v. Barrs	378	— v. Lancashire, &c., Ry.	
Garner v. Wingrove	939	Co.	535
Garnet v. Ball	64	— v. Metropolitan Ry.	
Garnet & Moseley Gold Mining			659, 662, 676
Co. v. Sutton	969	— v. Pack	370
Garnet's Case	154	— v. Ward	44
Garnett, <i>In re</i>	1008	Geere v. Mare	555
— v. Bradley	223	Geipel v. Peach	726
— v. Ferrand	173	Gelen v. Hall	998
— v. McKewan	327	Gellar, <i>Ex parte</i>	445
— v. Woodcock	299	Gelmini v. Moriggia	563, 567
Garr v. Fletcher	817	General Accident, &c., Cor.	
Garrard v. Cottrell	485	v. Robertson	340
— v. Giubilei	221	General Accident Assurance	
— v. Lewis	288, 317	Co. v. Noel	222
— v. Tuck	875, 881	General Billposting Co. v.	
Garrett v. Messenger	638	Atkinson	408, 556
Garth v. Howard	64	General Finance Co. v. Liber-	
Garton v. Bristol & Exeter		ator Building Soc.	69, 874
Ry. Co.	517, 518, 528		

	PAGE		PAGE
General Furnishing, &c., Co. v. Venn	1047	Gibson v. Doeg	615, 906
General Share & Trust Co. v. Wetley Brick & Pottery Co.	902	— v. Gavin	185
General Trading Co. & Van Stolk's Commissiehandel, <i>In re</i>	428	— v. Holland	237, 418
Genn v. Winkel	826	— v. Hunter	76
Genner v. Sparkes	790	— v. Ireson	779
Gent v. Cutts	636	— v. Kirk	255
Gentle v. Faulkner ... 612, 901,	903	— v. M'Carty	183
George, <i>In re</i>	322	— v. Sturge	356
— v. Clagett	590, 591	— v. Winter	62
— v. Davies	403	Gidley v. Palmerston	471
— v. Perring	1070	Gieve, <i>In re</i>	504
— v. Radford	799	Gilbert, <i>Ex parte</i>	1015
— v. Skivington	680	— v. Dee	1016, 1017
— v. Surrey	122	— v. Gosport & Alverstoke Urban Council	992
George and Goldsmiths', &c., Insur. Assoc., <i>In re</i>	344	— v. Trinity House	651
George & Richard, The	666, 690	Gilbert's Case	964
Geralopulo v. Wieler ... 191, 306,	481	Gilbey v. G. N. Ry. 525, 541	541
Gerard (Lord) and L. & N. W. Ry., <i>In re</i>	695	— v. G. W. R.	51
Gerhard v. Bates	725	Giles, <i>In re</i>	1015
German v. Chapman	615	— v. Dyson	1011
Gerrard v. Crowe	818	— v. Grover	839
Gerson v. Simpson	726	— v. Hutt	984
Gertrude, The	667	— v. Siney	97
Gervis v. Grand Water Canal Co.	69, 173	— v. Smith	13, 129
Gery v. Redman	52	— v. Spencer	785
Gether v. Capper	356	— v. Taff Vale Ry.	957
Ghose v. Manickchand	21	— v. Walker	643
Gibaud v. Gt. E. Ry.	541	Gilford v. Davis	205
Gibbes, <i>Ex parte</i>	864	Gilham's Case	154
Gibbins v. Buckland	878	Gill v. Manchester, &c., Ry. Co.	518, 521, 522
— v. Phillips	1034	Gillard v. Bates	153
Gibbon v. Budd	402	— v. Brittan	804
— v. Coggon	303, 1067	Gillespie, <i>Ex parte</i>	312
— v. Featherstonhaugh	33	— v. Cheney	15, 374
— v. Gibbon	501	Gillett v. Abbott	69, 129
— v. Paynton	536	Gilliat v. Gilliat	250
— v. Pease	397, 472	Gillies v. Smither	1012, 1014
Gibbons v. M'Casland	569	Gilligan v. Robb	664
— v. Pepper	791	Gillingham v. Gwyer	778
— v. Powell	10	Gillings v. Fletcher	140
— v. Vonillon	586	Gillon v. Boddington	655
Gibbs v. Cruikshank 181, 805, 806, 816, 951	951	Gilman v. Elton	779
— v. Fremont	510	— v. Robinson	441
— v. Gt. W. Ry.	686	Gilpin v. Fowler	746
— v. Guild	565, 566	Gilroy v. Price	361
— v. West's Case	969	Gimbert v. Coyney	998
Giblin v. McMullen	217	Gingell v. Purkins	488, 501
Gibraltar Sanitary Commis- sioners v. Orfila	650	Gingell, &c. v. Stepney Bor- ough Council	38, 713
Gibson, <i>Ex parte</i>	447	Girardot v. Fitzpatrick .. 430, 827	827
		Giraud v. Richmond	411
		Girdlestone v. Brighton Aqua- rium Co.	638
		— v. Porter	822
		Gisbourne v. Hurst	779
		Gladman v. Johnson	668
		Gladwell v. Blata	994

	PAGE		PAGE
Gladwell v. Turner	308	Godard v. Gray	184, 186
Glaholm v. Barker	690	Goddard v. Cox	582
— v. Hays	350	— v. Hodges	514
Glamorgan Coal Co. v. Glamorgan Quarter Sessions & County Council Joint Committee	1030	— v. O'Brien	544
Glamorganshire, The	665	Godefroy v. Dalton	398
Glamorganshire Iron Co. v. Irvine	968	— v. Jay	84, 399
Glasbrook v. David	472, 1071	Godfrey v. Poole	1038
Glasdir Copper Mines, <i>In re</i>	843	Godlonton v. Fulham, &c., Property Co.	782
Glasgow Cor. v. Lorimer	734, 740	Godson v. Smith	171
Glass v. Patterson	257	Godts v. Rose	23
Glasscock v. Balls	334	Godwin v. Culley	574
Glasscott v. Day	595	— v. Francis	239, 254, 381, 420, 629
Glassington, <i>In re</i>	29	Goff v. G. N. Ry.	956, 957
Glasspoole v. Young	1036	— v. Mills	138
Glave v. Harding	30, 698	Goffin v. Donnelly	745
Gleadow v. Atkin	34, 39, 51	Golden v. Manning	532
Gledstane v. Hewitt	868	Goldhill v. Clarke	229
Gleen v. Gleen,	188	Golding v. Bradlaw	318, 506
Glegg v. Bromley	1038	Golding, Davis & Co., <i>Ex parte</i> Socy.	864, 866
Glen v. Dungey	260	Goldrei Foucard & Son v. Sinclair	171
— v. Lewis	342	Goldschmidt v. Jones	462
Glendarroch, The	361	Goldshede v. Sivan	17
Glendevon, The	351	Goldsmid v. Bromer	913
Glenie v. Tucker (or Smith)	310, 368	— v. Hampton	280
Glenister v. Harding	194	Goldstein v. Salvation Assur. Socy.	337
Glenochil, The	362	— v. Sanders	612
Glenwood Lumber Co. v. Phillips	805	Goldstone v. Tovey	287
Gloag & Millers Contract, <i>In re</i>	242, 244, 252	— v. Williams, Deacon & Co.	140
Glossop v. Heston, &c., Local Board	166	Goldstrom v. Talleman ...	1058, 1059
— v. Pole	175, 1069	Golightly v. Reynolds	836
Gloucestershire Banking Co. v. Edwards	1067, 1035	Gomersall v. Davies	735, 746
Glover v. Coleman,	699, 704, 710, 715	— v. Serle	129
— v. Cope	898	Gompertz v. Bartlett	493
— v. E. London Waterworks Co.	648, 649	— v. Denton	376
— v. Halkett	368	Gonsky v. Durrell	783
— v. Lane	819	Gooch, <i>In re</i>	310, 368
— v. L. & N. W. Ry.	851, 957	— v. Clutterbuck	622
— v. L. & S. W. Ry.	791	Gooch's Case	964
Glubb, <i>In re</i>	829	Good v. Isaacs	353
— v. Edwards	119	Goodall v. Dolley	297
Gluckstein v. Barnes	490	— v. Little	151
Glyn v. Bank of England ...	50	— v. Lowndes	505
— v. E. & W. India Dock Co.	347, 359	— v. Skelton	439
— v. Howell	929, 933	— v. Skerratt	939, 940
Glynn v. Margetsen	345	Goodbody v. Poplar Borough Council	655
— v. Thomas	770	Goode v. Burton	860
— v. Thorpe	96	— v. Harrison	560
Goate v. Goate	575	— v. Howells	892
Goby v. Wetherill	222	— v. Job	939
		Goodered v. Armour	6, 322
		Goodhart v. Hyett	721
		Goodland v. Blewith	579, 592
		Goodlock v. Cousins	839

	PAGE		PAGE
Goodman <i>v.</i> Chase	367	Gough <i>v.</i> Findon	514
— <i>v.</i> Griffiths	418	— <i>v.</i> Wood	845
— <i>v.</i> Harvey	305, 318	Gould, <i>Ex parte</i>	843, 901, 903
— <i>v.</i> Pocock	409	—, <i>In re</i>	1015
Goodrich, <i>In re</i>	113, 114	— <i>v.</i> Coombs	315
Goodright <i>v.</i> Cordwent	895	— <i>v.</i> Johnson	567
— <i>v.</i> Davids	904	— <i>v.</i> Lakes	130
— <i>v.</i> Moss	41, 43, 910	— <i>v.</i> South E. & C. Ry. Co.	518
— <i>v.</i> Saul	917	Gouldsworth <i>v.</i> Knights	879
Goodson <i>v.</i> Baker	504	Goutard <i>v.</i> Carr	226
— <i>v.</i> Forbes	201	Gover's Case	969
— <i>v.</i> Richardson	816	Govett <i>v.</i> Hopgood	499
Goodtitle <i>v.</i> Alker	807	Govier <i>v.</i> Hancock	453
— <i>v.</i> Baldwin	941	Gozney <i>v.</i> Bristol, &c., Society ..	556
— <i>v.</i> Braham	214	Grace <i>v.</i> Morgan	771, 772
— <i>v.</i> Herbert	872, 881	— <i>v.</i> Smith	445
— <i>v.</i> Jones	875	Grafton <i>v.</i> Armitage	413
— <i>v.</i> Milburn	223	Graham <i>v.</i> Belfast & Northern Ry.	519
— <i>v.</i> Newnman	909	— <i>v.</i> Dyster	11
— <i>v.</i> Otway	31	— <i>v.</i> Edge	255, 974
— <i>v.</i> Southern	30	— <i>v.</i> Hart	1055
— <i>v.</i> Toombs	822	— <i>v.</i> Musson	418, 420
— <i>v.</i> Woodward	891	— <i>v.</i> Peat	805
Goodwin <i>v.</i> Coates	458	— <i>v.</i> Public Works Comrs.	471
— <i>v.</i> Cremer	320	— <i>v.</i> Robertson	83
— <i>v.</i> Roberts ... 22, 70, 471, 837		Grainger <i>v.</i> Aynsley	684
Goodwyn <i>v.</i> Cheveley	813, 949	— <i>v.</i> Hill	767, 799, 845
Goom <i>v.</i> Afalo	421	Grand Junction Canal Co. <i>v.</i> Petty	712
Gordon <i>v.</i> Gordon	917	Grand Surrey Canal Co. <i>v.</i> Hall	711, 712, 713
— <i>v.</i> Gt. W. Ry. Co.	529	Grand Trunk Ry. <i>v.</i> M'Alpine ..	674
— <i>v.</i> Harper	824	— <i>v.</i> Robinson	538
— <i>v.</i> James	579	Grant, <i>Ex parte</i>	459, 464
— <i>v.</i> Mackenzie	668	— <i>v.</i> Coverdale	354
— <i>v.</i> Secretan	128	— <i>v.</i> Da Costa	280
— <i>v.</i> Silber	857	— <i>v.</i> Ellis	602, 933
— <i>v.</i> Street	548	— <i>v.</i> Fletcher	422
— <i>v.</i> Williamson	85	— <i>v.</i> Gold Exploration, &c., Syndicate	729
Gore <i>v.</i> Gibson	563	— <i>v.</i> Grant	28
— <i>v.</i> Lloyd	885	— <i>v.</i> Jackson	58, 63, 66, 176
Gorenstein <i>v.</i> Feldmann	551	— <i>v.</i> Maddox	20
Gorley, <i>Ex parte</i>	617	— <i>v.</i> Norway	364
Gornall <i>v.</i> Mason	166	— <i>v.</i> Shaw	1054
Gorringe <i>v.</i> Irwell India Rubber, &c., Works ... 506, 1014		— <i>v.</i> United Kingdom Switchback Rys.	971
Gorrissen <i>v.</i> Perrin	20, 426	Granville & Co. <i>v.</i> Firth	225
Gorrissen's Case,	961	Grattan <i>v.</i> Wall	609
Gorton <i>v.</i> Dyson	105	Gravenor <i>v.</i> Woodhouse ... 256, 262	
Gosbell <i>v.</i> Archer	238, 240	Graves <i>v.</i> Key	61
Goslin <i>v.</i> Agricultural Hall Co.	678	Gray <i>v.</i> Bond	36
Gosling <i>v.</i> Gaskell	445	— <i>v.</i> Bonsall	907, 908
— <i>v.</i> Woolf	243	— <i>v.</i> Briscoe	626
Goss <i>v.</i> Nugent	26, 27	— <i>v.</i> Cookson	998
— <i>v.</i> Quinton	162, 828	— <i>v.</i> Fowler	244, 251
— <i>v.</i> Watlington	53	— <i>v.</i> Gutteridge	253
Gott <i>v.</i> Gandy	270	— <i>v.</i> Hill	412, 468
Gough <i>v.</i> Cecil	119		
— <i>v.</i> Davies	514		
— <i>v.</i> Everard	1048		
— <i>v.</i> Farr	383		

	PAGE		PAGE
Gray v. Jones	1053	Green v. Bartlett	475
— v. Owen	259	— v. Baverstock	250, 548
— v. Palmers	284, 332	— v. Button	742
— v. Pearson	986	— v. Cresswell	367
— v. Pullen	649	— v. Crockett	210
— v. Raper	332	— v. Davies ...	200, 203, 514, 515
— v. Smith	234, 237	— v. Deakin	285
— v. Stait	944	— v. Duckett	500, 950
— v. Trinity College, Dublin	953	— v. Dunn	849
Grayson v. Ellerman Lines ...	673	— v. Eales	619, 621
Grazebrook v. Davis	387	— v. Elgie	794
Great Central Ry. Co. v.		— v. Farmer	588, 855, 856
Balby with - Hexthorpe		— v. Gatewick	177
Urban Council	712	— v. Gosden	546
— v. Doncaster Rural Council	644	— v. Green	918
— v. Hewlett	652	— v. Hearne	71
Great Eastern, The	473	— v. Herring	903
Great Eastern Ry. Co. v.		— v. Hewett	502
Lord's Trustee	1048	— v. Humphreys	570, 575
Great North of England Ry.		— v. London General Omnibus Co.	956
v. Biddulph	988	— v. Lucas	475
Great North West Central Ry.		— v. Marsh	79, 1049, 1061
v. Charlebois	955	— v. New River Co.	171
Great Northern Railway v.		— v. Proude	97, 106
Coal Co-operative Co.	1062	— v. Saddington	234
— v. Hawcroft	538, 539	— v. Sevin	246, 589
— v. Kennedy	984	— v. Thompson	559
— v. Morville	518	— v. Waller	72
— v. Shepherd	540	— v. Wynn	586
— v. Swaffield	533	Green's Case	904, 963
— v. Witham	410	Green's Settlement, <i>In re</i>	39
Great Torrington Conservators		Greenaway v. Hart ...	607, 879, 897
v. Moore Stevens	810	— v. Hockin	723
Great W. Ry. Co. v. Bagge	357, 531	Greenham v. Child	1053
— v. Bennett	694, 695	Greenland v. Chaplin	666
— v. Blake	537	Greenlands v. Wilmshurst	743
— v. Bristol Corpn.	18	Greenock Cor. v. Caledonian Ry.	680, 720
— v. Bunch	539	Greenough v. Eccles	156
— v. Fisher	626, 628, 629	— v. Gaskell	152
— v. L. & County Banking Co.	325, 329, 330	— v. M'Clelland	323
— v. McCarthy	528, 529	Greenshields v. Crawford	121
— v. Redmayne	535	Greenslade v. Darby	807
— v. Rimmell	526	— v. Tapscott	611, 612
— v. Smith	906	Greenway v. Fisher	851
— v. Talbot	716	— v. Hindley	303
— v. Willis	65, 519, 534	Greenwell v. Howell	991
— of Canada v. Braid	659	— v. Low Beechburn Coal Co.	655, 695
Greatrex v. Hayward	718	Greenwich Board of Works v.	
Greaves, <i>In re</i>	565	Maudslay	711, 712
— v. Ashlin	14	Greenwood, <i>Ex parte</i>	446
— v. Greaves	912	— v. Francis	482
— v. Greenwood	38, 909	— v. Greenwood	686
— v. Keene	796	— v. Leather Shod Wheel Co.	726
— v. Whitmarsh	624	— v. Seymour	791
Grèbert-Borgnis v. Nugent ...	436	— v. Sutcliffe	595
Green, <i>In re</i>	910, 919		

	PAGE		PAGE
Greenwood's Case	976	Grimwood v. Moss	264, 904, 905, 943
Greeves v. W. India, &c., S. Ship Co.	493, 522	Grindell v. Bass	238
Gregg v. Wells	70	— v. Brendon	40, 129, 188, 1054, 1056
Gregory v. Brunswick (Duke) ..	753	— v. Godmond (or Godmore)	452
— v. Cotterell	1033	Grinham v. Willey	797
— v. Doidge	947	Grinnell v. Wells	787, 788
— v. Fraser	199	Grissell v. Bristowe ...	24, 459, 460, 461, 479
— v. Howard	58	— v. Robinson	478
— v. Piper	812, 813	Grissell's Case	969
— v. Tavernor	159, 162	Grizewood v. Blaine	464
— v. Torquay Corporation ..	990	Groning v. Mendham	440
— v. Tufts	39	Groom v. Barber	433
— v. W. Midland Ry. Co.	528	Grose v. West	809
Gregson v. Ruck	422, 820, 870	Grosvenor Hotel Co. v. Hamilton	629, 630
Greig v. National, &c., Union of Shop Assistants	550	Grote v. Chester & Holyhead Ry.	660
Grellier v. Neale	120	Grout v. Enthoven	285
Grenfell v. Pierson	756	Grove, <i>In re</i>	910
Gresham House Estate Co. v. Rossa Grande Gold Mining Co.	891, 895	— v. Cox	485
Greta Holme, The	667	— v. Portal	611
Grey v. Seckham	370	Grover v. Mathews	341
Greyvensteyn v. Hattingh..	670, 817	Groves v. Wimborne (Lord) ...	682
Grice v. Kenrick	439	Grundy v. Sun Printing, &c., Association	404
— v. Richardson	842	Grunnell v. Welch	777, 778
Gridley v. Austen	393	Guaranty Trust Co. of New York v. Hannay ...	297, 299, 493
Griffin v. Coleman	994	Gudgen v. Besset	125
— v. Dighton	806	Guest v. Homfray	244
— v. Langfield	560	— v. Worcester Ry.	981
— v. Scott	774	Guest's Estates v. Milner's Safes	714
— v. Weatherby ...	506, 507, 515	Gugen v. Sampson ...	40, 1054, 1071
Griffin's Divorce Bill	103	Guiard v. De Clermont	185
Griffinhoofe v. Daubuz	484	Guidon v. Robson	278
Griffith v. Clay	701	Guild v. Conrad	367
— v. Davies	153	Guillemard v. Silverthorne	895
— v. Matthews	722	Gullischen v. Steuart	364
— v. Taylor	801	Gulliver v. Cosens	501, 776, 950
Griffiths v. Dudley	685, 690	Gully v. Exeter (Bishop) ...	5, 55, 176
— v. Fleming	336	— v. Smith	648
— v. Lee	532	Gundry v. Sainsbury	224, 391
— v. Lewis	749	Gunn v. Bolckow, Vaughan & Co.	842
— v. London & St. Katherine's Dock Co.	681, 682	— v. Roberts	473
— v. Owen	584	Gunson v. Metz	303
— v. Payne	76, 317	Gunter v. Metropolitan Police District Receiver	1032
— v. Perry	435	Gunton v. Nurse	849
— v. Puleston	806	Gunyon v. S. E. & C. Ry. Co.	517, 519
— v. Teetgen	788	Gurney v. Womersley	493
Griffiths Cycle Cor. v. Humber & Co.	239	Gustard's Case	961, 964
Griffith's Policy, <i>In re</i>	335		
Grigg v. National Guardian Assur. Co.	1045		
Grill v. General Iron Screw Colliery Co.	361		
Grimman v. Legge	260, 263		

	PAGE		PAGE
Gutsole v. Mathers	758	Hall v. Ball	92, 869
Gutteridge v. Munyard	618	— v. Betty	243
Guy v. West	811	— v. Burgess	260, 263
Gwilliam v. Twist	656	— v. Burnell	252
Gwillim v. Daniell	426	— v. Butler	947
Gwinnet v. Phillips	772	— v. Byron	705
Gwynn v. S. E. R. Co. ...	734, 742, 755, 956	— v. Chandless	122
Gylbert v. Fletcher	558	— v. City of London Brewery Co.	629
Gyles v. Hill	88	— v. Cole	323
HAAS v. Atlas Insurance Co. 105, 335		— v. Conder	243
Hackney Furnishing Co. v. Watts	782	— v. Cox	551
Haddan v. Lott	742	— v. Dyson	555
Haddon v. Ayers	598	— v. Elliott	1010
— v. Haddon	453, 1021	— v. Fearnley	791
Haddow v. Morton	1036	— v. Flockton	543
— v. Parry	52	— v. Fuller	496
Haddrick v. Heslop	762	— v. Hall	147
Hadgett v. Inland Rev. Comrs.	201	— v. Hill	66
Hadjar v. Pitchey	1009	— v. Hollander	788
Hadley v. Baxendale	434, 534	— v. Lees	678
— v. Beedon	1047	— v. Norfolk (Duke) ...	655, 695
— v. Green	195	— v. N. E. Ry.	537
— v. Taylor	644, 647	— v. Smith	731
Hadsley v. Dayer-Smith	556	— v. Swansea (Mayor	502
Hadwell v. Righton	669	— v. Swift	710, 721
Hagedorn v. Reid	12, 56	— v. Whiteman	1058
Haggard v. Pelicier Frères	744, 797	— v. Wood	824
Haigh v. Brooks	199	— v. Wright	385
— v. Ousey	393	Hall's Case	722, 962
— v. Suart	84, 380	Hall's Estate, <i>In re</i>	113
— v. West	36, 37	Hall and Barker, <i>In re</i>	397
Hailes v. Marks	220, 763	Hall & Co., <i>In re</i>	965
Haine v. Davey	785	Hall S.S. Co. v. Paul	355
Haines v. Guthrie	41, 43, 562	Hallas v. Robinson	830
— v. Roberts	694	Hallen v. Runder	234
— v. Welch	946	Haller v. Worman	67
Halbot v. Lens	381	Hallet v. Mears	138
Haldane v. Johnson	611	Hallett v. Cousens	149
Hale, <i>In re</i>	570, 571	— v. Wigram	365
— v. Oldroyd	710, 721	Hallett's Estate, <i>In re</i>	492, 582
— v. Rawson	426	Halliday v. Holgate	848, 853
Hales v. Kerr	76	— v. Phillips	36
— v. L. & N. W. Ry. Co. 435, 517, 535		Halliley v. Nicholson	14
— v. Regem	382	Hallmark's Case	961
— v. Stevenson	576	Halsey v. Brotherhood	758, 759
Halford v. Cameron's, &c., Ry.	976	— v. Lowenfeld	262, 557
— v. Kymer	337	Halstead v. Skelton	284
Halifax, &c., Banking Co. v. Gledhill	1038	Halston, <i>In re</i>	28
Halifax Union v. Wheelwright	324	Ham v. Toovey	453
Halket v. Dudley (Earl)	4	Hamber v. Roberts	121
Hall, <i>Ex parte</i>	839	Hambro v. Burnand	233, 287
— v. Bainbridge	123	Hamelin v. Bannerman	717
		— v. Bruck	315
		Hamilton v. Chaine	1050
		— v. Clancy	537
		— v. Graham	807
		— v. Long	788
		— v. Pandorf	361

	PAGE		PAGE
Hamilton v. Vaughan-Sherrin	493	Hanson v. Waller	798
— v. Watson	371	Harbidge v. Warwick	699
Hamlet v. Richardson	501	Harburg India Rubber Comb	
Hamlin v. Gt. N. Ry.	539	Co. v. Martin	366, 367
Hamlyn v. Betteley	1050	Harcourt v. Wyman	631
— v. Crown Accidental		Hardaker v. Idle District	
Insur. Co.	340	Council	649
— v. Houston	443, 786	Hardcastle v. S. Yorkshire,	
— v. Wood	373	&c., Ry. Co.	645
Hammack v. White	661, 677	Harding v. Bulman	714
Hammersmith & City Ry. v.		— v. Crethorn 62, 238, 259,	620
Brand	654, 672	— v. Davies	594
Hammond v. Anderson	865	— v. Edgecumbe	572
— v. Bradstreet	45	— v. Greening	736
— v. Bussey	379	— v. Hall	786, 949
— v. Dufrene	307	— v. Harding	507
— v. Farrow	266	— v. Watts	386
— v. Hall	719	— v. Williams	110
— v. Hill	627	Hardingham v. Allen	593
— v. Hocking	1057	Hardman v. Bellhouse	544
— v. Howell	795	— v. Booth	831
— v. Mather	900	Hardon v. Hesketh	35, 257
— v. Prentice	706, 958	Hardoon v. Belilios	461, 480
— v. Schofield	171, 448	Hardy v. Central London Ry.	677
— v. Smith	567, 577	— v. Ryle	563, 1000
— v. Stewart	137	— v. Woodroffe	279, 333
Hamor v. Groves	15	Hardy's Case	159
Hampden v. Walsh	504	Hare v. Bickley	808
Hamper, <i>Ex parte</i>	445	— v. Elms	907
Hampshire Land Co., <i>In re</i> ...	300	— v. Henty	326
Hampton v. Glamorgan County		— v. Horton	125
Council	472	— v. Waring	129, 190
Hanau v. Ehrlich	411	Harford v. Morris	914
Hanberries' Case	824, 836	Hargreave v. Spink	835
Hanbury v. Jenkins	705, 812	Hargreaves, <i>Lim.</i> , <i>In re</i>	155
— v. Lovett	288, 314, 315	Hargroves v. Hartopp	623, 671
Hancock v. Austin	778	Harington v. Macmorris	80
— v. Gillard	266	Haris' Case	824, 836
— v. Somes	794	Harland v. Bromley	258, 263
— v. Welsh	169	Harley v. King	606
Hancocks v. Lablache	1022	Harlock v. Ashberry	600
Hand v. Hall	267, 884	Harman v. Ainslie	897
Handley v. Ward	159	— v. Anderson	867
Handman and Wilcox, <i>In re</i>	251	— v. Johnson	399
Hands v. Burton	439	— v. Reeve	412, 413
— v. James	133	Harmer v. Cornelius	408
— v. Slaney	569	— v. Jumbil (Nigeria) Tin	
Hankey v. Wilson	292	Areas	628
Hanley v. Pease	405	Harnett v. Baker	243
Hansard v. Robinson	277	— v. Maitland	268
Hensen v. Dixon	383	— v. Vise	224
— v. Harrold	354	Harnor v. Groves	375, 419, 423, 492
Hansford v. Jago	716	Harper v. Carr	993
Hanslip v. Padwick	254	— v. Charlesworth	
Hanson v. Armitage	414		712, 805, 808, 871
— v. Parker	62	— v. Godsell	852
— v. Roberdean	253	— v. Keller, Bryant & Co.	84
— v. Royden	473	— v. Luffkin	788
— v. Shackleton	74	— v. Phillips	563

	PAGE		PAGE
Harper v. Vigers	83	Harrison v. L. Brighton &	
— v. Williams	509, 511	S. C. Ry.	518, 530
Harrington (Earl) v. Derby		— v. L. & N. W. Ry.	526
Corporation	720, 992, 1000	— v. Luke	439
Harrington v. Fry	473	— v. Muncaster (Lord)	627, 628
— v. Victoria Graving Dock		— v. Parker	811
Co.	477, 549	— v. Ruscoe	301
— v. Wise	884	— v. Rutland (Duke)	
Harris, <i>In re</i>	1015	793, 809, 816, 818	818
—, <i>Ex parte</i>	58, 782, 1051	— v. Seymour	371
— v. Ashley	1034	— v. Southampton Corpora-	
— v. Boots, &c.	609	tion	180
— v. Brisco	550	— v. Southwark, &c., Water	
— v. Butler	787, 788	Co.	654
— v. Chesterfield	36	— v. Turner	588
— v. De Pinna	697, 698, 700	— v. Vallance	63
— v. Dreesman	353	— v. Wardle	636
— v. Drewe	722	— & Micks, Lambert & Co.,	
— v. Flower	716	<i>In re</i>	426
— v. Fowle	439	Harriss v. Fawcett	369
— v. Gt. W. Ry.	541	Harrod v. Benton	1069
— v. Harris	914	— v. Harrod	145
— v. Hickman	270, 624, 625	Harrold v. Watney	647, 663
— v. Hill	141	Harrop v. Fisher	292
— v. Jacobs	351, 352, 354	— v. Harrop	185
— v. James	650	— v. Hirst	720
— v. Jones	618	— v. Ossett (Mayor)	990
— v. Knight	133	Harrow School Governors v.	
— v. Lloyd	839	Alderton	269
— v. Mantle	615, 629	Harse v. Pearl Life Assur.	
— v. Mobbs	653	Co.	505
— v. Morris	452, 453	Hart v. Alexander	447
— v. Nickerson	252	— v. Baxendale .. 525, 535,	536
— v. Osbourn	397	— v. Bush	415
— v. Packer	299	— v. Frame	398
— v. Perry	660	— v. Frontino, &c., Gold	
— v. Petherick	224	Mining Co.	961, 979
— v. Quine	185, 397, 563	— v. M'Namara	172
— v. Saunders	185	— v. Marylebone Borough	
— v. Taylor	185	Council	991
— v. Tippet	159	— v. Minors	1009
— v. Warre	732	— v. Nash	571
Harris's Case	410, 961	— v. Porthgain Harbour Co. ..	830
Harris's Settled Estates, <i>In re</i>	1027	— v. Prendergast .. 573, 575,	577
Harrison, <i>In re</i>	129	— v. Rogers	623
— v. Bamby	948	— v. Wall	733
— v. Barry	1065	— v. Windsor	264
— v. Blackburn	808	Hartas v. Ribbons	480
— v. Blades	119	Hartell v. Blackler	895, 904
— v. Bush ... 739, 745, 746,	747	Hartland v. General Exchange	
— v. Cage	382, 383	Bank	408
— v. Fane	559	— v. Jukes	567
— v. Good	615	Hartley v. Cook	190
— v. Grady	452	— v. Harman	404
— v. Gt. N. Ry.	664, 680	— v. Herring	741
— v. Heathorn	449	— v. Hindmarsh	794
— v. Holland and Hannen		— v. Hitchcock	861
and Cubitts	252	— v. Hudson	624
— v. Knowles	373, 376	— v. Hymans	413, 429

	PAGE		PAGE
Hartley v. Maddocks	263, 607	Hawkey v. Stirling	554
— v. Moxham	802	Hawkins v. Harwood	398
— v. Wharton	570	— v. Kemp	135
Hartshorne v. Watson	610	— v. Maltby	461
Harvey v. Archbold	488	— v. Walrond	774
— v. Bridges	793	— v. Warre	3
— v. Copeland	888, 893	Hawse v. Crowe	859
— v. Croydon Sanitary Authority	210	Hawthorn Cor. v. Kannuluik	654
— v. Facey	232	Hawtry v. Butlin	1047
— v. Harvey	817	Hay, <i>In re</i>	131
— v. Kay	66	— v. Northcote	917
— v. Mitchell	8, 206, 215	Haycraft, Gold, &., Co.	963
— v. Morgan	9	Hayden v. Hayward	475
— v. Ocean, &., Co.	40, 339	Haydon v. Williams	570
— v. Pocock	779, 784, 785	Hayes v. Caulfield	294
— v. Rex	173, 176	— v. King's County County Council	991
— v. Towers	317	Hayling v. Mullhall	320
— v. Truro Council	713	— v. Okey	793
— v. Walters	716	Haylock v. Sparke	183, 997
Harvie v. Farnie	918	Hayman v. Flewker	833
Harwood v. Sims	47	Hayn v. Culliford ...	360, 361, 365
Haseler v. Lemoyne	785	Haynes, <i>In re</i>	31
Hasker v. Wood	223	— v. Foster	838
Haslewood v. Consolidated Credit Co.	1059	— v. Hayton	1066
Haslor v. Carpenter	206	— v. Holliday	20
Hasluck, <i>Ex parte</i>	1039, 1059	— v. King	697, 809
— v. Clark	1015	Hayslip v. Gymer	48
Hasser v. Wallis	499	Hayton v. Irwin	22
Hastelow v. Jackson	504	Hayward v. Drury Lane Theatre	647, 681, 683
Hastings, <i>In re</i>	1013	— v. Hague	596
—, <i>In re</i>	565, 1023	— v. Haswell	885
— v. Pearson	832	— v. Hayward	743
— v. Saddler	880	Hazard v. Treadwell	441
Hastings Corporation v. Ivall	25, 26, 805	Head, <i>In re</i>	447
Hastings Union v. S. James, Clerkenwell	887	— v. Diggon	232
Hatch v. Hale	951	— v. Head	917
— v. Searles	288	— v. Tattersall	377
Hatchard v. Mège	1002	Head's Case	964
Hatchet v. Marshall	80	Headlam v. Hedley	809
Hatley v. Liverpool Legal Friendly Socy.	337	Heald v. Carey	845, 848
Hatten v. Russell	246	Healey v. Batley Corporation	711, 713
Hatton v. English	1052	— v. Société Anonyme Française Rubastic	406
Hauxwell, <i>Ex parte</i>	1046, 1052	— v. Story	332
Havelock v. Rockwood	180	Heap v. Barton	843
Havens v. Middleton	617	Heard v. Pilley	242
Hawes v. Draeger	917	Hearn v. L. & S. W. Ry. Co.	525
— v. Forster	422	— v. Tomlin	261
— v. Humble	426	Hearne v. Rogers	57
Hawk v. Freund	68	— v. Stowell	747
Hawke v. Bacon	704	Heath v. Deane	187
Hawken v. Bourne	449, 952	— v. Freeland	473
Hawkes v. Orton	629	— v. Heape	762
— v. Salter	304	— v. Pryn	925
— v. Smith	532	— v. Pugh	938
		Heath's Case	176

PAGE	PAGE		
leath's Garage v. Hodges ...	669	Henderson v. Stevenson	538
leathcote, <i>In re</i>	131	— v. Thorn	620, 621
leather v. Webb	555	— v. Williams ...	826, 831, 832, 855
leaven v. Pender	647, 679	Henderson's Trusts, <i>In re</i>	38
leawood v. Bone	782	Henderson, Nouvion v. Freeman, <i>In re</i>	185
leeb's Case	961	Henfree v. Bromley	545
leebblethwaite v. Hebblethwaite	147	Henkel v. Pape	239, 410, 420
leebblewaite v. Peever	602	Henman v. Berliner	618
lebden v. Hartsink	584	— v. Dickinson	278
— v. West	337	— v. Lester	2, 160, 161
lebditch v. MacIlwaine	746	Henn v. Neck	206
ledges v. Tagg	787, 788	Hennan v. Duckworth	401
ledgley v. Holt	560	Hennell v. Davies	68
ledley v. Bainbridge	286	— v. Lyon	100, 104
— v. Barlow	753	Hennessy v. Wright	155
— v. Pinkney & Sons S.S. Co.	665, 683	Henniker v. Wigg	583
leenan v. Evans	1068	Henning v. Burnet	715
leffield v. Meadows ...	17, 368, 369	Henry v. Hammond	564
leegan v. Carolan	809	— v. Lee	299
— v. Johnson	944	— v. Leigh	8
leilbut v. Nevill	285	Henry Coxon, The	57
leilbut Symons v. Buckleton	252, 373, 376	Henthorn v. Fraser ...	232, 233, 410
leilbutt v. Hickson	428	Henwood v. Harrison ...	745, 746, 752, 753
leineky v. Earle	864	— v. Oliver	595
lelby v. Matthews	834	Hepworth v. Pickles	615
lelby's Case	564	Herbage Rents, Greenwich, <i>In re</i>	255
lelene, The	347, 361	Herbert v. Cook	182
lellawell v. Eastwood	779	— v. Tuckal	41
lellier v. Silcox	258	— v. Wilcocks	48
lellings v. Shaw	574, 575	Hercules Insurance Co., <i>In re</i>	589
lellwig v. Mitchell	730	Herd v. Weardale Steel Co. ...	798
lelme v. Smith	473	Herdman v. Wheeler	288, 333
lelmore v. Smith	759	Hereford, &c. Engineering Co., <i>In re</i>	972
lelps v. Clayton	388, 559	Herefordshire Banking Co., <i>In re</i>	510
— v. Glenister	830	Herman v. Jeuchner	505, 549
— v. Winterbottom	457	Hermann v. Charlesworth...504, 550	
lelsby v. Mears	427	Herne Bay S. Boat Co. v. Hulton	476
lelsham v. Blackwood	755	Heseltine v. Siggers	413, 458
lelyear v. Hawke	64, 377	— v. Simmons ...	1051, 1055, 1058, 1059
lelming v. Robinson	292	Heske v. Samuelson	685
lelmmings v. Gasson	740	Hesketh v. Fawcett	593
— v. Sceptre Life Assoc. ...	338	Hetherington v. Groome	1060
— v. Stoke Poges Golf Club	814	— v. Hetherington	918
Henderson v. Arthur	14	— v. Kemp	304
— v. Australian, &c., Steam Navigation Co.	954	Heugh v. L. & N. W. Ry...533, 846	
— v. Bank of Australasia	972, 985	Hewer v. Cox	1053
— v. Broomhead	745	— v. Dowson	748
— v. Comptoir d'Escompte de Paris	346, 347	Hewitt v. Piggott	100
— v. Easin	262	— v. Thomson	302
— v. Henderson	29, 171	Hewitt & Co. v. Cory	229
— v. Mears	264	Hewlett v. Allen	589
— v. Preston	796, 797, 993		
— v. Squire	259, 630, 822		

	PAGE		PAGE
Hewlett v. Crutchley	764	Hill v. Featherstonhaugh ...	395, 4
Hewson v. Shelley	1005	— v. Fox	2
Hext v. Gill	694	— v. Gray	5
Hey v. Moorhouse	543	— v. Kempshall	8
Heyling v. Hastings	569	— v. Kirshenstein	2
Heylyn v. Adamson	311	— v. Leigh	10
Heyman v. Neale	421, 422	— v. London Central Mar-	
Heyne v. Fischel	109, 190	kets Cold Storage Co.	8
Heysham v. Forster	190	— v. Manchester Water-	
Heywood, <i>In re</i>	1014	works Co.	65, 118, 1
— v. Mallalieu	250	— v. New River Co.	653, 6
— v. Pickering	326, 535	— v. Nuttall	4
Hibberd v. Knight	4, 142, 152	— v. Perrott	4
Hibbins v. Lee	753	— v. Prosser	1
Hibblewhite v. M'Morine	122, 123, 465	— v. Royds	4
Hibbs v. Ross	195, 473, 666	— v. Scott	5
Hibernian, The	358	— v. Smith	3
Hick, <i>In re</i>	386	— v. S. Staffordshire Ry. Co.	5
— v. Keats	486	— v. Sydney	3
— v. Raymond	353, 517	— v. Walker	1014, 10
Hickley v. Greenwood	1057	— v. Wilson	358, 486, 8
Hickling v. Hardey	458	Hilliar v. Dade	7
Hickman v. Haynes	419, 441	Hilliard v. Eiffe	1
— v. Machin	263	Hills v. London Gas Co.
— v. Maisey	816, 818	— v. Mesnard	581, 5
— v. Roberts	470	— v. Mitson	5
— v. Upsall	38	Hillyer v. St. Bartholomew's	
Hicks v. Beaufort (Duke)	303	Hospital	6
— v. Faulkner	762, 763, 764	Hilton v. Tucker	829, 10
— v. Hicks	492	— v. Woods	8
Hiddle v. National, &c. Insur.		Hinchcliffe v. Barwick	3
Co. of New Zealand	343	Hinde v. Liddell	4
Hide v. Thornborough	693	— v. Whitehouse	417, 4
Higginbotham v. Hawkins	269	Hindle v. Pollitt	6
Higgins v. Beauchamp	487	Hindley v. Westmeath (Mar-	
— v. Betts	653, 701	quis)	4
— v. Hopkins	450	Hindley's Case	9
— v. M'Adam	1067	Hindmarsh v. Charlton	1
— v. Nichols	284	Hindsley v. Russell	10
— v. Sargent	509	Hine v. Campion	7
— v. Senior	15	Hingeston v. Kelly	3
Higgins v. Burton	831	Hingston v. Wendt	8
Higgs v. Mortimer	563	Hinton v. Dibbin	5
— v. Northern Assam Tea		— v. Heather	7
Co.	589	Hiort v. Bott	845, 8
— v. Scott	498	— v. L. & N. W. Ry.	8
— v. Snell	740	Hipgrave v. Case	2
Higham v. Baddely	595	Hippisley v. Knee Brothers ..	477, 4
— v. Ridgway	41, 51	Hirachand Punamchand v.	
Highfield v. Peake	87, 160	Temple	5
Highmore v. Primrose	280, 289, 514	Hiram Maxim Lamp Co., <i>In re</i>	
Hilbery v. Hatton	852	588, 9	
Hildesheim, <i>In re</i>	446	Hire Purchase Furnishing Co.	
Hill, <i>Ex parte</i>	1057	v. Richens	39, 85, 5
— v. Coombe	159	Hirschel v. Gt. E. Ry.	5
— v. Cooper	453, 1027	Hirschfeld v. L. Brighton &	
— v. Crook	28, 29	S. C. Ry.	547, 7
— v. Curtis	1006, 1010	— v. Smith	3
		Hirschman v. Budd	3

	PAGE		PAGE
Hirst <i>v.</i> Horn	632	Hoey <i>v.</i> Felton	765
— <i>v.</i> Tolson	407	Hogarth <i>v.</i> Jennings	777
— <i>v.</i> West Riding Union Banking Co.	730	— <i>v.</i> Latham	286, 288
Hiscox <i>v.</i> Batchellor	404	— <i>v.</i> Miller	357
— <i>v.</i> Greenwood	860	— <i>v.</i> Wherley	580
Hitchin <i>v.</i> Campbell	171	Hogarth Shipping Co. <i>v.</i> Blythe, Green, Jourdain & Co. ...	346, 364
— <i>v.</i> Groom	19, 29	Hogg <i>v.</i> Brooks	892
Hitchings & Coulthurst Co. <i>v.</i> Northern Leather Co. of America	14, 319	— <i>v.</i> Skeen	285, 318
— <i>v.</i> Thompson	946	Hoggin's <i>v.</i> Gordon	471
Hitchins <i>v.</i> Eardley	44	Hoghton <i>v.</i> Hoghton	58
Hoadley <i>v.</i> M'Laine	418	Hohler <i>v.</i> Ashton	240
Hoare <i>v.</i> Niblett	448, 1027	Holbird <i>v.</i> Anderson	1038
— <i>v.</i> Rennie	429	Holcombe <i>v.</i> Hewson	76
— <i>v.</i> Silverlock	738, 751	Holden <i>v.</i> Ballantyne	221
Hobart <i>v.</i> Southend-on-Sea Cor- poration	642	— <i>v.</i> Bostock & Co.	380
Hobbs, <i>In re</i>	936	— <i>v.</i> Liverpool Gas Co.	662, 673
— <i>v.</i> Henning	181	— <i>v.</i> Thompson	550
— <i>v.</i> L. & S. W. Ry.	539	Holden's Case	966
Hobern <i>v.</i> Fowler	139	Holder <i>v.</i> Coates	811
Hobson <i>v.</i> Bass	370	— <i>v.</i> Soulby	543
— <i>v.</i> Bell	244	Holdfast <i>d.</i> Woollams <i>v.</i> Clap- ham	921
— <i>v.</i> Cowley	220, 407	Holding <i>v.</i> Elliott	431
— <i>v.</i> Gorringe	844	— <i>v.</i> Pigott	24
— <i>v.</i> Middleton	627	Holdringshaw <i>v.</i> Rag	820
— <i>v.</i> Thelluson ... 606, 839, 1037, 1068		Holdsworth <i>v.</i> Barsham	387
— <i>v.</i> Todd	704	— <i>v.</i> Dartmouth (Mayor) ..	156, 193
— <i>v.</i> Tulloch	615	— <i>v.</i> Lancashire & Yorkshire Insur. Co.	338
Hochster <i>v.</i> De La Tour ... 405, 408		— <i>v.</i> Wilson	386
Hockin <i>v.</i> Cooke	24	Hole <i>v.</i> Barlow	643
Hodder <i>v.</i> Williams	817	— <i>v.</i> Chard Union ... 222, 653, 721	
Hodenpyl <i>v.</i> Vingerhoed	286	— <i>v.</i> Harrison	481
Hodge <i>v.</i> Fillis	279	— <i>v.</i> Sittingbourne Ry.	649
Hodges <i>v.</i> Ancrum	205	Holford <i>v.</i> Bailey	807
— <i>v.</i> Lawrance	778	— <i>v.</i> Hatch	609
— <i>v.</i> Lichfield (Earl)	253	— <i>v.</i> Pritchard	262
— <i>v.</i> Webb	768	Holgate <i>v.</i> Bleazard	669, 813
Hodgkins <i>v.</i> Simpson	331	Holker <i>v.</i> Poritt	717, 719
Hodgkinson <i>v.</i> Ennor 718, 719		Holland, <i>In re</i> 235, 238, 1038	
— <i>v.</i> Fletcher	451, 812	— <i>v.</i> Cole	612
— <i>v.</i> Marsden	634	— <i>v.</i> Hodgson	779, 844
Hodgman <i>v.</i> W. Midland Ry. Co.	530	— <i>v.</i> Holland	487, 596
Hodgskin <i>v.</i> Queenborough... 263, 607		— <i>v.</i> Manchester & Liver- pool District Banking Co. ...	515
Hodgson, <i>In re</i>	448, 1008	— <i>v.</i> Russell	498, 501
— <i>v.</i> Davies	22	Holliday <i>v.</i> Camsell	852
— <i>v.</i> Johnson	234	— <i>v.</i> Hicks	824, 836
— <i>v.</i> Williamson 1009, 1023		— <i>v.</i> Lockwood	244
Hodkinson <i>v.</i> L. & N. W. Ry. 540		— <i>v.</i> Morgan	377, 378
Hodsoll <i>v.</i> Taylor	78, 789	— <i>v.</i> National Telephone Co. 649	
Hodson <i>v.</i> Pare	744	Hollingham <i>v.</i> Head 72, 76, 164	
— <i>v.</i> Terrill	504	Hollingshead, <i>In re</i> 572, 1017	
— <i>v.</i> Walker	182	Hollins <i>v.</i> Fowler	823, 847
Hoe <i>v.</i> Nelthorpe (or Nathorpe) 105		— <i>v.</i> Verney	709
— <i>v.</i> Taylor	807	Hollis <i>v.</i> Claridge	858, 860
		— <i>v.</i> Goldfinch	77, 806

	PAGE		PAGE
Holloway, <i>In re</i>	140	Hooper v. Williams	38
— v. Turner	800, 804	Hopcraft v. Parker	45
— v. York	587	Hope v. Atkins	1
Holman v. Johnson	549	— v. Beadon	1
Holme v. Brunskill	371	— v. Evered	765, 76
— v. Hammond	445, 446	— v. Glendinning	85
— v. Smith	138	— v. Hayley	85
Holmes v. Bell	578	— v. Hope	5
— v. Bellingham	809	— v. Osborne	65
— v. Brierley	385	— v. Walter	24
— v. Clarke	682	Hopewell v. De Pinna	102
— v. Goring	715	Hopkins v. Gudgeon	105
— v. Kerrison	333, 567	— v. Hitchcock	42
— v. Kidd	313	— v. Logan	57
— v. Mather	660, 791	— v. Ware	334, 58
— v. Mitchell	368	Hopkinson v. Lee	59
— v. N. E. Ry.	676	— v. Smith	39
— v. Penney	1022	Hopper, <i>In re</i>	38
— v. Pontin	262	— v. Burness	35
— v. Simmons	912	— v. Reeve	79
— v. Sixsmith	199	— v. Smith	13
— v. Trench	955	Hopwood v. Thorn	74
— v. Wilson	815, 840	— v. Whaley	101
Holroyd v. Breare	797	Horace, The	22
— v. Doncaster	798	Horlock v. Beal	350, 47
— v. Marshall	830	Horn v. Beard	60
Holsworthy Urban Council v. Holsworthy Rural Council ...	992	— v. Noel	91
Holt, <i>Ex parte</i>	58	Hornby v. Cardwell ...	227, 484, 62
— v. Collyer	614	Horncastle v. Farran	86
— v. Ely	499	Horne v. Hughes	105
— v. Everall	335	— v. Mackenzie	15
— v. Squire	288	— v. Midland Ry.	53
— v. Ward	382	— v. Wingfield	24
Holtby v. Hodgson	1027	Horner, <i>In re</i>	51
Homan v. Thompson	213	— v. Battyn	79
Home v. Bentinck	154, 155	Hornidge v. Wilson	101
Home & Colonial Stores v. Todd	623	Hornsey Local Board v. Monarch Investment Building Society	60
Home Insurance Co. v. Victoria- Montreal Fire Insur. Co.	341	Horsefall v. Mather	26
Homersham v. Wolverhampton Waterworks Co.	985	Horsey v. Graham	23
Homing Pigeon Publishing Co. v. Racing Pigeon Publishing Co.	752	Horsey Estates v. Steiger ...	896, 902, 90
Honywood v. Honeywood	269	Horsfall, <i>Ex parte</i>	39
Hood v. Anchor Line	538	— v. Handley	48
— v. Barrington (Lord)	236	— v. Thomas	54
— v. Beauchamp	41, 42	Horsford v. Webster	78
Hood-Barrs v. Cathcart	1028	Horsley v. Bell	47
— v. Heriot	1027	— v. Price	352, 35
Hooley Hill Rubber Co. v. Royal Insur. Co.	343	Horwood v. Millar's Timber, &c., Co.	52, 85
Hooman, <i>Ex parte</i>	1049, 1053	— v. Smith	85
Hooper v. Clark	898	Hosier v. Derby (Earl) ...	382, 47
— v. Herts	461, 960	Hosking v. Phillips ...	641, 653, 81
— v. Keay	582	Hoskins v. Knight	106
— v. Stephens	571, 585	Ho Tung v. Man On Insur. Co.	96
— v. Summersett	1009	Hough v. Manzanos	5
		— v. May	59
		Houghton v. Butler	84
		— v. Koenig	3, 598, 60

	PAGE		PAGE
Houghton v. Pilkington	657	Howell v. Dering	225
— v. Rusby	839	— v. Young	399, 655
Houghton's Case	657	Howells v. Landore Siemen's Steel Co.	681, 683
Houlden v. Smith	797	Howes v. Barber	138
— v. Weir	351	— v. Brushfield	627
Houldsworth v. City of Glas- gow Bank	376, 727, 973	— v. Martin	485
— v. Evans	975	Howitt v. Harrington (Earl) ...	934
Houlston v. Smyth	103, 452	Howlett v. Haswell	560
Hounsell v. Dunning	938	— v. Tarte	168
— v. Smyth	645	Howley Park Coal Co. v. L. & N. W. Ry.	695
House Property Co. v. London County & Westminster Bank	330	Howtayne v. Bourne	952
House Property Investment Co. v. Horse Nail Co.	82	Hoye v. Bush	993
Housego v. Cowne	301	Hoyes v. Tate	225
Household Insur. Co. v. Grant	232, 410, 961	Hoyle, <i>In re</i>	237, 367, 368
Houseman v. Roberts	9	Hubback, <i>In re</i>	29, 1016
Houston v. Hughes	875	— v. British North Borneo Co.	226
— v. Mills	550	Hubbard, <i>Ex parte</i>	1045
— v. Sligo (Marquis)	96, 109	— v. Goodley	228
How v. Greek	598	— v. Lees	41, 101, 111
— v. Hall	6	Hubbersty v. Manchester, &c., Ry.	981
— v. Kirchner	358	— v. Ward	364
— v. Winterton (Earl) ...	555, 568	Hubbuck, <i>In re</i>	1013
Howard v. Brownhill	514	— v. Wilkinson	734, 759
— v. Canfield	159	Huber v. Steiner	563
— v. Clarke	801	Hubert v. Treherne	238
— v. Crowther	788	— v. Turner	419
— v. Danbury	478, 486	Huckle v. L. C. C.	544
— v. Fanshawe	907	Hucklesby v. Hook	238
— v. Hodges	557	Huckman v. Fernie	212
— v. Lovegrove	480	Huddleston v. v. Briscoe	198
— v. Maitland	628	Hudson v. Bartram	246
— v. Patent Ivory Manufac- turing Co.	972	— v. Baxendale	533
— v. Shaw	261	— v. Bray	645
— v. Shepherd	347	— v. Buck	237, 244
— v. Sheward	377	— v. Ede	353
— v. Smith	59, 881	— v. Hudson	829
— v. Tucker	363	— v. Revett	122
— v. Wood	502	— v. Roberts	668
Howard's Case	961	Hudston v. Midland Ry.	540
Howarth v. Brearley	401	Huffell v. Armistead	888
— v. Howarth	124	Huggett v. Miers	647
— v. Pioneer Life Assur. Co.	505	Huggins v. Ward	94
— v. Sutcliffe	228	Hughes v. Budd	9, 10
Howatson v. Webb	547, 597	— v. Coles	600
Howbeach Coal Co. v. Teague	450, 963, 965	— v. Cornelius	180
Howcutt v. Bonser	573, 603	— v. Done	554
Howgate & Osborn's Contract, <i>In re</i>	545	— v. Græme	381, 434
Howe v. Botwood	625	— v. Great Western Ry. ...	207
— v. Finch	685	— v. Little	1058
— v. Scarrot	256, 880, 947	— v. Liverpool Victoria Legal Friendly Soc.	499, 505
— v. Smith	245, 252	— v. Macfie	663
		— v. Metropolitan Ry.	906
		— v. Pump House Hotel Co.	82, 507

	PAGE		PAGE
Hughes v. Smallwood	1065	Hunter v. Caldwell	31
— v. Wilson	189	— v. Emanuel	31
Hugill v. Masker	834	— v. Fry	31
— v. Wilkinson	936	— v. Hunt	41
Hulbert v. Dale	707	— v. Hunter	567, 91
Hull (Mayor) v. Harding	371	— v. N. Marine Insur. Co.	31
— v. Horner	34, 37	— v. Rice	195, 81
Hull v. Vaughan	255, 261	— v. Sharpe	71
Hull Flax Co. v. Wellesley ...	966	— v. Walters	51
Hull & Lady Meux's Arbitra- tion, <i>In re</i>	271	— v. Welsh	41
Hulse, <i>In re</i>	844	— v. Westbrook	81
— v. Hulse	316	— v. Young	101
Hulse's Claim	245	Huntingford v. Massey	71
Hulthen v. Stewart	353	Huntington v. Attrill	11
Hulton v. Hulton	1025	Huntley v. Bulwer	31
— v. Jones	733	— v. Donovan	113, 188, 11
Humble v. Hunt	191	— v. Russell	21
— v. Hunter	15	— v. Sanderson	51
— v. Langston	465	— v. Simson	71
— v. Mitchell	413, 458	— v. Gaskell	91
Hume v. Bentley	243	Huntsman, The	41
— v. Druyff	767	Hurd v. Fletcher	61
— v. Peploe	592	— v. Whaley	91
— v. Rundell	180	Hurdman v. North E. Ry.	61
— v. Somerton	563	Hurlbatt v. Barnett	21
Humfrey v. Dale	23	Hurry v. Mangles	81
— v. L. & N. W. Ry.	812	Hurst v. Evans	31
Humphery v. Conyheare	267	— v. Gt. W. Ry.	51
Humphreys v. Boyce	66	— v. Parker	51
— v. Budd	75	— v. Picture Theatres ..	819, 81
— v. Franks	889	— v. Taylor	61
— v. Green	241	— v. Osborne	31
— v. Jones	391, 472	— v. Watkis	71
— v. Miller	264	Hussey v. Christie	81
— v. Morton	907	— v. Horne Payne	237, 241
— v. Partridge	856	Hutcheson v. Eaton	81
— v. Willing	555	Hutchings v. Nunes	81
Humphries v. Brogden ... 35,	693, 694	Hutchins v. Chmbers	71
— v. Humphries	168	— v. London County Council	71
Humphry v. Damion	879	— v. Scott	19, 545, 71
Humphrys v. Polak	454	Hutchinson v. Copestake	71
Hunnings v. Williamson ..	140, 150	— v. Johnston	81
Hunt, <i>Ex parte</i>	1050	— v. Lowndes	91
— v. Andrews	189	— v. Tatham	21
— v. Clifford	1069	— v. Thomas	61
— v. De Blaquiere	453	— v. York, &c., Ry.	61
— v. Fensham	1069	Huth v. Huth	71
— v. Gt. N. Ry.	684, 750	Huttman v. Boulnois	41
— v. Gunn	466	Hutton v. Lippert	11
— v. Hooper	1068	— v. Mansell	31
— v. Massey	32	— v. Ras S.S. Co.	41
— v. Peake	692	— v. Uppill	41
— v. Silk	252	— v. Ward	27
— v. Star Newspaper Co. ...	752	— v. Warren	24, 27
— v. Wimbledon Local Board	955	— v. West Cork Ry.	98
— v. Wise	68	Huxham v. Smith	182, 51
Hunter v. Britts	822	Huxley v. Berg	81
		— v. West London, &c., Ry. Co.	224, 22

PAGE	PAGE		
Hyam's Case	606, 964	Ingham v. Primrose	317
Hyams v. Coombes	504	Ingle v. Bell	800
— v. Stuart King	219, 504	— v. McCutchan	393
— v. Webster	648	Inglehy v. Swift	69
Hyatt v. Griffiths	883	Ingledeu v. Douglas	560
Hybart v. Parker	952, 986	Inglesant v. Inglesant	132
Hyde v. Beardsley	230	Inglis v. Buttery	18
— v. Bulmer	728	— v. G. N. Ry.	983
— v. Hyde	910, 914, 1027	— v. Haigh	563
— v. Johnson	572	— v. Robertson	93, 833, 834
— v. Palmer	47, 72	Ingram v. Lawson	741
— v. Trent & Mersey Navigation Co.	532	— v. Morecraft	706
— v. Warden	250, 613, 897	— v. Services Maritimes ...	361, 362, 363
— v. Wrench	233	— v. Services Maritimes (No. 2)	225
Hydraulic Engineering Co. v. McHaffie	431, 436	— v. Shirley	439
Hyman v. Nye	660	Inland Rev. Comrs. v. Maple	202
— v. Rose	907	Inman v. Stamp	234
— v. Van den Bergh ...	696, 699	Innes, <i>In re</i>	828
Hymas v. Ogden	223	— v. Stephenson	580
Hyslop v. Shirlaw	376	— v. Wylie	798
IBBETSON, <i>Ex parte</i>	1048	Innes & Co., <i>In re</i>	963
— v. Peat	642	Ireland v. Hart	960
Ibbett v. Leaver	79	— v. Johnson	770
Ibbs v. Richardson	259	— v. Livingstone	23, 426
Icely v. Grew	247	— v. Powell	46
Ideal Bedding Co. v. Holland..	1038	— v. Thomson	489
Ideal Film Renting Co. v. Nielson	613	Ireson v. Pearman	397
Iggulden v. May	26	Irish Land Commission v. Grant	932, 934, 941
Ilfracombe Ry. v. Nash	981	Irish Peat Co. v. Phillips	980
Illingworth v. Leigh	50	Irish Society v. Derry (Bishop)	174, 188, 191, 925
Illustrated Newspaper Corporation, <i>In re</i>	404	Iron Ship Coating Co. v. Blunt	966
Imperial Bank v. L. & St. Katherine's Dock Co.	859	Irons v. Smallpiece	828, 829
Imperial Bank of Canada v. Bank of Hamilton ...	314, 496, 497	International Sponge Importers v. Watt	579
Imperial Gas Co. v. London Gas Co.	566	International Tea Store v. Hobbs	706
Imperial Land Co. of Marseilles, <i>In re</i>	589	Inverkip S.S. Co. v. Bunge ...	351
Imperial Loan Co. v. Stone ...	562	Irvine v. Union Bank of Australia	971
Imray v. Magnay	1068, 1069	— v. Watson	442
— v. Oakshette	908	Irving v. Burns	381
Ince Hall Rolling Mills Co. v. Douglas Forge	973	— v. Greenwood	384
Inchbald v. Robinson	642	— v. Motly	831
— v. W. Neilgherry Coffee, &c., Co.	474	— v. Veitch	571
Inclendon v. Berry	764	— v. Wilson	500
Ind v. Emerson	141	Irwin v. Brandwood	732
Independent Assur. Co., <i>In re</i>	975	— v. Dearman	788, 789
Indermaur v. Dames	646	— v. Lever	8
Indian Zoedone Co., <i>In re</i>	958	— v. Waterloo Taxicab Co.	658
Industrie, The	346	Isaac's Case	963
		Isaacs v. R. Insur. Co.	341
		— v. Salbstein	171, 578
		Isaacson v. New Grand (Clapham Junction)	688
		Isherwood v. Whitmore	424

	PAGE		PAGE
Isis S.S. Co. v. Bahr	356	James v. Biddington	78
Isitt v. Railway Passengers Assnr. Co.	340	— v. Brawn	103
Islington Guardians v. Big- genden	566	— v. Catherwood	20
Israel v. Clark	660	— v. Cochrane	59
— v. Douglas	506	— v. Crow	21
Ivay v. Hedges	645	— v. Gt. W. Ry.	67
Ive v. Scott	822	— v. Griffin	86
Iveson v. Moore	639	— v. Jackson	22
Ivimey v. Marks	393	— v. Plant	71
— v. Stocker	36, 699, 719	— v. Ricknell	38
Izard, <i>Ex parte</i>	1056	— v. Salter	93
Izon v. Gorton	260	— v. Saunders	100
		— v. Stevenson	70
		— v. Vane	22
		Janesich v. Attenborough	83
JACAUD v. French	320	Janson v. Driefontein, &c., Mines	557
Jack v. M'Intyre	18	Janvier v. Sweeney ... 664, 729,	742
Jackson, <i>In re</i>	38, 391	Jaques v. Millar	254
— v. Allen	11, 125	Jardine v. Payne	200
— v. Anderson	847	Jardine, Matheson & Co. v. Clyde Shipping Co.	356, 426
— v. Benson	150	Jarman v. Hale	882, 936
— v. Courtenay	805	Jarmain v. Hooper	793, 813
— v. Dickinson	483, 1007	Jarrett v. Hunter	236
— v. Forster	339	— v. Kennedy	494, 499
— v. Hanson	636	Jarvis v. Dean	645
— v. Hesketh	205, 212	— v. Hemmings	610
— v. Hill	684	Jay, <i>Ex parte</i>	1048
— v. Hopperton	739	— v. Johnstone	602
— v. Lowe	417	— v. Robinson	1027
— v. Metropolitan Ry. ...	217, 676	— v. Warren	323
— v. Nichol	864	Jay's Furnishing Co. v. Brand	782
— v. Normanby Brick Co.	222	Jayne v. Hughes	939
— v. N. E. Ry.	487, 596	— v. Price	909
— v. Rotex Motor Co. ...	375, 455	Jeakes v. White	234
— v. Smithson	668	— v. Wright	242
— v. Stopherd	508	Jefferies v. Duncombe	733
— v. Thomason	157	Jefferson v. Derbyshire Farmers	671
— v. Tollett	661	— v. Paskell	385
— v. Turquand	961	Jeffery, <i>In re</i>	28
— v. Union Marine Insur. Co.	350	Jefferson v. Morton	874
— v. Watson	664	Jeffery v. Bamford	508
— v. Woolley	572	— v. Neale	623
— v. Yeats	1016	Jeffreys v. Evans	315, 390
Jacob v. Lee	9	Jeffries v. Gt. W. Ry.	841, 855
— v. Down	902, 906	— v. Williams	695
Jacobs, <i>Ex parte</i>	373	Jegon v. Vivian	815
— v. Davis	384	Jekyll v. Moore	744
— v. Humphrey	1035, 1067	Jelks v. Hayward	824, 1036
— v. Latour	861	Jenkins v. Biddulph	129
— v. Morris	502	— v. Coomber	310, 368
— v. Revell	249	— v. Gt. Central Ry. ...	527, 530
— v. Seward ... 220, 812, 817,	852	— v. Great Western Ry. 663, 674	
— v. Tarleton	206	— v. Harvey	32, 37, 707
Jaerderer, The	21, 353	— v. Hutchinson	15, 83, 380
Jagers v. Binnings	66	— v. Jackson	628, 649
Jakeman v. Cook	555	— v. Morris	285, 562
Jamal v. Moolla Dawood ...	247, 466		

	PAGE		PAGE
Jenkins v. Phillips	738	Johnson v. Dodgson	238, 419
— v. Price	613	— v. Durant	387
— v. Tucker	484, 1008	— v. Edge	759
— v. Turner	667	— v. Emerson	767
— v. Walford	353	— v. Evans	744
Jenkins' Claim	972	— v. Faulkner	783
Jenks v. Clifden (Viscount) ...	1008	— v. Gallagher	1022
Jenkyns v. Southampton, &c., Co.	541	— v. Goslett	494
Jenner v. A'Beckett	734	— v. Hill	858
— v. Clegg	261, 945	— v. Kearley	479
— v. Morris	486	— v. Lancashire & York- shire Ry.	853
— v. S. E. Ry.	674	— v. Lawson	43
— v. Walker	560	— v. Lindsay	683
Jenner's Case	963	— v. Lyttle's Iron Agency	966
Jenneson, Taylor & Co. v. Secretary of State for India	354	— v. M'Adam	788
Jennings v. Gt. N. Ry. ...	538, 539	— v. Macdonald	426
— v. Griffiths	473	— v. Mason	123
— v. Johnson	395	— v. Midland Ry. Co. ...	516, 518, 543
— v. Mather	1072	— v. Pickering	839, 1015
— v. Rigby	1013	— v. Pye	558
— v. Roberts	301	— v. Raylton	20, 428
Jenoure v. Delmege	739	— v. Reg.	509
Jersey (Earl) v. Neath Union	694	— v. Royal Mail Steam Packet	474, 480, 850
Jessel v. Bath	364	— v. St. Peter, Hereford	270, 618
Jesser v. Gifford	640	— v. Sargant	95
Jesus College v. Gibbs	4	— v. Stear	848, 853
Jewan v. Whitworth	833	— v. Upham	950
Jewish v. Dyson	78	— v. Ward	178, 189
Jewison v. Dyson	189	— v. Warwick	1009
Jewry v. Busk	471	— v. Wild	484
Jewsbury v. Mummery ...	168, 1014, 1018	Johnson, &c. v. Consumers Gas Co. of Toronto	652
Jezepeh v. Ingram	1038	Johnston v. Boyes	252, 594
Jinks v. Edwards	630	— v. Braham & Campbell ...	437
Job v. Job	1012	— v. Gt. W. Ry.	664
— v. Lamb	266	— v. Kershaw	426
Joel v. Law Union, &c., Co. ...	337	— v. O'Neill	77
Johannesburg, The	990, 991	— v. Renton	979
John v. Bacon	537, 676	— v. Sumner	451, 453
— v. Jenkins	885, 944	— v. Osborne	20
John Morley Building Co. v. Barras	963	Johnstone, <i>Ex parte</i>	70
Johns v. Pink	923	— v. Crompton	694
— v. Simons	485	— v. Hudleston ...	259, 633, 943
— v. Ware	1047	— v. Marks	560
Johnson, <i>Ex parte</i>	1050, 1054	— v. Milling	405
—, <i>In re</i>	600	— v. O'Neill	49
— v. Alston	395	— v. Spencer (Earl)	186
— v. Baker	124	— v. Sutton	764
— v. Barnes	35, 703	Jolliffe v. Baker	252
— v. Blenkinsop	404	Jolliffe v. Wallasey Local Board	647
— v. Blumenthal	833	Jolly, <i>In re</i>	602
— v. Bragge	15	— v. Arbutnot	946
— v. Brock	933	— v. Kine	701
— v. Crédit Lyonnais Co. 70, 833	70, 833	— v. Rees	451
— v. Diprose	829, 1057		

	PAGE		PAGE
Jonassohn v. Young	429	Jones v. Marshall	487
Jones's Case	962	— v. Mason	119
Jones, <i>Ex parte</i>	445, 961	— v. Merionethshire, &c., Building Soc.	552
—, <i>In re</i>	391	— v. Mills	884, 888, 896
— v. Adamson	352	— v. Nanney	240, 476
— v. Arthur	594, 595	— v. Nixon	887
— v. Biernstein	778	— v. Pacaya Rubber, &c., Co.	973
— v. Bone	614	— v. Pearle	861
— v. Bow	179	— v. Peppercorne	856
— v. Broadhurst	321, 554	— v. Phipps	892
— v. Brooke	485	— v. Randall	97
— v. Brown	852	— v. Reynolds	262, 885
— v. Canadian Pacific Ry.	682	— v. Ryder	495, 570, 573
— v. Carter	264, 905	— v. Scullard	658
— v. Chapman	816	— v. Shears	895
— v. Chappell	268	— v. Simes	702, 1003
— v. Clayton	1067	— v. Smith	83
— v. Cliff	861	— v. Stevens	731, 756
— v. Consolidated Anthra- cite Collieries	628, 694	— v. Tanner	1009
— v. Corbett	285	— v. Tarleton	861
— v. Curling	225, 871	— v. Tyler	542
— v. Daniel	237	— v. Vaughan	994
— v. Dowle	868	— v. Victoria Graving Dock	238, 971
— v. Edney	249	— v. Waller	92
— v. Edwards	9	— v. Watney, Coomb, Reid & Co.	664
— v. Festiniog Ry.	673	— v. Watts	243
— v. Flint	233	— v. Whitehouse	394
— v. Foley	816	— v. Williams	77, 483, 632, 637, 638, 654, 812, 817
— v. Fort	206	— v. Wood	1034
— v. Foxall	58	Jordeson v. Sutton, &c., Gas Co.	654, 692, 702
— v. Gardiner	254	Jory v. Orchard	7, 994
— v. German	795	Joseph v. Corvander	788
— v. Gibbons	431	— v. Lyons	830, 874
— v. Gooday	815	Josling v. Irvine	379
— v. Gordon	318	— v. Kingsford	428
— v. Great Central Ry.	140	Jourdaine v. Lefevre	856
— v. Green	353	Jowitt v. Union Cold Storage Co.	856, 861
— v. Harris	1052, 1053	Joy (Lady) & Neale's Case ...	193
— v. Hart	850	Joyce v. Swann	348
— v. Hill	269	Joyner v. Weeks	620
— v. Hough	348, 846	Joynt v. Cycle Trade Pub- lishing Co.	752, 753
— v. Howell	469	Judge v. Cox	668
— v. Hughes	571	Judson v. Etheridge	858
— v. Humphreys	507	Jump v. Payne	883
— v. James	78, 384	Jurgens v. Dreyfus	866
— v. Johnson	997	Jury v. Barker	333
— v. Jones ... 121, 122, 133, 159, 732, 819, 866		KAHEN, <i>Ex parte</i> ... 1051, 1052, 1053	
— v. Just	379, 428	Kahl v. Jansen	64
— v. Lavington	630		
— v. Lee	669		
— v. Littledale	15, 431		
— v. Littler	731		
— v. Liverpool Corp.	658		
— v. Llanrwst Urban Coun- cil	640		
— v. Mackie	757		
— v. Marsh	894		

PAGE	PAGE		
Kain v. Old	428	Kelk v. Pearson	696
Kaltenbach v. Lewis	491, 591,	Kell v. Nainby	84
833, 835		Kellard v. Rooke	686, 687
Kane v. Mulvany	751, 752, 753	Kellock v. Enthoven	462
Kannen v. M' Mullen	402	Kelly v. Curzon	489
Karavais v. Callinicos	660	— v. Enderton	232
Karberg v. Blythe, Green,		— v. Kellond	1057, 1061
Jourdain & Co.	348, 440,	— v. Kelly	102
	557, 825	— v. Lawrence	797
Karberg's Case	724, 968	— v. Metropolitan Ry. Co.	
Karet v. Kosher Meat Supply		Assoc.	229, 230
Assoc.	1056	— v. Morray	95
Karuth's Case	963	— v. Sherlock	757
Kate, The	667	— v. Partington	741, 747
Katy, The	351	— v. Patterson	889, 890
Kaufman v. Gerson	553	— v. Rogers	627
Kaufmann v. Liverpool Cor-		— v. Small	66
poration	1032	— v. Solari	497
— v. Liverpool Cor.	992	— v. Tinting	753
Kavanagh v. Gudge	819	— v. Webster	234
Kay v. Field	354	Kelner v. Baxter	83, 380, 443,
— v. Oxley	716, 718	450, 971	
— v. Pienne	1021, 1022	Kemble v. Addison	1054
Kaye v. Brett	579	— v. Farren	248
Keable v. Payne	199	Kemp v. Baerselman	410
Kearley v. Thomson ..	504, 505, 555	— v. Balls	581
Kearney v. L., Brighton &		— v. Burt	397
S. C. Ry.	677	— v. Canavan	866
— v. King	75, 280	— v. Clark	347
— v. Whitehaven Colliery		— v. Derrett	888, 889
Co.	549	— v. Falk	864, 865, 866
Kearon v. Pearson	353	— v. Finden	481
Kearsley v. Cole	371, 372, 586	— v. Ismay	864
— v. Oxley	1011	— v. Neville ..	95, 183, 796, 998
— v. Phillips	142, 945	Kempe v. Gibbon	603
Keate v. Temple	366	Kempson v. Boyle	20, 422
Keates v. Cadogan (Earl) ..	270, 548	— v. Saunders	494
— v. Woodward	230	Kempston v. Butler	693
Keay v. Fenwick	444, 584	Kempton v. Cross	72, 105
Keck v. Faber	247	Kendal v. Marshall	864
Keech v. Hall	921	— v. Wood	497, 500
Keegan v. Smyth	453	Kendall v. Hamilton ..	82, 171, 448
Keeling v. Ball	125	— v. London & S. W. Ry.	
Keen v. Henry	658	Co.	518
— v. Milwall Dock Co.	687	— v. Wilkinson	997
— v. Price	508	Kendrick v. Lomax	321
— v. Priest	784, 785	Kennedy, <i>Ex parte</i> ..	958, 963, 985,
Keene v. Deardon	875	1049	
— v. Dilke	804	— v. Broun	471
— v. Keene	510	— v. Green	61
— v. Ward	393	— v. Lee	236
Keesebower v. Tims	334	— v. Lyell	153
Keighley, Maxsted & Co. v.		— v. Panama, &c., Mail Co.	
Durant	233, 410, 803, 851	500, 547	
Keightley v. Birch	1069	— v. Thomas	282
— v. Watson	598	Kennell v. Abbott	28
Keir v. Leeman	552	Kennett v. Milbank	570
Keith v. Burrows	349, 357	Kenrick v. Beauclerk	874
— v. Gancia	922	— v. Taylor	722

	PAGE		PAGE
Kensington v. Inglis	5, 158	Kimber v. Press Association...	751
Kensington Electric Lighting Co. v. Lane Fox Electrical Co.	759	Kinahan v. Parry	442
Kensington Station Act, <i>In re</i>	567, 985	Kinaston v. Moor	824
Kensit v. Gt. E. Ry.	720	Kineaid's Case	968
Kent v. Gt. W. Ry.	977	Kindersley v. Chase	180
— v. Lowen.....	48, 109, 192	Kine v. Beaumont	7, 304
— v. Midland Ry. Co.	528	— v. Jolly	653
— v. Pickering	1016	King v. Brown, Durrant & Co.	704
Kent's Case	969	— v. Cole	58
Kent County Council v. Folke- stone Cor.	991	— v. Corke	219
Kenworthy v. Schofield	239, 413, 417, 420	— v. England	774
Kenyon v. Wakes	79	— v. Eversfield	887
Keon v. Hart	405	— v. Foster	191
Kepitigalla Rubber Estates v. National Bank of India	514	— v. Francis	78
Ker v. Osborne	489	— v. Gillett	587
Kerby v. Harding	774	— v. Henderson	767
Kerford v. Mondel	861	— v. Hoare	171
Kern v. Deslandes	358	— v. Hutton	465
Kerr's Policy, <i>In re</i>	509	— v. Improved Cab Co. ...	658
Kerrison v. Glyn, Mills Currie & Co.	497	— v. Jones	606
— v. Smith	819	— v. Norman	171
Kershaw v. Ogden.....	414, 415	— v. Phippard	792
Kessebaw v. Tims	312	— v. Price	379
Kettlewell v. Refuge Assurance Co.	499, 727	— v. Smith	579, 597
Keys v. Harwood	468	— v. Turner	921
Keyse v. Powell	935	— v. Waring	739
Keyser v. Suse	867	— v. Williamson	216
Keyworth v. Hill	845	— v. Wilson	246
Kibble, <i>Ex parte</i>	561	King & Co. v. Gillard & Co.	224
— v. Fairthorne	933	King and Duveen, <i>In re</i>	387
— v. Gough	415	King, Viall & Benson v. Howell	427
Kidd v. Rawlinson	1038	Kingdom v. Cox	431
Kiddell v. Burnard	378	Kingdon v. Nottle	606
Kidderminster Corporation v. Hardwick	954, 955	Kingsford v. Merry	831
Kiddle v. Lovett	679, 686	Kingsland, The	353
Kidgill v. Moor	640, 705, 711	Kingston v. Phelps	196
Kidner v. Keith	124	Kingston's (Duchess) Case 69, 103, 168, 172, 179, 184	184
Kidney v. Cockburn	42	Kingston-on-Hull (Guardians) v. Petch	431
Kidston v. Empire Marine In- surance Co.	22	Kingston Race Stand v. King- ston (Mayor)	933
Kilgour v. Finlyson	293	Kinloch v. Craig	860
— v. Gaddes	711	— v. Neville	710
Killby v. Rochussen	300, 303	Kinlyside v. Thornton	269
Kilmer v. Brit. Columbia Orchard Lands	245	Kinnaird v. Webster	582, 583
Kilpin v. Ratley	828	Kinnell v. Harding, Wace & Co.	953
Kilshaw v. Jukes	445	Kinnersley v. Orpe	129, 169
Kilvington v. Stevenson	1005	Kino v. Rudkin	701
Kimber v. Gas Light & Coke Co.	646	Kinsman v. Rouse	939, 941
		Kintrea, <i>Ex parte</i>	964
		— v. Preston	243
		Kipling v. Todd	980, 984
		Kirby v. Banister	455
		— v. Chessum	815
		— v. Great W. Ry. Co. ...	529
		— v. Simpson	997, 999, 1000

	PAGE		PAGE
Kirchner v. Venus	358,	Knox v. Gye	565
Kirk v. Blurton	285	Knutsford v. Tillmans	353
— v. Gregory	802	Kong Magnus, The	667
— v. Todd	1007	Kopitoff v. Wilson	363
Kirkham v. Attenborough	826	Kreeft v. Thompson	348
— v. Peel	492	Krehl v. Burrell	715
Kirkland v. Peatfield	602	Krell v. Henry ... 18, 27, 262,	476
Kirklington v. Wood	622	Kreuger v. Blanck	426
Kirkman v. Hargreaves	846	Kruger v. Moel Tryvan Ship-	
— v. Shawcross	855	ping Co. 346,	364
Kirkpatrick v. S. Australian		— v. Wilcox	856
Insur. Co. 341		Kurtz v. Spence	219,
Kirkstall Brewery Co. v. Fur-		Kusel v. Watson	759
ness Ry. 65, 526,	534	Kynnaid v. Leslie	910
Kirkwood v. Carroll	331	Kynoch v. Rowlands	934
Kirton v. Braithwaite	592,		
Kirwan v. Cockburn	593	LACAVE v. Credit Lyonnais 325,	329
— v. Kirwan	167	Lacey, <i>In re</i>	604
— v. Kirwan	447	La Cloche v. La Cloche	112
Kish v. Cory	354	La Compagnie de Mayville v.	
— v. Taylor	359,	Whitley	962
Kissam v. Link	362	Lacon v. Higgins	107, 205,
Kitchen v. Campbell	111	Lacons v. Wormald	213
— v. Hawkins	502	Lacy, <i>In re</i>	565, 1018
Kitchin, <i>In re</i>	599	— v. Rhys.....	940
Kleinert v. Abbosso Gold Min-		Ladbroke v. Todd	203
ing Co. 430		Ladd v. Thomas	330
Kleinwort v. Dunlop Rubber		Lade v. Holford	776, 814,
Co. 497		— v. Shepherd	950
Klingemann, <i>In re</i>	108	Ladies' Dress Assoc. v. Pul-	
Knatchbull v. Fowle	166	brook	967
Knight v. Ashton, Edridge &		Lady Forrest, &c., Gold Mines,	
Co. 476		<i>In re</i>	490
— v. Benett	945	Ladyman v. Grave	699
— v. Clements	278	Ladywell Mining Co. v.	
— v. Coales	208	Brookes	490
— v. Cox	256	Lafitte v. Slatter	307
— v. Crockford	238,	Lafond v. Ruddock	569
— v. Egerton	419	Lafone v. Smith	757
— v. Fitch	775	Lagunas Nitrate Co. v.	
— v. Fox	464	Lagunas Syndicate 724, 972,	973
— v. Gibbs	648	Laidler v. Burlinson	828
— v. Gravesend, &c., Water-		Laing v. Barclay	827
works Co. 596		— v. Hollway	351
— v. M'Douall	946	— v. Meader	595
— v. Martin	8	— v. Whaley	717
— v. North Metropolitan		Laird v. Briggs	219, 708,
Tramways	798	— v. Pim	247
— v. Pursell	811	Lake v. Argyle (Duke)	449
— v. Waterford	53, 54	— v. Billers	924
— v. Williams	869	— v. King	72, 744,
Knight's Will, <i>In re</i>	225	Lamb v. Attenborough	833
Knights v. Wiffen	826	— v. Brewster	265
Knott v. Farren	575	— v. Burnett	792, 793
— v. Jeffrey	742	Lamb's Case	735
Knowles v. Compigne	67,	Lambert, <i>In re</i>	192
— v. Lancashire & York-		— v. G. E. Ry. ... 798, 957,	994
shire Ry. 694			
— v. Scott	974		
Knowlman v. Blnett 220, 411,	412		

	PAGE		PAGE
Lambert v. Heath	467	Larchin v. N. W. Deposit	
— v. Home	140	Bank	108
— v. Oakes	334	Larkin v. Long	76
Lambert's Estates	1028	Larkworthy's Case	96
Lamberton v. Aiken	273	Larsen v. Sylvester	35
Lambourn v. McLellan	844	Larner v. Larner	102
Lambton v. Mellish	650, 713	Lart, <i>In re</i>	17
Lamburn v. Cruden	408	Lascelles v. Onslow (Lord) ..	81
L'Amie v. Wilson	110	— v. Rathbun	44
Lamond v. Dorrell	502	Last v. Dinn	25
Lamond v. Richard	543	— v. Hucklesby	23
Lamont v. Crook	138	Latch v. Rumner Ry.	65
Lamplugh v. Braithwait	483	Latham v. Barber	41
Lampton v. Corke	61, 69	— v. Johnson	645, 66
Lamprell v. Billericay Union		— v. Rutley	52
	468, 470	Latimer v. Batson	103
Lanauze v. Palmer	7, 304	Latkow v. Eamer	17
Lancashire Waggon Co. v.		Latter v. White	331, 86
Fitzhugh	824	Lauderdale Peerage ...	12, 193, 91
Lancashire & Yorkshire Ry.		Laughter v. Pointer	648, 65
v. Gidlow	500	Laughton v. Sodor & Man	
— v. MacNicoll	823	(Bishop)	75
Lancashire, &c., Ry. v.		Laurie v. Scholefield	
Greenwood	527	17, 220, 368, 369, 371, ..	57
Lancaster v. Eve	803	Lautour v. Teesdale	91
— v. Lancaster	101	Lavell v. Richings	78
Lancastrian, The	679	Lavery v. Pursell	234, 24
Lancum v. Lovell	170	— v. Turley	54
Landa v. Greenberg	404	Law v. Harwood	75
Landauer v. Craven	424	— v. Hodson	55
Lander v. Bagley's Contract,		— v. Law	72
<i>In re</i>	237	— v. Llewellyn	744, 99
Lands Allotment Co., <i>In re</i> ..	565, 568	— v. London Indisputable	
Lane v. Applegate	755	Policy Co.	33
— v. Chapman	1069	— v. Parnell	29
— v. Cotton	537, 543	— v. Redditch Local Bd. ...	24
— v. Cox	650	Law & Bonar v. British	
— v. Dixon	812	American Tobacco Co.	44
— v. Eve	218	Law, Car & General Insur.	
— v. Glenny	394	Co., <i>In re</i>	961, 96
— v. Hill	514	Law Guarantee Co. v.	
— v. Ironmonger	451	Fearnley	34
— v. Stanhope (Earl)	29	Lawes v. Purser	457, 49
Lane's Case	72	Lawford v. Billericay Rural	
Lanesborough's (Earl) claim	88	Council	95
Lang v. Kerr	93	— v. Davies	91
Langdon v. Godfrey	397	Lawless v. Anglo-Egyptian,	
Langford v. Foot	1036	&c., Co.	735, 746, 75
Langfort v. Tiler	417	— v. Queale	5
Langhorn v. Allnutt	64	Lawrence v. Accidental Insur.	
Langley v. Hammond	716	Co.	34
Langrish v. Watts	574	— v. Clark	6, 9, 1
Langston v. Corney	283	— v. Hitch	3
Langton v. Carleton	405	— v. Hodgson	38
— v. Higgins	826	— v. Jenkins	95
— v. Hughes	552	— v. Knowles	42
Lanyon v. Davey	213	— v. Norreys	94
Laporte v. Costick	1023	— v. Obee	70
Lapsley v. Grierson	39	— v. Walmesley	37

	PAGE		PAGE
Lawrence's Case	968	Lee v. Cooke	776
Laws v. Rand	32, 326	— v. Dangar ... 1037, 1070, 1071	1071
Lawson v. Burness	353	— v. Gaskell	234
— v. Langley	710	— v. Griffin	401, 413
— v. Sherwood	11	— v. Huson	740
— v. Wallasey Local Board	469	— v. Johnstone	31
Lawson's Executors v. Watson	288	— v. Jones	370, 388
Lawton v. Hickman	438, 467	— v. Lancashire & York-	
— v. Newland	486	shire Ry.	61, 544
— v. Sweeney	486	— v. Levy	323
Lax v. Darlington Cor. ...	647, 676	— v. Merrett	488
Lay v. Lawson	750	— v. Munn	253
Laybourn v. Crisp	101, 104, 166	— v. Nuttall	1015
Laycock, <i>In re</i>	1013	— v. Pain	28
— v. Pickles	247, 513	— v. Rayson	249
Layer's Case	151, 155	— v. Riley	669, 813
Layfield v. Layfield	1006	— v. Risdon	438, 457
Laythoarp v. Bryant ...	239, 242, 419	— v. Robinson	850, 851
Lazarus v. Andrade	830	— v. Roundwood Colliery	
Lazonby v. Rawson	1011	Co.	1049
Lea v. Charrington	762, 766	— v. Shore	438
Leach v. Simpson	2	— v. Smith	833, 945
— v. Thomas	269	— v. Turner	1054
— v. Thompson	606	— v. Vessey	949
Leadhitter v. Farrow	286	— v. Walker	398
Leader v. Homewood	843	— v. Wilmot	574
— v. Moody	628	— v. Wilson	394
— v. Moxton	651	Lee Conservancy Board v.	
Leake v. Loveday	854, 855	Button	37
— v. Westmeath	103	Lee and Chapman's Case	973
Lean v. Scutz	1021	Leeds v. Cook	6, 384
Leap v. Butt	10	— v. Lancashire	319
Leaper v. Tatton	289	— v. Wright	864
Learoyd v. Brook	409	Leeds Bank v. Walker ...	314, 495
— v. Brook	407	Leeds & Hanley Theatres, <i>In</i>	
— v. Halifax Joint Stock		<i>re</i>	490, 729
Banking Co.	140	Leeke v. Portsmouth Cor.	810
Leary v. Patrick	997	Leeke's Case	963
Leask v. Scott	347, 866	Lees v. Dunkerley	689
Leather Cloth Co. v. Hieron-		— v. Patterson	588, 767
imus	424, 441	Leese v. Martin	856
— v. Lonsont	555	Leete v. Gresham Insurance	
Leathes v. Leathes	868	Co.	211
Leathley v. Spyer	369	Leetham v. Johnstone-White	556
Lehel v. Tucker	291	Le Fanu v. Malcomson ...	731, 738
Le Blanche v. L. & N. W. Ry.		Leggatt v. Tollervey	760
.....	538, 539	Legge v. Edmonds 43, 63, 917,	918
Le Brasseur, <i>In re</i>	471	Leggott v. Gt. N. Ry.	1002
Lechmere v. Fletcher	574	Legh v. Lillie	616
Lecky v. Walter	500, 724	Legross v. Levermoor	50
Leconfield (Lord) v. Dixon ...	704	Lehain v. Philpott	266
Le Conteur v. L. & S. W. Ry.		Leicester v. Cherryman	836
.....	515, 524	— v. Walter	756
Ledbetter v. Salt	173	Leidemann v. Schultz	20, 353
Leduc v. Ward	14, 346	Leigh v. Dickeson 257, 270, 482,	946
Lee v. Barnes	1060	— v. Gladstone	791
— v. Bayes	835, 836	— v. Jack	809, 934
— v. Birrell	155	— v. Paterson	425, 436
— v. Butler	834	— v. Shepherd	948

	PAGE		PA
Leigh v. Taylor	803, 844	Lewin v. Trimming	2
— v. Thornton	266	— v. Wilson	6
Leishman v. Cochrane	90	Lewis, <i>Ex parte</i>	10
Lekeux v. Nash	606	— v. Baker	257, 606, 888, 9
Leland v. Murphy	573	— v. Branthwaite	8
Le Lievre v. Gould ...	656, 680, 723	— v. Brass	2
Le Loir v. Bristow	588	— v. Campbell	4
Lemaitre v. Davis	693	— v. Clay	288, 3
Leman v. Fletcher	401	— v. Davies	943, 10
— v. Houseley	401	— v. Great W. Ry. Co.	18, 519, 5
Lemere v. Elliott	513	— v. Lee	10
Le Mesurier v. Le Mesurier ...	918	— v. Levy	7
Lemmon v. Webb ...	642, 654, 935	— v. Lewis	131, 1
Lempriere v. Pasley	860	— v. London, Chatham & D. Ry.	6
Leng, <i>In re</i>	1014	— v. M'Kee	3
— v. Andrews	556	— v. Marshall	7
— v. Langlands	753	— v. Meredith	83, 3
Lennard v. Robinson	83	— v. Jones	320, 3
Lennard's Carrying Co. v. Asiatic Petroleum Co.	362	— v. Parker	2
Lennard & Sons, <i>In re</i>	354	— v. Peake	3
Lenzberg's Policy, <i>In re</i> 500, 505	505	— v. Price	48, 10
Leon v. Edinburgh Evening News	733	— v. Samuel	395, 5
Leonard v. Baker	1038	— v. Thomas	10
— v. Brownrigg	229	— v. Walter	7
— v. Franklyn	191	Lewis & Allenby v. Pegge	6
— v. Simpson	1018	Lewes' Trusts, <i>In re</i>	:
Leonis S.S. Co. v. Rank	352	Ley v. Peter	64, 67, 937, 9
Lepla v. Rogers	613, 614	Leybourn v. Crisp	170, 1
Leschallas v. Woolf	844	Leyman v. Latimer	744, 7
Leslie v. Fitzpatrick	559	Lichfield v. Dreyfus	5
— v. Reliable Advertising, &c., Agency	482	Lichfield Union v. Greene	583, 5
— v. Sheill	558	Lickbarrow v. Mason	8
Lester v. Hickling	1055	Liddlow v. Wilmot	4
Le Tailler v. S. E. Ry.	977	Liebig's Extract of Meat Co. v. Mersey Docks & Harbour Board	6
Lethnlier's Case	19, 75	Liford's Case	8
Leuw v. Dudgeon	361	Liggins v. Inge	721, 8
Lever v. Koffler	239	Lightfoot v. Creed	4
Leverson v. Lane	285	Lilley v. Elwin	403, 4
Levi v. Anglo-Continental Gold Reefs of Rhodesia	217	Lilly v. Hays	4
Levi, Jones & Co. v. Cheshire Lines Committee	524	— v. Smales	20, 3
Levita's Case, A.	962	— v. Tilling	6
Levita's Case, G. H.	962	Limmer Asphalte Paving Co. v. Inland Rev. Comrs.	197, 2
Levitt v. Hamblet ...	464, 467, 723	Limpus v. London General Omnibus Co.	656, 9
Levy v. Abercorris Slate Co.	1062	Lindlar's Case	9
— v. Baker	562	Lindley v. Lacey	14,
— v. Barnard	861	Lindo v. Belisario	107, 9
— v. Goldhill	475	Lindon v. Hooper	498, 5
— v. Green	424	Lindsay v. Cundy	836, 8
— v. Hale	1068, 1069	— v. Janson	:
— v. Herbert (Lord)	432	— v. Queen's Hotel	4
— v. Langridge	727		
— v. Lewis	259		
— v. Pope	151, 153		
— v. Warburton	478		

	PAGE		PAGE
Lindus <i>v.</i> Bradwell	287, 292	Lloyd <i>v.</i> Wigney	655
— <i>v.</i> Melrose	332	— <i>v.</i> Willan	64
Line <i>v.</i> Stephenson	629	Lloyds <i>v.</i> Harper	369, 370
— <i>v.</i> Taylor	669	Lloyds Bank <i>v.</i> Cooke	288, 333
Linfoot <i>v.</i> Pockett	1055, 1059	— <i>v.</i> Swiss Bankverein	838
Linley <i>v.</i> Polden	578	Load <i>v.</i> Green	831
Linnett <i>v.</i> Chafers	1072	Loane <i>v.</i> Casey	1015
Linsell <i>v.</i> Bonsor	571, 576	Lock <i>v.</i> Ashton	765, 800
Lintott, <i>Ex parte</i>	512	— <i>v.</i> Furze	629
Lisburne (Earl) <i>v.</i> Davies	880	— <i>v.</i> Norborne	169
Lishman <i>v.</i> Christie	364	— <i>v.</i> Pierce	902
Lister <i>v.</i> Lanc. & Yorkshire Ry. Co.	518	Locke <i>v.</i> Matthews	936, 937
— <i>v.</i> Lane	618	Lockett <i>v.</i> Nicklin	15, 419
— <i>v.</i> Perryman	763	Lockhart <i>v.</i> Falk	354
— <i>v.</i> Priestley	62	Locking <i>v.</i> Parker	940
— <i>v.</i> Stubbs	490	Lockley <i>v.</i> Pye	1037
Litchfield <i>v.</i> Ready ...	168, 809, 822	Lockwood <i>v.</i> Levick	475
Litchfield-Speer <i>v.</i> Queen Anne's Gate Syndicate	702	Lockyer <i>v.</i> Jones	594
Litt <i>v.</i> Martindale	495	Lodder <i>v.</i> Slowey	468
Little <i>v.</i> Spreadbury	210	Loder <i>v.</i> Kekulé	435
Littledale, <i>Ex parte</i>	982	Lodge Holes Colliery Co. <i>v.</i> Wednesbury Cor.	695
— <i>v.</i> Liverpool College	934, 935	Loeschman <i>v.</i> Machin	824
Liver Alkali Co. <i>v.</i> Johnson	360, 516	Lofft <i>v.</i> Dennis	260
Liverpool Adelphi Loan Assoca- tion <i>v.</i> Fairhurst	558, 1020	Logan, <i>Ex parte</i>	408
Liverpool Banking Co. <i>v.</i> Eccles	239	— <i>v.</i> Hall	622, 640
Liverpool Cor. <i>v.</i> Coghill	655	— <i>v.</i> Houlditch	850
Liverpool Household Stores Assoc. <i>v.</i> Smith	743	Loibl <i>v.</i> Strampfer	90
Liversidge <i>v.</i> Broadbent	506	Lomas <i>v.</i> Graves	465, 467
Livett <i>v.</i> Wilson	35	London (City) <i>v.</i> Clerke	170
Livingstone <i>v.</i> Rawyards Coal Co.	815	London (Mayor) <i>v.</i> Long ...	63, 65
— <i>v.</i> Ross... ..	232	— <i>v.</i> Pewterers' Co.	699
Llandudno Urban Council <i>v.</i> Woods	816	London Association for Protec- tion of Trade <i>v.</i> Greenlands	749
Llanover (Lady) <i>v.</i> Homfray	178	London Assur. <i>v.</i> Mansel	338
Llewellyn <i>v.</i> Winckworth	287	London & Brighton Ry. <i>v.</i> Fairclough	983, 984
Lloyd, <i>In re</i>	603	— <i>v.</i> Wilson	984
— <i>v.</i> Archbowle	444	London, Brighton & South Coast Ry. <i>v.</i> Truman ...	654, 672
— <i>v.</i> Ashby	285	London Celluloid Co., <i>In re</i> ...	965
— <i>v.</i> Coote and Ball	397, 573, 576	London Chartered Bank of Australia <i>v.</i> Lemprière	1022
— <i>v.</i> Grace, Smith & Co. 547, 725, 728	728	London, Chatham & Dover Ry. <i>v.</i> S. E. Ry.	509, 512
— <i>v.</i> Guibert	346	London City & Midland Bank- ing Co. <i>v.</i> Gordon	324, 325, 329, 330
— <i>v.</i> Howard	291, 294	London, &c., Coal Co., <i>In re</i> ...	962
— <i>v.</i> Johnson	557	London Corporation <i>v.</i> Cox ...	182
— <i>v.</i> Maund	576	— <i>v.</i> Great Western Ry. Co.	618
— <i>v.</i> Nowell	237	— <i>v.</i> Riggs	706, 716
— <i>v.</i> Ogleby	661	London & County Banking Co. <i>v.</i> Groome	325
— <i>v.</i> Oliver	280	— <i>v.</i> L. & River Plate Bank 544, 829, 837, 838	838
— <i>v.</i> Passingham	194	— <i>v.</i> Ratcliffe	198, 582
— <i>v.</i> Powell Duffryn Steam Coal Co.	42	London Dock Co. <i>v.</i> Sinnott	954, 955
— <i>v.</i> Rosbee	631, 633		
— <i>v.</i> Sandilands	34		

	PAGE		PAGE
London & Eastern Counties Loan, &c., Co. v. Creasey ...	1057	London & Suburban Land & Building Co. v. Field	1
London Founders' Association v. Clarke	461, 466	London, Tilbury & Southend Ry. v. Paterson	1
London, Freehold, &c., Co. v. Suffield (Lord)	125	London, Tilbury & Southend Ry. and Gower's Walk Schoole, <i>In re</i>	1
London Furnishing Co. v. Solomon	782	London Transport Co. v. Trechmann	1
London General Omnibus Co. v. Holloway	370	London & Westminster Loan Co. v. Chase	10
— v. Lavell	217	— v. Drake	824, 8
London & Globe Finance Corporation, <i>In re</i>	856	— v. L. & N. W. Ry. ...	900, 9
— v. Kaufman	138	London & Yorkshire Bank v. Belton	1
London Grand Junction Ry. v. Freeman	981, 983	Long v. Chapman	1
London Joint Stock Bank v. London Corporation	182	— v. Clarke	1
— v. Macmillan	496	— v. District Messengers, &c., Co.	1
— v. Simmons	318, 838	— v. Greville	1
London & Lancashire Paper Mills Co., <i>In re</i>	1046	— v. Millar	1
London, &c., Land Co., <i>In re</i>	963, 965	— v. Orsi	1
London, Leith, &c., Shipping Co. v. Ferguson	407	Longbottom v. Berry	1
London & Manchester Plate Glass Co. v. Heath	344	Longchamp v. Fish	1
London Marine Assur. Assoc., <i>In re</i>	441	— v. Kenny	4
London & North Western Ry. v. Ashton	515, 524	Longdill v. Jones	10
— v. Barlett	533	Long Eaton Recreation Grounds Co. v. Midland Ry.	1
— v. Buckmaster	942	Longford v. Eyre	1
— v. Evans	694	Longman v. Bath Electric Traction	1
— v. Garnett	614	Longmeid v. Holliday	1
— v. Glyn	342	Longmore v. Gt. W. Ry.	1
— v. Hudson	518	Lonsdale (Earl) v. Rigg	1
— v. West	877, 879	Loog v. Bean	7
— v. Westminster Corporation	809	Looker v. Wrigley	1
London & Northern Estates Co. v. Schlesinger	262, 557	Loosemore v. Radford	1
London & Provinces Discount Co. v. Jones	1062	Lopes v. Andrews	1
London & Provincial Bank v. Bogle	1020	Lord v. Colvin	1
London, Prov. & S. W. Bank v. Buszard	324, 327	— v. Hall	2
London & River Plate Bank v. Bank of Liverpool	495, 496	— v. Midland Ry. Co.	5
London School Board v. Peters	892, 894	— v. Price	8
London & South Western Bank v. Wentworth	288, 289	— v. Sydney City	8
London & S. W. Ry. v. Myers	517	Lord Advocate v. Blantyre (Lord)	1
London & Staffordshire Fire Insur. Co., <i>In re</i>	974	Lord of the Isles, The	4
		Loring v. Davis	459, 4
		— v. Warburton	770, 776, 9
		Lotan v. Cross	8
		Lothian v. Henderson	1
		Lott v. Melville	10
		Loughman v. Barry	8
		Lound v. Grimwade	549, 5
		Lousley v. Hayward	7
		Lovatt v. Gas Light, &c., Co. ..	6
		Lovatt v. Hamilton	4
		Love v. Bell	6
		Love & Stewart v. Rowtor S.S. Co.	3

	PAGE		PAGE
Lovegrove v. L., Brighton & S. C. Ry.	682	Lucy v. Bawden	647
— v. White	398	— v. Mouflet	60, 456
Lovejoy v. Cole	228, 229	Ludbrook v. Ludbrook	938
Lovell, <i>Ex parte</i>	612, 902	Ludford (or Ludmore), <i>In re</i> ...	1070
— v. Martin	847	Ludlow, <i>Ex parte</i>	856
— v. Newton	1023	— v. Charlton	99
— v. Wallis	166	Luker v. Dennis	614
Lovelock v. Cheveley	79	Lumby (or Lumley) v. Allday	732
— v. Franklyn	252	Lumley, <i>In re</i>	1022, 1027
— v. King	469	— v. Brooks	394
Loveridge v. Botham	394	— v. Gye	742, 786, 789
Lovesey v. Palmer	236	— v. Musgrave	321, 510
Lovett, <i>In re</i>	1010	— v. Simmons	1059, 1060
Low, <i>In re</i> ; Bland v. Low ...	109	Lumsden v. Burnett	775
— v. Bouverie	70, 373, 723	— v. Shipcote Land Co.	394
Lowden v. Blakey	140	Lumsden's Case	969
Lowe v. Adams	263, 820, 888	Lund v. Campbell	226
— v. Broxtowe	1031	Lundie v. Robertson	299, 302
— v. Carpenter	709	Lungworthy v. Hockmore	452
— v. Dixon	481, 482	Lunn (or Lunt) v. L. & N. W. Ry.	674
— v. Dorling	782	Lunn v. Thornton	829
— v. Fox	545	Lurcott v. Wakely	618
— v. Holme	226, 588	Lurgan's Case	968
— v. Howarth	794	Luscombe v. Gt. W. Ry.	675
— v. Jolliffe	133, 134	Lusher v. Hassard	577
— v. L. & N. W. Ry. ...	955, 985	Lutscher v. Comptoir d'Escompte de Paris	860
— v. Peskett	1011, 1016	Lutterell v. Reynell	163
— v. Ross	258	Luttrell's Case	716
— v. Walter	405	Luxmore v. Robson	620
Lowe's Case	964	Lydall v. Martinson	221
Lowenthal, <i>Ex parte</i>	305, 1052	Lyde v. Barnard	729, 730
Lowery v. Walker	645, 669	— v. Russell	843
Lewis v. Rumney	1014	Lydnev, &c., Iron Ore Co. v. Bird	490
Lowndes v. Bray	251	Lyell v. Hothfield (Lord) ...	36, 703, 707
— v. Garnett, &c., Gold Mining Co.	573	— v. Kennedy	42, 91, 106, 114, 116, 140, 909, 933, 938
Lowry v. Bourdieu	504, 505	Lygo v. Newbold	663
Lows, <i>Ex parte</i>	218	Lygon v. Strutt	91
Lowther v. Heaver ...	219, 886, 944	Lyle v. Ellwood	910, 914
— v. Radnor	795	— v. Richards	30
Lowther Castle, The	793	Lyle-Samuel v. Odhams	752
Lubbock v. Tribe	485	Lyles v. Southend-on-Sea Corporation	977, 991
Lucas v. Bristow	21	Lynch v. Clerke	87, 109
— v. De la Cour	66	— v. Dalzell	341
— v. Dixon	419	— v. Knight	741, 742
— v. Godwin	468	— v. Nurdin	663
— v. How	898	Lynde v. Anglo-Italian Hemp Spinning Co.	968
— v. Mason	798	Lyne v. Nicholls	759
— v. Nockells	839	Lynes v. Snaith	882, 937
— v. Novosilieski	33	Lynn v. Bell	318, 505
— v. Roberts	393	Lynne's (Mayor) Case	118
— v. Tarleton	219, 770, 773	Lyon v. Fishmongers' Co.	717
— v. Wilkinson	581		
— v. Williams	2		
— v. Worswick	497		
Luce v. Izod	19		
Lucton School Governors v. Scarlett	25		

	PAGE		P.
Lyon v. Haynes	988	McCord v. Cammell	
— v. Holt	323, 371	M'Corquodale v. Bell	
— v. Knowles	445	M'Craw v. Gentry	
— v. London, City, &c., Bank	845	McCulloch v. Dawes	1
— v. Maxwell	321	Macdonald, <i>In re</i>	1
— v. Mells	363	— v. Law, &c., Insur. Co. ..	
— v. Morris	1060	— v. Longbottom ... 27, 424,	
— v. Reed	37, 259	— v. Macbrayne	
— v. Tomkins	775	— v. M'Donald	
— v. Weldon	774	— v. Whitfield	312,
Lyons v. Elliott	779	Macdonald, Sons & Co., <i>In re</i> ..	
— v. Gulliver	642	Macdonell v. Evans	
— v. Hoffnung	863, 864	— v. M'Kinty	
— v. Martin	786	M'Dougall v. Claridge	
— v. Tucker	1051	— v. Knight ... 172, 206, 731,	
Lysaght v. Bryant	291	— v. Young	12,
Lythgoe v. Vernon	503, 840	McDowall v. Gt. W. Ry.	
		— v. Lyster	
		MacDowall's Case	
		McEntire v. Crossley	834, 10
		— v. Potter	
MAANSS v. Henderson	856	McEuen v. West London Wharves Co.	967, 9
Maas v. Pepper	1046	M'Ewan v. Perth Magistrates ..	
Maber v. Maber	571	M'Ewan v. Woods	
Maberley v. Robbins	242, 508	McFadden v. Blue Star Line ...	
— v. Sheppard	414	Macfarlane's Claim	10
Mac, The	1047	M'Gahey v. Alston	6,
MacAndrew v. Chapple	350	M'Giffin v. Palmer's Ship- building Co.	
McArthur v. Cornwell	815, 823	McGowan v. Dyer	
— v. Dominion Cartridge Co. ..	677	— v. Middleton	
— v. Seaforth, Ltd.	467	— v. Smith	
Macarthy v. Smith	80	Macgregor v. Deal & Dover Ry. 74, 550,	
Macaulay v. Polley	211	— v. High	
Macbeath v. Haldimand	471	— v. Keily	
Macbeth v. Chislett	684	— v. Lowe	
M'Cabe v. Gt. N. Ry.	690	— v. McGregor	411, 10
— v. Pathé Frères	404	— v. Rhodes	
M'Call v. Taylor	280	— v. Thwaites	
McCallum, <i>In re</i>	940	McGrory v. Alderdale Estate Co.	
— v. North British Ry.	677	McGruther v. Pitcher	410, 1
Maccan v. Maccann	154	Machado v. Fontes	
M'Canse v. L. & N. W. Ry. Co.	528, 536	M'Hattie, <i>Ex parte</i>	10
M'Cannon v. Sinclair	810	Macbell v. Kinnear	
M'Carthy v. Fitzgerald	79	Machu v. L. & S. W. Ry. ...	
— v. Metropolitan Board of Works	714	McIlwraith v. Dublin Trunk Connecting Ry.	
— v. Young	678	Macintosh v. Dun	
McCartney v. Londonderry Ry. 717, 720		— v. Marshall	
McCawley v. Furness Ry.	537	Macintyre v. Connell	
McCheane v. Giles (No. 2)	82	— v. McGavin	
McClelland v. Manchester Cor. 652, 991		— v. Miller	
McClure v. Little	622	— v. Smith	
McCollin v. Gilpin	27, 382	McIver v. Tate Steamers	
M'Combie v. Davies	847	Mackay v. Commercial Bank of New Brunswick	547, 7
M'Connel v. Murphy	426		
— v. Wright	725, 726		

PAGE	PAGE		
Mackay v. Dick	430	McQuire v. Western Morning News Co.	752, 753
— v. Ford	745	McRobert v. Reid	992
— v. Mackreth	884	Macrow v. Gt. W. Ry. 539, 540,	541
— v. Toronto Cor.	955	Mactavish's Judicial Factor v. Michael's Trustees	311
McKay's Case	980	McVittie v. Marsden	183, 996
McKean v. McIvor	533, 846	Madden v. Kempster	860
McKenna v. City Life Assur- ance Co.	335	Maddever, <i>In re</i>	1038
Mackenzie, <i>Ex parte</i>	969, 970	Maddick v. Marshall	450
— v. British Linen Co. ...	70, 288	Maddison v. Alderson 240, 241,	412
— v. Chilliwack Cor. ...	674, 690	Madell v. Thomas	1046
— v. Hancock	378	Maden v. Catanach	142
— v. Hardinge	789	Magdalen Hospital v. Knotts 49, 879, 881,	935
Mackers v. Ramsays	487, 491	Magee v. Atkinson	15
McKewan v. Sanderson	555	— v. Lavell	18, 248
McKewan's Case	967	Magennis v. Dempsey	1008
M'Kewen v. Cotching	148, 849	Magnay v. Burt	796
Mackill v. Wright	357, 361	— v. Edwards	598
M'Kinnell v. Robinson	551	— v. Knight	199
M'Kinnon v. Penson	651	Magor v. Chadwick ...	36, 207, 718
Mackintosh v. Mitcheson ...	441, 473	Magrath v. Hardy	153
— v. Trotter	843	Maguire v. Liverpool Cor. ...	651
Mackley Case	962	Maguire's Case	975
Mackreth v. Symmons	61, 860	Maher & Nugent's Contract, <i>In re</i>	17
Mackusick v. Carmichael	613	Mahoney v. Besley	798
Maclae v. Sutherland	286	Mahony v. Holyford Mining Co.	971
M'Laughlin v. Pryor	658, 803	Mainprice v. Westley	250, 421
McLean v. Carlish	391, 395	Mainwaring v. Giles	722, 808
— v. Clydesdale Banking Co.	325	— v. Leslie	452
— v. Dunn	239, 420	Mair v. Rio Grande Rubber Estates	726, 968
— v. Fleming	359, 364	Maisel v. Financial Times (No. 1)	755
Macleay v. Tait	726	— v. Financial Times (No. 2)	755
Maclennan v. Segar	543, 679	Maitland v. Goldney	737
M'Leod v. M'Ghie	853	Makin v. Watkinson	622
— v. McNab	28	Malachy v. Soper	758
— v. Power	448	Malcolmson v. O'Dea	50, 176
Maclure, <i>Ex parte</i>	407	Malden v. Fyson	254
McMahon, <i>In re</i>	1015	Male v. Roberts	106
— v. Burchell	262	Mallalieu v. Hodgson	547
— v. Field	539	Mallam v. Rose	699
McManus v. Bark	319	Mallet v. Gt. E. Ry. Co.	519
— v. Cooke	241, 412	Mallory's Case	898, 943
— v. Crickett	656	Malone v. Laskey	650, 656
— v. Fortescue	240, 421	Malpas v. Clements	32
— v. Lancashire & York- shire Ry. Co.	518, 528	— v. L. & S. W. Ry.	16
M'Morrow v. Layden	645	Maltass v. Siddle	307
M'Mullen v. "Sir Alfred Hickman" S.S. Co.	202	Maltby v. Christie	62
McMyn, <i>In re</i>	1009	Malzy v. Eichholz	628
McNab v. Robertson	719	Mambre Saccharine Co. v. Corn Products Co.	433
M'Namara v. Brown	793	Man v. Carey	109
Macnee v. Gorst	833	Manby v. Curtis	91
M'Neil v. Perchard	1034	— v. Scott	451
M'Neil v. Richards	436		
Maccoun v. Erskine & Co.	479		
M'Pherson v. Daniels	756		
M'Queen v. Gt. W. Ry. Co.	526		

	PAGE	P.
Manby v. Witt	748	
Manchester (Mayor) v. Williams	734	
Manchester Bonded Warehouse Co. v. Carr	264, 265, 269, 619, 622	
Manchester Brewery Co. v. Coombs	271, 614, 898, 944	
Manchester Overseers v. Headlam	942	
Manchester, &c., Ry. v. Anderson	628	
— v. Brooks	590	
— v. Brown	519	
— v. Denaby Main Colliery Co.	526	
— v. Doncaster Union	577	
— v. N. Central Wagon Co.	857, 1046	
— v. Wallis	675	
Manchester Trust v. Furness	365	
Manders v. Williams	824, 1036	
Mandleberg, <i>Ex parte</i>	257	
Mangena v. Wright	178, 754, 755, 756	
Manifold v. Pennington	704	
Manley v. Berkett ..	439, 589, 591	
— v. Burn	692, 693	
— v. Field	787	
Mann v. Barrett	787	
— v. Edinburgh N. Tramways Co.	550, 955, 986	
— v. Forrester	856	
— v. Lang	1011	
— v. Lovejoy	883	
— v. Moors	303	
— v. Nunn	16, 235	
Manning v. Adams	678	
— v. Clement	755	
— v. Fitzgerald	18	
— v. Phelps	602	
Mansel v. Norton	270	
Mansell v. Clements	475	
— v. Griffin	793	
— v. Webb	644	
Mansfield v. Relf	265, 625	
Mansfield Union v. Wright ..	210, 370	
Mant v. Collins	803	
— v. Smith	392	
Mantz v. Goring	617	
Mannbens v. Leon	409	
Manville v. Thomson	788	
Manzoni v. Douglas	661	
"Maori" King (Cargo owners) v. Hughes	361, 363	
Maplin Sands, <i>In re</i>	160	
Mappin v. Liberty	809	
Mara v. Quinn	1010	
Marc v. Rouy	202	
March v. March		P.
Marchant v. Morton Down & Co.	122, 123, 443, 507,	
Mardall v. Thelluson		1
Mardorf v. Accident Insur. Co.		
Mare v. Charles		
Margary v. Robinson		
Margate Pier Co. v. Hannam ..	999, 1	
Margetson v. Wright	376,	
Margrett, <i>Ex parte</i>		
Maria das Dores, The		
Marie Joseph, The ...	347, 831,	
Marine Investment Co. v. Haviside		
Marine Mansions Co., <i>In re</i> ..	1	
Marine Spinning Co. v. Sutcliffe		
Marino's Case		
Marker v. Kenrick		
Market Overt, Case of		
Markey v. Tolworth Joint Hospital Board	689,	
Markham v. Paget	629,	
Marks v. Beyfus		
— v. Frogley		
— v. Hamilton		
— v. Laheè	55,	
— v. Samuel		
Markwick v. Hardingham		
Marlborough (Duke) v. Osborne		
Marlow v. Pitfield	486,	
Marney v. Scott		
Marpesia, The		
Marpessa, The		
Marples v. Hartley	1	
Marreco v. Richardson		
Marrett, <i>In re</i>		
Marriage v. Lawrence		
Marriott v. Cotton		
— v. Hampton	498, 501,	
— v. Stanley		
Marrow v. Flimby, &c., Brick Co.		
Marryat v. Marryat		
Marryatts v. White		
Marsden v. City and County Assur. Co.	341, 343,	
— v. Meadows	1	
Marsden's Estate, <i>In re</i>		
Marsh v. Davies		
— v. Horne		
— v. Hutchinson	1	
— v. Jones		
— v. Keating		
— v. Maxwell		
— v. Pedder		

	PAGE		PAGE
Marsh and Earl Granville, <i>In re</i>	250	Mason <i>v.</i> Farnell	920, 1009
Marshall <i>v.</i> Berridge	237	— <i>v.</i> Harvey	341
— <i>v.</i> Bolckow	352	— <i>v.</i> Hill	36, 717
— <i>v.</i> Broadhurst	1003	— <i>v.</i> Motor Traction Co. ...	199
— <i>v.</i> Cliff	68, 473	— <i>v.</i> Provident Clothing, &c., Co.	555
— <i>v.</i> Granville	475	— <i>v.</i> Rumsey	285
— <i>v.</i> Green	234, 416	— <i>v.</i> Sainsbury	344
— <i>v.</i> Lamb	40	— <i>v.</i> Shrewshury & Here- ford Ry.	718, 719
— <i>v.</i> Lynn	26	— <i>v.</i> Williams	730
— <i>v.</i> Nicoll	435	— <i>v.</i> Wood	40, 129, 1056
— <i>v.</i> Parker	173	Mason, Mason & Cattley, <i>In re</i>	141
— <i>v.</i> Pitman	942	Masper <i>v.</i> Brown	794
— <i>v.</i> Rutton	1021	Massam <i>v.</i> Thorley's Cattle Food Co.	166
— <i>v.</i> Taylor	811, 934	Massey <i>v.</i> Allen	51, 56
— <i>v.</i> Ulleswater S. Naviga- tion Co.	714, 807	— <i>v.</i> Goodall	271
— <i>v.</i> York & Newcastle Ry.	538, 540	— <i>v.</i> Johnson	998, 1000
Marshfield, <i>In re</i>	603	— <i>v.</i> Goyder	216
Marston <i>v.</i> Allen	291, 294	— <i>v.</i> Sladen	804
— <i>v.</i> Downes	142, 1014	Masson Tamplier & Co. <i>v.</i> De Fries	829
— <i>v.</i> Phillips	840, 847	Master <i>v.</i> Miller	315, 546
Martin, <i>In re</i>	910	Master's Case	964
— <i>v.</i> Andrews	495	Masters <i>v.</i> Barretto	279, 333
— <i>v.</i> Bell	1034	— <i>v.</i> Green	784
— <i>v.</i> G. E. Ry.	673	— <i>v.</i> Farris	785
— <i>v.</i> Gt. Indian Peninsular Ry.	518, 521, 538, 540	— <i>v.</i> Pollie	811
— <i>v.</i> Gt. N. Ry.	536, 663	Matheson <i>v.</i> Ross	200
— <i>v.</i> Henrikson	78	Mathew <i>v.</i> Blackmore	487
— <i>v.</i> London County Council	714	Mathews <i>v.</i> Biddulph	800
— <i>v.</i> Martin	115	Matson <i>v.</i> Baird	674
— <i>v.</i> Price	702	— <i>v.</i> Cooke	805
— <i>v.</i> Smith ...	267, 270, 883, 923	Matthew <i>v.</i> Osborne ...	821, 920, 921
— <i>v.</i> Spicer	16	Matthews <i>v.</i> Baxter	562
— <i>v.</i> Strachan	871	— <i>v.</i> Gibbs	358
— <i>v.</i> White	6	— <i>v.</i> Munster	210
— <i>v.</i> Whitmore	830	— <i>v.</i> Phillips	1005
Martindale <i>v.</i> Booth	1038	— <i>v.</i> Ruggles-Brise	483
— <i>v.</i> Falkner	393	— <i>v.</i> Sawell	259
— <i>v.</i> Smith	431, 842	— <i>v.</i> Smallwood ...	598, 904, 908
Martineau <i>v.</i> Kitching	342, 430	— <i>v.</i> Usher	874, 881
Martineaus <i>v.</i> Royal Mail Steam Packet Co.	347, 365	Matthewson <i>v.</i> Lydiate	597
Martyn <i>v.</i> Clue ...	617, 618, 620, 622	Mattbias <i>v.</i> Mesnard	779
— <i>v.</i> Gray	444	Matthiessen <i>v.</i> L. & County Bank	329
— <i>v.</i> Podger	924	Matts <i>v.</i> Hawkins	811
— <i>v.</i> Williams	607, 898	Maugham <i>v.</i> Hubbard	121, 158, 199
Marvin, <i>In re</i>	1015, 1018	— <i>v.</i> Sharpe	829
— <i>v.</i> Wallis	415, 416	Maund <i>v.</i> Monmouth Canal Co.	804, 956
Marzetti <i>v.</i> Williams	326, 399	Maunder <i>v.</i> Conyers	441
Maskell <i>v.</i> Hill	478	— <i>v.</i> Venn	787
— <i>v.</i> Horner	500	Maunsell <i>v.</i> Ainsworth	138
Maskelyne, &c., <i>v.</i> Smith	1038, 1064	Maving <i>v.</i> Todd	516
Mason, <i>Ex parte</i>	1059	Mavor <i>v.</i> Pyne	412
— <i>v.</i> Bradley	315	Mawby <i>v.</i> Barber	756
— <i>v.</i> Ditchbourne	216, 547	Mawson <i>v.</i> Hartsink	164

	PAGE		PAGE
Mawson S.S. Co. v. Beyer ...	351	Melling v. Leak	881, 9
Maxsted v. Paine	23, 459	Mellis v. Shirley Local Board	9
Maxted v. Morris	460, 461	Mellish v. Rawdon	9
— v. Payne	460, 461, 462	Melliss v. Shirley, &c., Board	9
Maxwell v. Jameson	478	of Health	9
Maxwell's Case	964	Mellor v. Leather	9
May v. Belleville	706, 716	— v. Walmesley ...	56, 706, 9
— v. Bornp	892, 893	— v. Watkins	820, 9
— v. Burdett	668	Mellors v. Shaw	9
— v. Chapman	316	Meluish v. Milton	1
— v. Footner	220	Melville v. Stringer	1058, 10
— v. May	194	Melville's (Lord) Case	72,
— v. Platt	241, 242, 628	Membery v. Gt. W. Ry. ...	659, 6
— v. Taylor	62		6
— v. Thomson	237	Mendelssohn v. Hoppe	9
Mayd v. Field	1022	— v. Ratcliffe	9
Mayer v. Jadis	293	Menetone v. Athawes	9
Mayfield v. Wadsley	438, 581	Mercantile Bank of London	9
Mayhew v. Boyce	661, 662	v. Evans	9
— v. Herrick	847, 852, 1037	Mercantile Bank of Sydney	9
— v. Nelson	533	v. Taylor	9
Maynard v. Consolidated Kent		Mercantile Investment Co. v.	
Collieries Co.	197, 964, 970	River Plate Trust & Loan	
— v. Eaton	461	Agency	9
— v. Peter Robinson, Ltd.	684	Mercer, <i>Ex parte</i>	10
Maynard's Case	962	— v. Denne	46, 56, 188, 9
Mayo, <i>In re</i>	28	— v. Whall	212, 9
— v. Joyce	886	— v. Woodgate	645, 9
Mead v. Daubigny	740	— v. Wright	84, 9
— v. Robinson	109, 189	Merceron v. Dowson	9
— v. S. E. Ry. Co.	532	Merchant Banking Co. of	
Measres Bros. v. Measures	408	London v. Phoenix Bessemer	
Meath (Bishop) v. Belfield		Steel Co.	9
(Lord)	30	Merchant Prince, The	213, 9
— v. Winchester (Marquis)	92	Merchant Shipping Co. v.	
Mecca, The	581	Armitage	357, 9
Mechelen v. Wallace	234	Merchants of the Staple of	
Medawar v. Grand Hotel Co.		England v. Bank of England	
.....	85, 541, 542	117, 118, 9
Mediana, The	667, 804	Meredith v. Meigh ...	414, 415, 9
Mediterranean, &c., S.S. Co.		— v. Footner	9
v. Mackay	360	Meres v. Ansell	9
Medley v. London United		Merest v. Harvey	791, 9
Tramways	216	Meriton v. Coombes	733, 7
Mee v. Cruikshank	796	753, 9
Meek v. Wendt	380	Merle v. More	9
Meering v. Grahame-White		Merrick v. Liverpool Cor.	9
Aviation Co.	762, 797, 798	— v. Wakley	9
Meggison v. Groves	413, 616	Merryweather v. Nixan	9
Meggison v. Harper	572	Mersey Docks Board v. Gibbs	9
Meguerditchian v. Lightbound	856	Mersey Docks Cases	9
Melaccrino v. Nickoll	433, 434	Mersey Steel & Iron Co. v.	
Melbourne Banking Cor. v.		Naylor	429, 972, 10
Brougham	955	Merttens v. Hill	9
Melen v. Andrews	60, 740	Messina v. Petrocchino	9
Melhado v. Porto Alegre Ry.		Messing v. Kemble	9
Co.	450, 971	Metals Constituent, <i>In re</i>	9
Melhuish v. Collier	156, 163	Metcalfe v. Britannia Iron	
Melles v. Holme	623	Works Co.	9

	PAGE		PAGE
Metcalf v. L. & Brighton Ry. Co.	525, 526,	Midland Counties District Bank v. Attwood	407
— v. Shaw	451	Midland Great Western Ry. v. Gordon	981
Metropolis & Counties, &c., Building Society, <i>In re</i>	940	Midland Insurance Co. v. Smith	503, 673, 791
Metropolitan Association, &c., v. Petch	640	Midland Ry. v. Edmonton Union	577
Metropolitan Asylums Board v. Kingham	233	— v. Martin	870
Metropolitan Asylum District v. Hill	653, 654,	— v. Robinson	695
Metropolitan Bank v. Heiron	565, 566	— v. Taylor	979
Metropolitan Water Board v. Dick, Kerr & Co.	476	— v. Wright	984
Metropolitan Board of Works v. Howard	175	Midwood v. Manchester Cor. ...	655
— v. M'Carthy	639	Mighell v. Sultan of Johore ...	167
Metropolitan Counties Society v. Brown	922	Migotti's Case	962
Metropolitan Omnibus Co. v. Hawkins	734	Milbank v. Milbank	11
Metropolitan Ry. v. Defries ...	261	Mildmay v. Newton	187
— v. Delaney	659	Mildmay's Case	17
— v. Jackson	659	Mildred v. Mashons .. 491, 590,	856
Metters v. Brown	925	Miles, <i>Ex parte</i>	864
Metzler v. Wood	205	Miles' Claim	285
Metzner v. Bolton	404	— v. Furber	779, 785
Meux v. Copley	269, 615	— v. Gorton	842
— v. Gt. E. Ry.	538, 657	— v. Harris	1070
— v. Jacobs	844	— v. New Zealand Alford Estate Co.	316
Meux's Executors' Case	65	— v. Rose	32
Mews v. Carr	239	Milgate v. Kebble	842
Mexican Mining Co., <i>Ex parte</i> ..	959	Mill v. Hawker	813
Meyer v. Decroix	284, 294	— v. New Forest Commis- sioners	705
— v. Dresser	22, 360, 364	Millar v. "Freden" (Owners) ..	356, 357, 361
— v. Everth	428	Millen v. Brasch	362, 525
— v. Sze Hai Tong	329	— v. Dent	200
Meyerhoff v. Froehlich	577	Miller v. Biddle	333
Meyerstein v. Barber	359	— v. Borner	356, 426
Meynell v. Angell	1073	— v. Burt	619
Meyrick v. Anderson	1010	— v. Caldwell	575
— v. Woods	10	— v. David	741
Michael v. Hart	480	— v. Dell	867, 870
— v. Scockwith	597	— v. Foster	91
Michell v. Rabbetts	92	— v. Francis	898
— v. Williams	763	— v. Green	783
Micklethwait v. Newlay Bridge Co.	809, 810	— v. Hancock	647
Middleditch v. Ellis	514	— v. Johnson	79
Middleton, <i>Ex parte</i>	827	— v. Lawton	377
— v. Barned	318	— v. Miller	119
— v. Hall	265	— v. Newman	438
— v. Melton	53	— v. Race	837
— v. Pollock	589	— v. Salomons	143
— v. Sandford	121	— v. Tetherington	21
Midgley v. Coppock	624	— v. Thomson	280
— v. Wood	912	— v. Travers	27
Mid Kent Fruit Factory, <i>In re</i> ..	972	Miller's Case	965
		Miller & Aldworth v. Sharp ...	241
		Miller, Gibb & Co. v. Smith & Tyrer	84, 443
		Millership v. Brookes	125

	PAGE		P.
Millett v. Van Heek	434	Mitchell's N. Case	
Milligan v. Wedge	648	Mitchell's Claim ... 58, 573, 575,	
Millington v. Loring	384	Mitchell, Cotts & Co. v. Steel	359,
Mills, <i>Ex parte</i>	446		
— v. Ball	863	Mitchell-Henry v. Norwich	
— v. Barber	212	Union, &c., Society	
— v. Cannon Brewery	613	Mitcheson v. Nicol	
— v. Capel	940	— v. Oliver	
— v. Colchester Corpn.	37	Mizen v. Pick	
— v. Collett	795	Moakes v. Nicholson	
— v. East London Union ...	620	Moens v. Heyworth	
— v. Fowkes ... 570, 577, 582, 583	583	Moffat v. Bateman	
— v. Goff	894	— v. Laurie	
— v. Mills	56	— v. Parsons	
— v. Oddy	213, 315, 316	Mogul S.S. Co. v. McGregor	
— v. Stephens	213	Gow & Co.	
Mills' Estate, <i>In re</i>	223	Mohima v. Mohesh	
Mills' Trust, <i>In re</i>	925	Moises v. Thornton	117,
Millwall, The	379	Molière S.S. Co. v. Naylor ...	
Millward v. Buswell	131	Molineaux v. London Birming-	
— v. Midland Ry.	686	ham Insur. Co.	
Milne, <i>Ex parte</i>	1064	Mollett v. Brayne	
Milner, <i>Ex parte</i>	555	— v. Wackerbarth	422,
Milner's Safe Co. v. Gt. N. &		Mollwo v. Court of Wards 445,	
City Ry.	716	Molton v. Camroux	
Milnes v. Duncan	497	Molyneux v. Hawtrey	
Milton v. Edgeworth	587	— v. Richard	
Milward v. Caffin	942	Monaghan v. Rhodes	
— v. Forbes	58	Moncke v. Butler	
— v. Littlewood	382	Monckton v. Payne	
— v. Temple	67	Mondel v. Steel	
Miner v. Gilmour	717	Monet, <i>Ex parte</i>	
Minet v. Morgan	140, 152	Monetary Advance Co. v. Cater 10	
Minford v. Carse	608	Moneux v. Goreham	
Minister v. Apperley	210, 224	Money v. Leach	
— v. Price	1049	Monk, <i>In re</i>	
Minshall v. Lloyd	6, 824, 843,	— v. Noyes	
	1034, 1038	— v. Whittenbury	
Minshull v. Oakes	621	Monks v. Dykes	793, 8
Mirabita v. Imperial Ottoman		Monkton v. A.-G. ... 41, 42, 43,	
Bank	348, 825	Monmouthshire Canal Co. v.	
Misa v. Currie	24, 856	Harford	7
Mist v. Metropolitan Water		Monro v. Burghclere (Lord) ...	6
Board	652	Monroe v. Twistleton	1
Mitchell v. Aberdeen Insur.		Monson v. Tussauds	733, 7
Committee	991	Montagu v. Forwood	
— v. Cantrill	697	Montague v. Benedict	
— v. Cockburne	483	— v. Davies Benachi & Co.	
— v. Crasweller	220	1069, 1070, 10	
— v. Darthez	358	— v. Perkins	2
— v. Holmes	1005	— v. Preston	5
— v. Jenkins	762	Montaignac v. Shitta	
— v. Lancashire & Yorks.		Monte Rosa, The	
Ry.	533	Montefiore v. Lloyd	
— v. Lapage	422	— v. Menday Motor Co. ...	50
— v. Moorman	1005		549, 5
— v. Reynolds	556	Monti v. Barnes	
— v. Simpson	796, 1035	Montreal Gas Co. v. Vasey ...	
Mitchell's Case	969	Montriu v. Jefferys	4

	PAGE		PAGE
Monypenny v. Bristow	131	Morgan v. Davies	888
Moodie v. Bannister	603	— v. Fear	697
— v. Reid	136	— v. Griffith	16, 235
Moody v. Steggles	36, 803	— v. Hardy	620
— v. Thurston	181	— v. Harris	80
Moon v. Andrews	1016	— v. Hughes	795, 797
— v. Raphael	853, 868, 1035	— v. Jones	515
— v. Towers	761	— v. Knight	855
— v. Witney Union	472	— v. Lariviere	507
Moons v. De Bernales	180	— v. L. General Omnibus Co.	684
Moorcock, The	373, 671, 679	— v. Morgan	119, 940
Moore v. Burke	725	— v. Nicholl	178
— v. Bushell	491	— v. Palmer	500, 1000
— v. Campbell	423, 437	— v. Pike	598
— v. Clementson	590	— v. Powell	815
— v. Flanagan	451	— v. Ravey	541, 542, 1007
— v. Fulham Vestry	501	— v. Rowland	570
— v. Gamgee	182	— v. Thomas	1003
— v. Garwood	494	— v. Vale of Neath Ry.	682
— v. Harris	361	— v. Wallis	746
— v. Hill	514	— v. Whitmore	33
— v. King	132	Moriarty v. Brooks	207
— v. Knight	565	— v. L. & C. D. Ry.	57, 62
— v. Lamheth Waterworks..	652	Morier, <i>Ex parte</i>	589
— v. Landauer	456	Morison v. Gray	840
— v. Metropolitan Ry.	957	— v. London County & West- minster Bank	278, 287
— v. N. W. Bank	960	— v. Thompson	489
— v. Ostler	756	Morland v. Pellatt	1066
— v. Peachey	11	Morley v. Attenborough	374
— v. Pyrke	478	— v. Clifford	703
— v. Rawson	696, 700	— v. Pincombe	782
— v. Robinson	802	Morphett v. Jones	241
— v. Smee	907	Morrell v. Cowan	17
— v. Ulcoats Mining Co. ...	905	— v. Frith	575, 576
— v. Voughton	511	Morris, <i>In re</i>	1016
— v. Warren	583	— v. Baron ... 26, 237, 412, 419, 437, 545, 587	288
— v. Watts	840	— v. Bethell	288
— v. Woolsey	339	— v. Carnarvon County Coun- cil	647
Moore & Robinson's Banking Co., <i>In re</i>	1047	— v. Davies	917
Moore, Nettlefold & Co. v. Singer Co.	774	— v. Délobbel-Flipo	1048
Moorsom v. Page	356	— v. Edwards	141
Moravia v. Sloper	75	— v. Hanser	9
Mordaunt v. British Oil & Cake Mills	827, 864	— v. Levison	356, 357
Mordue v. Durham (Dean)	694	— v. Lotan	213
Morel Bros. & Co. v. West- moreland (Earl)	447, 451	— v. Martin	453
Moreland v. Bennett	635	— v. Matthews	636
Morewood v. S. Yorkshire Ry. 1053		— v. Ogden	926
— v. Wood	44, 45	— v. Salberg	813
Morgan, <i>In re</i>	1036	— v. Saxelby	556
— v. Bain	432, 842	Morrison v. Barking Chemicals Co.	369
— v. Birnie	469	— v. Chadwick	263, 607
— v. Bissell	884	— v. Lennard	145
— v. Brydges	1034	— v. Ritchie	733
— v. Couchman	179	— v. Shaw, Savill, &c., Co.	360
— v. Curtis	722		

	PAGE		P
Morrison v. Sheffield Corp. ...	652	Muir v. Crawford	323,
Morrison, Jones, &c., <i>In re</i> ...	845	Mulgrave v. Ogden	
Morritt, <i>In re</i>	1060	Mullens v. Miller	
— v. N. E. Ry. Co.	525	Mullett v. Hulton	
Morrow v. Stepney Corporation	653	— v. Hunt	
Mors-le-Blanch v. Wilson	359	— v. Mason	
Morse v. Slue	360, 516	Mullick v. Radakissen	
Mortimer v. Cragg	1070	Mulliner v. Florence ...	848, 856, 858,
— v. M'Callan	2, 109	— v. Midland Ry. Co.	
— v. Preedy	258	Mumford v. Collier	1
Mortimore v. Wright	454	— v. Gethling	
Mortin v. Shoppee	790	— v. Oxford, &c., Ry. Co. ...	
Morton v. Palmer	782	Munday v. Asprey	235,
— v. Tibbett	414, 415	— v. London County Coun- cil	
— v. Woods	945	— v. Norton	
Morton's Case	981	Mundy v. Jolliffe	
Moscatti v. Lawson	215	— v. Rutland (Duke)	
Moseley v. Hanford	14	Municipal Building Soc. v. Smith	898,
— v. Rendell	1003, 1004	Munn v. Godbold	
Moses v. Macferlan	181, 488	Munro v. De Chemant	
Moss v. Hall	323	— v. Mallow Urban Council	
— v. Hancock	836, 838	Munroe v. Pilkington	184,
— v. James	843	Munster v. Lamb	
— v. Sweet	438	— v. S. E. Ry. Co.	
Moss S.S. Co. v. Whinney ...	855	Murchie v. Black	
Mossam v. Ivy	193	Murgatroyd v. Robinson	
Mostyn v. Atherton	719	— v. Wright	
— v. Fabrigas	106	Murly v. M'Dermott	30,
— v. W. Mostyn Coal & Iron Co.	548, 611, 629	Murphy v. Boese	
Mott v. Shoobred	640	— v. Caralli	648,
Motteram v. E. Counties Ry. ...	91	— v. Sullivan	
Mouatt, <i>In re</i>	1010	Murray v. Bush	
Mouflet v. Cole	556	— v. Currie	648,
Moule v. Brown	326	— v. East India Co.	1
— v. Garrett	480	— v. Fitzgerald	
Moulis v. Owen	319, 553	— v. Gregory	
Moult v. Halliday	403	— v. Hall	812,
Mounsey v. Blamire	29	— v. Mackenzie	1
— v. Ismay	702	— v. Mann	
Mountcashel (Earl) v. Barber... 482		— v. Milner	43,
Mountford v. Gibson	1006	— v. Stair (Earl)	125,
— v. Harper	34	Muschamp v. Lancaster, &c., Ry.	
Mountnoy v. Collier	263	Musgrave v. Drake	285,
Mountstephen v. Lakeman ... 220, 366		— v. Emmersen	
Mourmand v. Le Clair	1059	— v. Inclosure Commissioners	
Mousley v. Lndlam	271	— v. Newall	
Mowats v. Hudson	844	Musgrove v. Pandalis	
Mowatt v. Castle Steel & Iron Works Co.	117, 986	Mussen v. Price	457,
— v. Londesborough	511	Musurus Bey v. Gadban ...	568,
Mowbray v. Merryweather	380	Mutlow v. Bigg	
Moxham v. Grant	483	Mutton, <i>Ex parte</i>	1
Moyle v. Jenkins	687	— v. Peat	
Mucklow v. Mangles	827	Mutual Loan Assoc. v. Sudlow	
Muggeridge, <i>In re</i>	564	Myers v. Defries	
Muggleton v. Barnett	187	— v. Elliott	1059, 1
Muilman v. D'Eguino	297, 304		

	PAGE		PAGE
Myers v. Perigal	235	National Telephone Co. v. King-	992
— v. Sarl	21	ston-upon-Hull Cor.	992
Mynn v. Joliffe	579	Nautilus S.S. Co. v. Henderson	873
Myroft v. Sleight	732	Naylor v. Mangles	856
Myrtle v. Beaver	471	Neal v. Joy	193
Mytton v. Midland Ry. Co. ...	521,	— v. Swind	259
	540	Neale v. Clarke	229
— v. Thornbury	47	— v. Electric, &c., Co.	688
Mytton Overseers v. Thornbury	91, 92	— v. Fry	192
		— v. Gordon Lennox ...	208, 211
NANNEY v. Morgan	978	— v. Mackenzie	263
Nant-y-glo, &c., Ironworks Co.		— d. Leroux v. Parkin	60
v. Grave	490	— v. Ratcliffe	622
Napier v. Williams	597	Neall v. Beadle	883
Nargett v. Nias	784, 785	Neate v. Harding	502
Nash v. De Freville	322	Neaverson v. Peterborough	
— v. Duncomb	199	Rural Council	36, 37
— v. Hodgson	571	Needham v. Bremner ..	171, 179, 453
— v. Inman	558	Neeld v. Hendon Urban Coun-	
— v. Lucas	778	cil	713
— v. Palmer	626	Neenan v. Hosford	662
— v. Rochford Rural Council	652	Neill v. Devonshire (Duke) ...	45, 49,
Natal Land, &c., Co. v. Pauline		77, 170, 174, 812	812
Colliery Syndicate	450, 972	— v. Whitworth	427
Nathan v. Jacob	12, 59	Neill's Case	967
— v. Woolf	913	Neilson v. James	459
Nathans v. Ogdens	325, 544	— v. L. & N. W. Ry. Co. ...	519
Nation v. Tozer	260	Nelson, <i>Ex parte</i>	1050
Nation's Case	964	— v. Cherrill	802
National Bank v. Silke	330	— v. Couch	181
National Exchange Co. of Glas-		— v. Dahl	352, 355
gow v. Drew	65, 727, 957	— v. Liverpool Brewery Co.	650
National Mail Motor Coach Co.		— v. Whittall	119
(No. 1), <i>In re</i>	972	Nelson Line v. Nelson	360, 522
National Mercantile Bank, <i>Ex</i>		Nelson & Sons v. Nelson Line	351
<i>parte</i>	1049, 1052	Nene Valley Drainage Commrs.	
— v. Hampson	830	v. Dunkley	236
— v. Rymill	852	Nec v. Nec	31, 910
National Park Bank of New		Nepean v. Doe d. Knight 932, 936,	941
York v. Berggren	275, 281	Nesom v. Metcalfe	766
National Phonograph Co. v.		Ness v. Armstrong	982
Edison - Bell Consolidated		— v. Stephenson	782
Phonograph Co.	556	Nettleingham v. Powell	689
National Phonograph of Aus-		Nevanas v. Walker	556
tralia v. Menck	410, 556	Nevill v. Fine Arts, &c., Insur.	
National Protector Fire, &c.,		Co.	733, 750
Co. v. Nivert	343	Nevill's Case	372
National Provincial Bank of		Neville v. London Express	
England, <i>Ex Parte</i>	370	Newspapers	550, 956
— v. Glanusk	371	New Balkis Eersteling v. Randt	
— v. Jackson	123, 547, 597	Gold Mining Co.	967
National Provincial, &c., Insur.		New Brunswick & Canada Ry.	
Co. v. Prudential Assur. Co.	701	v. Muggeridge	547, 968
National Savings Bank Associa-		New Brunswick Co. v. Cony-	
tion v. Tranah	458	beare	207, 968
National Telephone Co. v. Baker		New Chinese Antimony Co. v.	
209, 654, 671		Ocean S.S. Co.	346, 364
		New Imperial & Windsor Hotel	
		v. Johnson	642

	PAGE		
New London Credit Syndicate <i>v.</i> Neale	319	Newson <i>v.</i> Pender	
New Moss Colliery <i>v.</i> Man- chester Cor.	695	Newsum <i>v.</i> James	
New River Co. <i>v.</i> Crumpton ...	902	Newton <i>v.</i> Allin	
New Romney (Mayor) <i>v.</i> New Romney Sewers Commis- sioners	175	— <i>v.</i> Beck	
New Sombbrero Phosphate Co. <i>v.</i> Erlanger	1007	— <i>v.</i> Belcher	57,
New Westminster Brewery Co. <i>v.</i> Hannah	166	— <i>v.</i> Chaplin	142
New York Breweries Co. <i>v.</i> Att.-Gen.	1010	— <i>v.</i> Forster	
New Zealand, &c., Co. <i>v.</i> Wat- son	219, 491, 591	— <i>v.</i> Harland	
New Zealand Gold Co. <i>v.</i> Pea- cock	964, 967	— <i>v.</i> Liddiard	
Newall <i>v.</i> Elliott	196	— <i>v.</i> Ricketts	
— <i>v.</i> Starkie	991	— <i>v.</i> Sherry	
— <i>v.</i> Tomlinson	498	Newton's Case	
Newberry <i>v.</i> Bristol Tramways Co.	660	Niblett <i>v.</i> Confectioners' Mate- rials Co.	
Newbigging <i>v.</i> Adam	724	Niboyet <i>v.</i> Niboyet	
Newbold <i>v.</i> Coltman	997	Nicholas <i>v.</i> Chamberlain	
Newbold & Metropolitan Ry., <i>In re</i>	196	Nicholl <i>v.</i> Jones	
Newbould <i>v.</i> Smith	54, 600	Nicholls <i>v.</i> Diamond	279,
Newby <i>v.</i> Sharpe	219, 263, 622	— <i>v.</i> Dowding	
Newcastle (Duke) <i>v.</i> Broxtowe	46	— <i>v.</i> Downes	
— <i>v.</i> Clark	810	— <i>v.</i> Evans	
Newcastle Pilots <i>v.</i> Bradley ...	33	— <i>v.</i> Haywood	
Newcomen <i>v.</i> Coulson ...	706, 716	— <i>v.</i> Parker	4†
Newell <i>v.</i> National Provincial Bank of England	1005	— <i>v.</i> Rosewarne	
— <i>v.</i> Radford	18, 418	Nichols <i>v.</i> Marsland ...	517, 659,
Newen, <i>In re</i>	210	Nicholson <i>v.</i> Bradfield Union ...	
Newfoundland Government <i>v.</i> Newfoundland Railway	507, 508, 591	— <i>v.</i> Brooke	
Newhall <i>v.</i> Holt	2, 59, 513	— <i>v.</i> Coghill	
Newham <i>v.</i> Raithby	194	— <i>v.</i> Cooper	855,
Newitt, <i>Ex parte</i>	1048	— <i>v.</i> Gooch	
Newlove <i>v.</i> Shrewsbury	1046	— <i>v.</i> Lancashire, &c., Ry. ..	
Newman, <i>In re</i>	248	— <i>v.</i> Revill	
— <i>v.</i> Newman	34, 336	— <i>v.</i> Ricketts	
— <i>v.</i> Oughton	553	— <i>v.</i> Smith	
— <i>v.</i> Rogers	245	Nickalls <i>v.</i> Merry ...	23, 459, 461,
— <i>v.</i> Zachary	742	Nickells <i>v.</i> Atherstone	
Newman & Dale S.S. Co. and British, &c., S.S. Co., <i>In re</i> ...	349	Nickoll <i>v.</i> Ashton	
Newmarch <i>v.</i> Clay	581	Nickolson <i>v.</i> Knowles	
Newport <i>v.</i> Godfrey	578	Nickson <i>v.</i> Jepson	
Newry & Enniskillen Ry. <i>v.</i> Edmunds	980, 983	Nicol, Tufnell & Ponsonby's Cases	
Newsam <i>v.</i> Carr	761, 766	Nicoll <i>v.</i> Greaves	
Newson <i>v.</i> Thornton	862	Nicolls <i>v.</i> Bastard ...	823, 824,
Newsome <i>v.</i> Coles	444	Nield <i>v.</i> L. & N. W. Ry.	
— <i>v.</i> Graham	498	Nielsen <i>v.</i> Wait	21,
		Nifa, The	
		Nightingale <i>v.</i> Devisme ...	478,
		— <i>v.</i> Parsons	
		Nightingall <i>v.</i> Smith	
		Nind <i>v.</i> Nineteenth Century Building Soc.	907.
		Nisbet <i>v.</i> Rayne	
		Nisbet & Potts Contract, <i>In re</i>	249
		Nitedals Tændstikfabrick <i>v.</i> Bruster	

PAGE	PAGE
Nitrophosphate, &c., Manure Co. v. L. & S. Katherine's Dock Co.	517, 671
Nixon v. Albion Marine Insurance Co.	204
— v. Freeman	777
— v. Jenkins	850
— v. Mayoh	141
Noble v. Adams	831, 865
— v. Durell	24
— v. Edwardes	245
— v. Kennoway	76
— v. National Discount Co.	491
— v. Ward	26, 437, 587
Nockels v. Crosby	494
Nocton v. Ashburton (Lord) ...	723
Nodin v. Murray	12
Noel v. Redruth Foundry Co. ...	687
— v. Robinson	920
Noell v. Wells	180
Nolisement (Owners) v. Bunge & Born	348, 351
Norburn v. Hillman	221
Norden Steam Co. v. Dempsey ..	21
Nordenfelt v. Maxim Nordenfelt, &c., Co.	555
Norfolk County Council v. Child ..	893
Norfolk (Duke) v. Arbutnot ..	36, 722, 807
— v. Worthy	248, 253
Norfolk Ry. Co. v. M'Namara ..	578
Norman v. Gt. Western Ry. ...	647
— v. Phillips	414
— v. Thompson	544
— v. Villars	1021
Norris, <i>In re</i>	388
— v. Great Central Ry.	519
North v. Bassett	472
— v. Loomes	238
— v. Miles	65, 1035
— v. Wood	670
North American Land, &c., Co. v. Watkins	564
North Australian Territory Co. v. Goldborough	161
North British & Merc. Insur. Co. v. L. Liverpool & Globe Insur. Co.	344
North British Insur. Co. v. Lloyd	371
— v. Moffatt	342
North British Ry. v. Wood ...	544
North Eastern Ry. v. Hastings (Lord)	26
— v. Wanless	674
North London & General Property Co v. Moy	265
North Metropolitan Tramways Co. v. London County Council ..	992
North & South Wales Bank v. Macbeth	281
North Stafford Steel, &c., Co. v. Ward	965
North Staffordshire Ry. v. Hanley Cor.	56
North Sydney, &c., Co. v. Higgins	971
North W. Bank, <i>Ex parte</i>	1046
North Western Ry. v. M'Michael ..	969, 982
— v. Whinray	371
North Western Salt Co. v. Electrolytic Alkali Co. ...	506, 549
Northam v. Bowden	841
— v. Hurley	717, 720
Northampton (Mayor) v. Ward ..	807
Northcote v. Doughty	385
Northcott v. Roche	633
Northern Assam Tea Co., <i>In re</i> ..	589
Northumberland Avenue Hotel Co., <i>In re</i>	972
Northumbria, The	361
Norton v. Davison	417
— v. Ellam	289, 567, 592
— v. Herron	83
— v. L. & N. W. Ry.	934
— v. Pickering	307
— v. Powell	554, 555
— v. Seymour	286
Norval v. Pascoe	898
Norway, The	361, 859
Notara v. Henderson	365
Notting Hill, The	667
Nottingham Brick & Tile Co. v. Butler	250
Nottingham, &c., Building Soc. v. Thurstan	561
Nottingham Guardians v. Tomkins	918
Nottingham Hide, &c., Co. v. Bottrill	369
Nottingham Patent Brick & Tile Co. v. Butler	253
Nottingham Union v. Tomkinson	147
Novelli v. Rossi	185, 546
Nowell v. Roake	823
Nowlan v. Ablett	403, 404
Noy v. Reynolds	488
Noyce, <i>In re</i>	93
Noyes v. Price	488
Nugee, <i>Ex parte</i>	1005, 1006
Nugent v. Smith	516, 517, 518
Nunn v. Fabian	241
Nussey v. Provincial Bill-posting Co.	615
Nuttall v. Bracewell	717

	PAGE		PAGE
Nuttall v. Staunton	943	Oliver v. Nautilus Steam Ship-	
Nyberg v. Handelaar	840, 869	ping Co.	61
		— v. N. E. Ry.	648
		— v. Oliver	869
OAKAPPLE d. Green v. Copous ...	890	Olivia, The	94
Oakeley v. Ooddeen	213	Olley v. Fisher	241
Oakes v. Green	1055	Olliott v. Bessey	796
— v. Turquand	968, 973	Ollivant v. Bayley	456
— v. Wood	792	Ollive v. Booker	350
Oakey v. Dalton	1002	Olney (or Onley) v. Gardiner ...	709
Oakley v. Monck	272	Olpherts v. Coryton	1015
— v. Portsmouth, &c., Steam		Omealey v. Newell	192
Packet Co.	517	Omichund v. Barker	142, 143
Oastler v. Henderson	259	Omca, &c., Coal & Iron Co. v.	
Oates v. Brydon	878	Huntley	360
— v. Hudson	501	O'Neil v. Armstrong	476
Oates' Case	168	— v. City & County Finance	
Oatway, <i>In re</i>	582	Co.	1062
Ohicini v. Bligh	185	Onley v. Gardiner	710
O'Brien v. Clement	757	Onslow v. Corrie	606
Ocean Accident Corporation v.		— v. Eames	378
Ilford Gas Co.	809	Onward Building Soc., <i>In re</i> ...	459
Ochsenhein v. Papelier	184	— v. Smithson	69, 597
Ockenden, <i>Ex parte</i>	858	Ooregum Gold Mining Co. v.	
— v. Henley	247	Roper	962
O'Connor v. Grand Interna-		Oppenheim v. Russell	855
tional Hotel Co.	542	— v. White Lion Hotel Co.	542
— v. Marjoribanks	151	Oppenheimer v. Attenborough	833
Oddy v. Paulet	751	— v. Frazer	833
Odell, <i>Ex parte</i>	1046	Opperman v. Smith	944
— v. Wake	606	Oram v. Hutt	550
Odessa Tramways Co. v. Mendel	969	Orchard v. Bush	541
Oelkers v. Ellis	566	— v. Rackstraw	858
Oesterreichische Export, &c. v.		Orchis, The	484
British Indemnity Co.	82	Ord v. Portal	294
Oettinger v. Cohn	331	Orford v. Cole	383
Offin v. Rochford Rural Council		Oridge v. Sherborne	333
	713, 991	Orient Co. v. Brekke	440
Offord v. Davies	369	Oriental Commercial Bank, <i>Ex</i>	
Ofner, <i>In re</i>	29	<i>parte</i>	317
Ogden v. Benas	325	Oriental Financial Association,	
— v. Graham	359	<i>Ex parte</i>	509
— v. Ogden	910	— v. Overend, Gurney & Co.	323
Ogdens v. Nelson	407, 475	Oriental S.S. Co. v. Tylor ...	348, 356
Ogg v. Shuter	348, 440	Original Hartlepool Collieries	
Ogilvie v. Foljamhe	236	Co. v. Gibb	588, 642
— v. West Australian Cor.	70	Orme v. Galloway	509
Ogle v. Norcliff	74	Ormerod v. Todmorden Joint	
— v. Vane (Earl)	419, 435	Stock Mill Co.	208, 717, 720
O'Hanlan v. Gt. W. Ry.	534	Ormerod's Case	962, 967
Ohrhy v. Ryde Commissioners	651	Ormiston v. G. W. Ry. Co. ...	539,
Oldenburg (Prince), <i>In re</i>	108		731
Oldershaw v. King	367	Ormond v. Holland	681
Oldfield v. Round	250	Ornamental Woodwork Co. v.	
Olive v. Guin	72, 87	Brown	450, 965
Oliver v. Dovatt	308	O'Rourke v. Commr. for Rail-	
— v. Fielden	350	ways	147, 387
— v. Hunting	236	Orpen's Case	981
		Orr v. Maginnis	307

	PAGE		PAGE
Orr v. Morice	128	Oxley v. Wilkes	757
Orr-Ewing v. Colquhoun ...	711, 714, 717, 720	Ozard v. Darnford	452
Orton v. Butler	824	PACAYA Rubber, &c., Co., <i>In re</i>	726
Osborn, <i>In re</i>	393	Pack v. Tarpley	923
— v. Gillett	664, 835	Packer v. Gillies	836
— v. Wise	818	Paddock v. Forrester	58
Osborne v. Amalgamated Society of Railway Servants	556	— v. Fradley	30
— v. Chocqueel	668	Padget v. Priest	1009
— v. Jackson	687	Padmore v. Lawrence	748
— v. L. & N. W. Ry. ...	678, 681	Padstow, &c., Assur. Assoc., <i>In re</i>	551
— v. Milman	796	Padwick v. Scott	1003
Osgood v. Nelson	502	Page v. Cowasjee	431, 804, 842
— v. Sunderland	566	— v. Hatchett	641
O'Shea, <i>In re</i>	478	— v. Midland Ry.	628
— v. Wood	140, 152	— v. Morgan	413, 415
Ostell v. Lepage	186	— v. Newman	509
Oswald v. Berwick (Mayor) ...	372	Paget v. Foley	602
— v. Legh	34	Paice v. Walker	83
Ottaway v. Hamilton	452	Paine, <i>In re</i>	389
Ottos Kopje Diamond Mines, <i>In re</i>	964, 979	— v. Chisholm	228
Oughton v. Seppings	802	— v. Strand Union	476
Oulds v. Harrison	313, 590	Painter v. Abel	487
Outram v. Morewood ...	50, 168, 169	Palace Shipping Co. v. Gans S.S. Line	359
— v. Outram	142	Palethorpe v. Furnish	66
Over v. Harwood	84	Palethorpe v. Home Brewery Co.	615
Overend, Gurney & Co., <i>Ex</i> <i>parte</i>	286, 970, 973	Paley v. Garnett	685
Overton v. Freeman	648	Palgrave v. Windham	1065
Overweg, <i>In re</i>	480	Palk v. Skinner	705, 710
Owen, <i>In re</i>	600, 936	Palliser v. Gurney	1020
— v. Barrow	579	Pallister v. Pallister	1067
— v. Burnett	524	Palmer v. Birmingham Manu- facturing Co.	760
— v. Cronk	443	— v. Bramley	584, 948
— v. De Beauvoir	934, 948	— v. Earith	623
— v. Homan	370	— v. Fletcher	697, 706
— v. Legh	774, 776	— v. Garrett	229
— v. Leigh	783	— v. Grand Junction Ry. ...	977
— v. Owen	876	— v. Guadagni	707
— v. Routh	467	— v. Hutchinson	471
— v. Van Ulster ...	279, 286, 449	— v. Jarman	847
— v. Waters	32	— v. Johnson	252
— v. Wilkinson	589	— v. Mallet	598
— v. Williams	133	— v. Snow	555
— v. Wolley	575	— v. Trower	163
Owen and Ashworth's Claim ...	971	— v. Waller	1018
Owens v. Wynne	777	Palmerston's (Lord) Case	103
Oxendale v. Wetherell	439	Panama, &c., Royal Mail Co. v. Kennedy	968
Oxenham v. Clapp	1014	Panama, &c., Telegraph Co. v. India Rubber, &c., Co.	547
— v. Lemon	392	Panmure, <i>Ex parte</i>	380, 381
Oxford & Cambridge Univers. v. Gill	81	Pannell v. City of London Brewery	902
Oxford Corporation v. Crow ...	954	Panoutsos v. Raymond Hadley Corporation	423
Oxford Rate, <i>In re</i>	74		
Oxlade & North E. Ry. Co., <i>In re</i>	518		

	PAGE		PAGE
Panton v. Jones	256	Parmiter v. Coupland	732
— v. Williams	763	— v. Parmiter	573, 576
Papè v. Westacott	580	Parr v. Lillicrap	229
Papendick v. Bridgwater	55, 63	— v. Wintringham	489
Papillon v. Brunton ..	891, 892, 895	Parr's Banking Co. v. Yates ...	567, 582
Papworth v. Battersea Borough Council	652	Parrot v. Anderson	948
Paquin v. Beauclerk	1026	Parrott, <i>In re</i>	121
Paquine v. Snary	1027	— v. Fishwick	764
Parana, The	535	— v. Watts	48
Parbury's Case	965	Parry v. Duncan	944
Pardington v. S. Wales Ry. Co.	529	— v. May	8
Pardo v. Bingham	568, 569	— v. Nicholson	315
Pardoe, <i>In re</i>	600	— v. Roberts	495
— v. Price	6	— v. Smith	673, 680
Pargeter v. Harris	605	Parry & Hopkin, <i>In re</i>	269
Paris v. Levy	753	Parson v. Nesbitt	574
Park, <i>In re</i>	394	Parsons, <i>Ex parte</i>	1045, 1051, 1058
Parke, <i>Ex parte</i>	946	—, <i>In re</i>	1027
— v. Mears	121	— v. Alexander	221
Parker, <i>Ex parte</i>	964	— v. Blandy	500
—, <i>In re</i>	481, 551	— v. Brand	1058
— v. Atfield	1017	— v. Equitable Investment Co.	1050
— v. Bristol & Exeter Ry. Co.	500	— v. Gingell	780
— v. Crisp	417	— v. Hancock	1012
— v. First Avenue Hotel Co.	702	— v. Loyd	793
— v. Frith	245	— v. Mayesden	1009
— v. Gibbins	260	— v. New Zealand Shipping Co.	365
— v. Godin	851	— v. Purcell	176
— v. Gordon	298	— v. Queen Insur. Co.	341
— v. Gt. W. Ry.	500, 520	— v. St. Matthew's Vestry	651
— v. Hoskins	119	— v. Surgey	736, 750
— v. Ibbetson	21, 404	Parsons & Brixham Fishing, &c., Socy., <i>In re</i>	387
— v. Jones	877, 906	Partington v. Butcher	575
— v. Leach	722	Parton v. Crofts	422, 423
— v. Leigh	322	— v. Williams	993, 995
— v. Lewis	170, 483	Partridge v. Scott...35, 692, 693, 709	947
— v. London County Council	991	Pascoe v. Pascoe	723, 729
— v. McWilliam	142	Pater v. Baker	758
— v. Mitchell	709	Paterson v. Gandassequi	442
— v. Rawlings	431	Pateshall v. Tranter	376
— v. S. E. Ry.	538	Patrick v. Milner	245
— v. Staniland	234, 438, 807	— v. Simpson	940
— v. Taswell	886	Patrickson v. Patrickson	914
— v. Wallis	416	Patridge v. Coates	8
— v. Winlow	83	Patscheidner v. Gt. W. Ry. ...	540
Parker's Policies, <i>In re</i>	335	Patten v. Patten	925
Parkes v. Prescott	736	— v. Rea	658
Parkin v. S. Hetton Colliery Co.	406	Patterson v. Landsberg	548
Parkins v. Hawkshaw ...	68, 121, 151	— v. Ritchie	818
— v. Scott	741	— v. Wallace	690
Parkinson v. Collier	22	Pattinson v. Luckley	470, 546
— v. Francis	113	Pattison v. Jones	739, 747
— v. Garstang, &c., Ry. ...	674	— v. Robinson	827
— v. Lee	376		
Parks v. Edge	311		
Parmenter v. Webber	606, 947		

	PAGE		PAGE
Paul v. Dod	457	Pearson v. Commercial Union	
— v. G. E. Ry.	662	Assur. Co.	342
— v. Meek	199	— v. Cox	645, 648
— v. Nurse	606	— v. Dublin Corporation ...	547, 727, 728, 991
— v. Robson	701	— v. Henry	1011
Pauling v. L. & N. W. Ry. ...	985	— v. Lemaitre	740
Paul v. Simpson	608, 1010	— v. Scott	580
Pawle v. Bussell	345	— v. Skelton	483, 508
Pawle's Case	973	— v. Spencer	706, 715
Pawley v. Pawley	1028	Pease v. Chaytor	998
Pawly v. Holly	869	— v. Coats	614
Paxton v. Douglas	150	— v. Courtney	630
— v. Popham	18	— v. Naylor	1016
Payne v. Brecon (Mayor)	553	Peat v. Clayton	980
— v. Burridge	624	Peate v. Dicken	201
— v. Cave	240	Peatfield v. Barlow	396, 491
— v. Chapman	502	Peck v. Peck	54, 162
— v. Esdaile	934	Pedder v. Hunt	936
— v. Haine	618	Pedgrift v. Chevallier	400
— v. Ibbotson	207	Pedler v. Paige	119
— v. Lewis & Peat	428	Pedley v. Davis	942, 997
— v. Revans	762	— v. Dodds	29
— v. Rogers	650	Peebles v. Ostwaldtwistle, &c.,	
— v. Shedden	709	Council	1002
Payne's Case	966	Peek v. Derry	728
Paynter v. James	355	— v. Gurney	548, 727, 1007
Payton & Co. v. Snelling,		— v. Matthews	615
Lampard & Co.	157	— v. N. Staffordshire Ry.	
Payzu v. Hannaford	404	Co.	528
— v. Saunders	380, 437	Peek's Case	961
Peaceable v. Read	878	Peel's Case	968
— v. Watson	52, 909	Peer v. Humphrey	835
Peacock v. Harper	166	Peerless, The	106
— v. Harris	49, 62, 515	Pegg v. Wisden	246
— v. Pursell	585	Peirce v. Jersey Waterworks	
— v. Purvis	783	Co.	966, 971
— v. Raynell	750	Peirse v. Bowles	596
— v. Young	803	Peizer v. Lefkowitz	553
Peake v. Carter	1073	Pell's Case	962
Pearce, <i>Ex parte</i>	1061	Pellatt v. Boosey	264
— v. Brooks	551, 557	Pellocat v. Angell	552
— v. Cheslyn	885	Pellew v. Wonford	1031
— v. Day	499	Pelton v. Harrison	1027
— v. Foster	140, 406	Pember v. Mathers	241
— v. Gardner	236	Pemberton v. Chapman...1005,	1019
— v. Hooper	128	— v. Hughes	185, 918
— v. Ornsby	740	Pendlebury v. Greenhalgh...651,	652
— v. Rogers	441	Penfold v. Abbott	629
— v. Whale	62	Peninsular & Oriental S. Nav.	
Pearl Life Assur. Co. v.		Co. v. Shand	519
Johnson	69	Penkivill v. Connell	332
Pearl Mill Co. v. Ivy Tannery		Penley v. Anstruther	393
Co.	431	— v. Watts	621
Pearsall v. Brierley Hill Local		Penn v. Jack	206
Board	196	— v. Scholey	1039
Pearse v. Boulter	892	— v. Ward	793
— v. Coaker ... 821, 822, 823,	881	Pennant's Case	897, 904
Pearson v. Coles	212, 816	Pennell v. Meyer	71, 101, 176

	PAGE		
Penniall <i>v.</i> Harborne	617	Peter <i>v.</i> Compton	
Pennington <i>v.</i> Brinsop Hall		— <i>v.</i> Jones	
Coal Co.	720	— <i>v.</i> Rich	
— <i>v.</i> Crossley	579	Peter der Grosse, The	
— <i>v.</i> Healey	1011	Peters <i>v.</i> Fleming	558,
Penny, <i>In re</i>	175	— <i>v.</i> Staveley	
— <i>v.</i> Allen	940	Petersen <i>v.</i> Freebody	
— <i>v.</i> Brice	1004	Peterson <i>v.</i> Ayre	
— <i>v.</i> Foy	86, 635	Peto <i>v.</i> Reynolds	
— <i>v.</i> Slade	182	Petre (Lord) <i>v.</i> Hencage	
— <i>v.</i> Wimbledon, &c., Council	222, 649	Petre <i>v.</i> Petre	
Penrose <i>v.</i> Martyr	970	Petrel, The	
Penruddock <i>v.</i> Hammond	151	Petrie <i>v.</i> Nuttall	
Penruddock's Case	647	Petrocochino <i>v.</i> Bott	
Pentelow's Case	961	Petty <i>v.</i> Parsons	
Penton <i>v.</i> Barnett	902	Pettit <i>v.</i> Lodge	
— <i>v.</i> Robert	843	Pettman <i>v.</i> Bridges	
Penwarden <i>v.</i> Roberts	1052	— <i>v.</i> Keble	
Pepper <i>v.</i> Burland	469	Petty <i>v.</i> Anderson	
— <i>v.</i> S. E. Ry.	541	— <i>v.</i> Cooke	
Peppercorn <i>v.</i> Hofman	993	— <i>v.</i> Gt. W. Ry.	
Percival <i>v.</i> Caney	177	Peverett, <i>In re</i>	
— <i>v.</i> Hughes	649	Peyton <i>v.</i> London (Mayor) ...	
— <i>v.</i> Nanson	51, 52	— <i>v.</i> S. Thomas's Hospital	
— <i>v.</i> Stamp	814, 1037	Pfiel <i>v.</i> Vanbatenberg	
Perez <i>v.</i> Oleaga	19	Phelps <i>v.</i> Comber	
Perkins <i>v.</i> Bell	429	— <i>v.</i> London Corporation ...	
— <i>v.</i> Smith	846, 851	— <i>v.</i> L. & N. W. Ry.	
Permanent Trustee Co. <i>v.</i> Fels		— <i>v.</i> Prew	
13, 192		Phené <i>v.</i> Popplewell	
Perren <i>v.</i> Monmouthshire Ry.	69	Phené's Trusts, <i>In re</i>	38
Perrett, <i>Ex parte</i>	391	Pheysey <i>v.</i> Pheysey	
Perring <i>v.</i> Brook	885	Philby <i>v.</i> Hazle	
— <i>v.</i> Emerson	777	Philip <i>v.</i> Knoblauch	
— <i>v.</i> Tucker	216	Philips <i>v.</i> Astling	
Perrins <i>v.</i> Marine & General		— <i>v.</i> Bury	
Insur. Socy.	338	— <i>v.</i> Philips	573,
Perry <i>v.</i> Barnett	24, 459, 478	— <i>v.</i> Robinson	
— <i>v.</i> Bouchier	202	Phillips <i>v.</i> Barnett	
— <i>v.</i> Clissold	871, 872, 993	— <i>v.</i> Batho	
— <i>v.</i> Eames	697	— <i>v.</i> Berryman	
— <i>v.</i> East	739	— <i>v.</i> Biron	
— <i>v.</i> Fitzhowe	819	— <i>v.</i> Bistolli	
— <i>v.</i> Gibson	142, 162	— <i>v.</i> Briard	20
— <i>v.</i> House	947	— <i>v.</i> Bridge	
— <i>v.</i> National Provincial		— <i>v.</i> Brooks	548,
Bank of England	372	— <i>v.</i> Caldcleugh	243,
— <i>v.</i> Slade	333, 513	— <i>v.</i> Cole	
— <i>v.</i> Smith	153, 246	— <i>v.</i> Crawley	
— <i>v.</i> Suffields	237	— <i>v.</i> Crutchley	
Persian Investment Co. <i>v.</i>		— <i>v.</i> Eamer	
Malcolm Khan (Prince)	492	— <i>v.</i> Edwards	
Pertwee <i>v.</i> Townsend	255	— <i>v.</i> Eyre	
Peruvian Guano Co. <i>v.</i> Dreyfus	854	— <i>v.</i> Foxall ...	369, 370, 406,
Peruvian Ry., <i>In re</i>	970	— <i>v.</i> Halliday	
— <i>v.</i> Thames & Mersey		— <i>v.</i> Henson	
Marine Insurance Co.	286	— <i>v.</i> Homfray ...	512, 815,
Petch <i>v.</i> Lyon	68, 152, 509, 514	— <i>v.</i> Howgate	792,
		— <i>v.</i> Hudson	

	PAGE		PAGE
Phillips <i>v.</i> Hull Alhambra Palace Co.	407, 469, 1007	Pike <i>v.</i> Fitzgibbon	1022
— <i>v.</i> Im Thurn	289, 309	— <i>v.</i> Ougley	23
— <i>v.</i> Jansen	735	— <i>v.</i> Polytechnic Institution	207
— <i>v.</i> Jones	869	Pilgrim <i>v.</i> Southampton & Dorchester Ry.	68
— <i>v.</i> L. & S. W. Ry.	644, 691	Pilkin & Co., <i>In re</i>	962
— <i>v.</i> Low	697	Pilkington <i>v.</i> Cooke	74
— <i>v.</i> Pearce	256	— <i>v.</i> Gray	133
— <i>v.</i> Rees	773	— <i>v.</i> Scott	555
— <i>v.</i> Warren	34, 295	Pilkington's Case	950
— <i>v.</i> Whitsed	943	Piller <i>v.</i> Roberts	227
— <i>v.</i> Willetts	216	Pilley <i>v.</i> Robinson	82
Phillipson <i>v.</i> Gibbon	935	Pilling <i>v.</i> Lancashire & Yorkshire Ry.	934
— <i>v.</i> Hayter	217, 451	Pilling's Trusts, <i>In re</i>	924
Philliskirk <i>v.</i> Pluckwell	31	Pillott <i>v.</i> Wilkinson	849
Phillpotts <i>v.</i> Clifton	592	Pilmore <i>v.</i> Hood	548, 729
— <i>v.</i> Evans	425, 436	Pim <i>v.</i> Curell	45, 46, 177
Philpott <i>v.</i> Bryant	298	— <i>v.</i> Reid	342
— <i>v.</i> Jones	583	Pindar <i>v.</i> Wadsworth	704
— <i>v.</i> Kelley	846, 867	Pinero <i>v.</i> Judson	258, 885
Phipps <i>v.</i> Dauhney	392	Pinhorn <i>v.</i> Souster	882, 946
— <i>v.</i> Parker	120	Pinney <i>v.</i> Hunt ...	105, 106, 180, 919
— <i>v.</i> Sculthorpe	255	— <i>v.</i> Pinney	105
Phipson <i>v.</i> Kneller	306	Pinnington <i>v.</i> Galland	706
Phoenix Assur. Co. <i>v.</i> Spooner	344	Pinnock <i>v.</i> Harrison	859
Phosphate of Lime Co. <i>v.</i> Green	971	Pipe <i>v.</i> Fulcher	46
Pianciani <i>v.</i> L. & S. W. Ry.	524	Piper <i>v.</i> Chappell	75
Picard <i>v.</i> Hine	1022	Pippet <i>v.</i> Hearn	761
Pickard <i>v.</i> Bankes	488	Pitcher <i>v.</i> Bailey	485
— <i>v.</i> Bretz	1053	— <i>v.</i> King	87
— <i>v.</i> Sears	70	— <i>v.</i> Tovey	606
Picker <i>v.</i> London & County Banking Co.	837	Pitchford <i>v.</i> Davis	449
Pickering <i>v.</i> Busk	377	Pitman <i>v.</i> Woodbury	598
— <i>v.</i> Dowson	376, 428	Pitt <i>v.</i> Donovan	758
— <i>v.</i> Noyes	140	— <i>v.</i> Pursford	481
— <i>v.</i> Rudd	812	— <i>v.</i> Shew	774
Pickford <i>v.</i> Gd. Junction Ry.	517, 520, 522	Pittard <i>v.</i> Olivier	749
Pickin <i>v.</i> Graham	306	Pitton <i>v.</i> Walter	41, 96, 98
Pickles <i>v.</i> Sutcliffe	236	Pitts <i>v.</i> Beckett	423
Pickstock <i>v.</i> Lyster	1017	Place <i>v.</i> Potts	74
Picton's Case	107	Plaice <i>v.</i> Allcock ...	22, 23, 855, 856
Pictou Municipality <i>v.</i> Geldart	651	Planché <i>v.</i> Colburn	468
Piddington <i>v.</i> S. E. Ry.	520	Plant <i>v.</i> Bourne	236
Pierce <i>v.</i> Corf	420	— <i>v.</i> Cotterell	870
— <i>v.</i> Fothergill	510	— <i>v.</i> Taylor	43, 44, 877
— <i>v.</i> Williams	484	Plasycod Collieries Co. <i>v.</i> Partridge, Jones & Co.	774
Piercy <i>v.</i> Humphreys	1049	Plasterers' Co. <i>v.</i> Parish Clerks' Co.	699
Pierson <i>v.</i> Hutchinson	277	Plata (Owners) <i>v.</i> Ford	352
Piggot <i>v.</i> E. Counties Ry.	672	Platt <i>v.</i> Bromage	497
Piggott <i>v.</i> Birtles	771, 784	— <i>v.</i> New South Wales Attorney-General	910
— <i>v.</i> Middlesex County Council	619, 898	Plaxton <i>v.</i> Dare	46, 47, 92
Pignarato <i>v.</i> Gilroy	60	Playford <i>v.</i> Mercer	427
Pigot <i>v.</i> Cadman	393	— <i>v.</i> United Kingdom Telegraph Co.	515
— <i>v.</i> Cubley	848	Pleasant d. Hayton <i>v.</i> Benson	892
Pigot's Case	545		

	PAGE		PAGE
Plevins v. Downing	419, 424	Popplewell, <i>Ex parte</i> ...	1050, 1053, 1055
Plomer v. Long	583	— v. Hodkinson	692, 719
Pluckwell v. Wilson	661	Portage v. Cole	417
Plumer v. Brisco	128	Portal v. Emmens	980
— v. Gregory	399	Portalis v. Tetley	832
Plummer v. David	881, 887	Porter v. Cooper	96
— v. Plummer	912	— v. Drew	627
— v. Woodburn	185	— v. Freudenberg	557
Plumstead Board of Works v. British Land Co.	809	— v. Moore	70
Plunkett v. Cobbett	155, 740	— v. Tottenham Urban Dis- trict Council	469
Plymouth v. Throgmorton	403	— v. Viner	1033
Poad v. Watson	874	— v. Weston	762
Pocock v. Carter	884, 887	Porteus v. Watney	352, 364
— v. Eustace	266	Porthouse v. Parker	301
— v. Moore	799	Portland (Duke) v. Hill	187
Polak v. Everett	371, 372	Portman v. Middleton	435
Polden v. Bastard	706, 718	Portsmouth, The	364
Pole v. Cetevovich	363	Portuguese, etc., Mines	962
Pole-Carew v. Western Count- ies, &c., Manure Co.	844	Postlethwaite, <i>In re</i>	141
Polglass v. Oliver	594	— v. Freeland	353
Polhill v. Walter	279, 281	Postman v. Harrell	785, 944
Polini v. Gray	56, 57, 191	Pothonier v. Dawson	850
Pollard v. Bank of England ..	498	Potiz v. Glossop	32, 33
— v. Bell	181	Pott v. Clegg ... 487, 513, 567,	573
— v. Ogden	487	— v. Flather	466
— v. Scott	45	— v. Lomas	507
Polley v. Fordham ... 991, 998,	1000	Potter v. Chambers	229
Pollock v. Stables	479	— v. Deboos	383
— v. Stacy	257	— v. Duffield	236
— v. Garle	110	— v. Faulkner	681
Polsue v. Rushmer	643	— v. Metropolitan District Ry.	1002
Pomeroy v. Baddeley	142	— v. Rayworth	311
Pomfret v. Ricroft	706	— v. Sanders	232
Ponsford v. Walton	199	— v. Welsh	688
Ponsolle v. Webber	464	Potts v. Durant	13, 91
Pontifex v. Bignold	729	— v. Smith	698
— v. Jolly	212	— v. Sparrow	396, 549
— v. Midland Ry.	230	Poulett Peerage	918
Ponting v. Noakes	642	Poulteney v. Holmes	257
Pool's Case	843	Poulter v. Killingbeck	438
Poole v. Bentley	884, 885	Poulton v. L. & S. W. Ry. ...	957
— v. Dicas	55	— v. Moore	69, 227
— v. Hill	251	Pound v. Wilson	157
— v. Huskinson	711, 712	Pounder v. N. E. Ry.	677
— v. Sidden & Another	216	Pounsett v. Fuller	254
— v. Smith	277	Pountney v. Clayton	695
— v. Tumbridge	592, 595	Pow v. Davis	381
— v. Warren	125, 631, 1014	Powell v. Brodhurst	581, 635
Poole (Mayor) v. Whitt	264	— v. Divett	422
Poole's Estate, <i>In re</i>	1016	— v. Edmunds	14, 201
Pooley v. Driver	445, 446	— v. Evan Jones	490
— v. Goodwin	198	— v. Fall	673
— v. Harradine	323	— v. Gelston	735
Pope, <i>In re</i>	924	— v. Hibbert	262
Poplett v. Stockdale	550	— v. Horton	19
Popplewell v. Wilson	315	— v. Hoyland	845
Poppleton, <i>Ex parte</i>	551		

	PAGE		PAGE
Powell v. Jessop	235	Price v. Salusbury	241
— v. London & Provincial		— v. Seaward	212
Bank	122, 123, 978	— v. Taylor	332
— v. Milbank	926	— v. Torrington (Lord)	56
— v. Rees	1007	— v. Woodhouse	12, 177
— v. Vickers, &c.	226	— v. Worwood	86, 617, 906
Power v. Barham	376	Price & Co. v. Union Lighter-	
Powers, <i>In re</i>	601, 602	age Co.	361, 522
Powis v. Harding	988	Price's Patent Candle Co. v.	
Powles v. Hider	522, 658	London County Council	642
— v. Page	301, 987	Prickett v. Badger	474
Pownal v. Ferrand	480	Priddy v. Henbrey	280
Powney v. Blomberg	594	Prideaux v. Collier	48, 297
Praed v. Graham	742	— v. Criddle	302, 306
Praeger v. Bristol & Exeter Ry.	675	Pridgeon v. Mellor	805
Prange, <i>Ex parte</i>	301	Priest v. Last	374
Pratt v. British Medical Asso-		Priestly v. Fernie	442
ciation	762, 768	— v. Fowler	680
— v. Inman	1015	Priestman v. Thomas	168
— v. S. E. Ry.	541	Prince v. Blackburn	119
Prehu v. Royal Bank of Liver-		— v. Brunatte	292
pool	313	— v. Haworth	552
Premier Industrial Bank v.		— v. Sams	71, 165
Crabtree or Carlton Manufac-		— v. Oriental Bank Cor.	
turing Co.	970		327, 488, 491
Prentice v. Elliott	263	Prince of Wales, &c., Associa-	
— v. Harrison	793, 794	tion v. Palmer	173, 183
Prenty v. Midland Gt. W. Ry.	855	Pring v. Clarkson	321
Prescott v. Buffery	988	Printing Telegraph, &c., Co.	
— v. Flinn	291, 292	v. Drucker	178
Presland v. Bingham	699	Prior v. Hembrow	482
Prested Miners' Co. v. Garner		— v. Wilkinson	435
	411, 412	— v. Wilson	534
Prestidge v. Woodman	999	Pritchard v. Bagshaw ...	59, 178, 563
Preston v. Peeke	19, 173	— v. Draper	66
— v. Tamplin	473	— v. Hitchcock	581
Prestwick v. Marshall	292	— v. Peto	645
— (or Pristwick) v. Poley ...	210	— v. Powell	44
Preull, <i>Ex parte</i>	1053	Pritchard's Case	971
Prevost v. Wood	382	Pritchett v. Currie	827
Price v. Barker	371, 586	— v. Honeyborne	46
— v. Dewhurst	185	Pritchit v. Waldron	1031
— v. Dyer	241	Pritt v. Fairclough	12, 56
— v. Glynea, &c., Co.	691	Probart v. Knouth	560
— v. Green	556	Proctor v. Hodgson	715
— v. Griffith	241	— v. Webster	745
— v. Kirkham	323	Procurator-General v. Williams	43
— v. Lea	417	Produce Brokers Co. v. Weis ...	435
— v. Littlewood	190	Prosser v. Wagner	1005
— v. Livingstone	355	Protector Endowment, &c., Co.	
— v. Manning	149	v. Grice	634
— v. Messenger	994	Proud v. Price	722
— v. Mitchell	279	Proudfoot v. Hart	618, 621
— v. Mouat	27	Proudlove v. Twemlow	783
— v. Moulton	578	Provincial Billposting Co. v.	
— v. Neale	496	Low Moor Iron Co.	779
— v. Nixon	457	Provis v. Reed	133
— v. Page	29	Prudhomme v. Fraser	738
— v. Peek	794	Pryor v. Petre	809

	PAGE		PAGE
Pryse, <i>In re</i>	1004	Quickstep, The	658
Public Works Commissioner		Quigley & M'Clays Contract,	
<i>v.</i> Hills	247	<i>In re</i>	251
Puckett & Smith's Contract,		Quilter <i>v.</i> Heatly	11, 206
<i>In re</i>	249	— <i>v.</i> Jorss	4
Pugh <i>v.</i> Arton	843	Quincey <i>v.</i> Sharpe	574, 575
— <i>v.</i> L. Brighton, &c., Ry.	340	Quinn <i>v.</i> Leatham :.....	768, 769, 786
— <i>v.</i> Robinson	74	Quinton <i>v.</i> Frith	920
— <i>v.</i> Stringfield	598	Quirk <i>v.</i> Thomas	384, 1007
Pugh & Sharman's Case	961		
Pulbrook, <i>Ex parte</i>	858	R. <i>v.</i> Abingdon (Lord)	744
— <i>v.</i> Lawes	234	— <i>v.</i> Adderbury (East)	65
Pulley <i>v.</i> Hilton	92	— <i>v.</i> Adey	151, 156, 215
Pulling <i>v.</i> Gt. E. Ry.	1002	— <i>v.</i> Aickles	189
Pullman <i>v.</i> Hill	735, 746	— <i>v.</i> Aire & Calder Naviga-	
Pulman <i>v.</i> Meadows	1015	tion	694
Pulsford <i>v.</i> Devenish	974	— <i>v.</i> Albutt	110
— <i>v.</i> Richards	249	— <i>v.</i> All Saints, Worcester	151
Punnett, <i>Ex parte</i>	845, 945	— <i>v.</i> Amphlit	736
Purcell <i>v.</i> Macnamara	762	— <i>v.</i> Anderson	74
— <i>v.</i> Sowler	754	— <i>v.</i> Anon	145
Purchase <i>v.</i> Lichfield Brewery		— <i>v.</i> Antrobus	45
Co.	608	— <i>v.</i> Austrey	122
Purdon <i>v.</i> Purdon	571	— <i>v.</i> Baillie	747
Pursell <i>v.</i> Horn	790	— <i>v.</i> Barr	712
Purves <i>v.</i> Landell	397	— <i>v.</i> Bartholomew	713
Pust <i>v.</i> Dowie	350	— <i>v.</i> Basingstoke	59
Pwllbach Colliery Co. <i>v.</i> Wood-		— <i>v.</i> Bathwick	118, 151, 192
man	644, 650	— <i>v.</i> Beare	735
Pybus <i>v.</i> Gibb	372	— <i>v.</i> Bedfordshire	44, 45
Pye <i>v.</i> Brit. Automobile Syndi-		— <i>v.</i> Bellamy	97
cate	248	— <i>v.</i> Berger	46
— <i>v.</i> Butterfield	149	— <i>v.</i> Bignold	215
— <i>v.</i> Mumford	708, 710	— <i>v.</i> Bingham	100
Pyer <i>v.</i> Carter	718	— <i>v.</i> Birmingham	51, 53, 911
Pyke, <i>Ex parte</i>	318, 551	— <i>v.</i> Bjornsen	195
— <i>v.</i> Crouch	169	— <i>v.</i> Blackmore	168
Pym <i>v.</i> Blackburn	241	— <i>v.</i> Bliss	46, 49
— <i>v.</i> Campbell	14	— <i>v.</i> Bono	110
— <i>v.</i> Gt. N. Ry.	691	— <i>v.</i> Boyes	150
Pyman <i>v.</i> Dreyfus	352	— <i>v.</i> Braintree	5
Pyne <i>v.</i> Dor	843	— <i>v.</i> Bramley	43
— <i>v.</i> Pyne	146	— <i>v.</i> Brampton	107, 914, 915
		— <i>v.</i> Brightside Bierlow	77
QUARMAN <i>v.</i> Burnett	648, 658	— <i>v.</i> Brown	164
Quartz Hill Gold Mining Co.		— <i>v.</i> Browne	96, 98
<i>v.</i> Eyre	743, 762, 767	— <i>v.</i> Budd	31
Quatermaine <i>v.</i> Selby	889	— <i>v.</i> Burdett	735
Queen's Case, The	144, 150, 160,	— <i>v.</i> Cambrian Ry.	196
	162, 164, 165	— <i>v.</i> Carlile	737
Queen's Proctor <i>v.</i> Fry	115	— <i>v.</i> Carpenter	50
Queensland Land & Coal Co.,		— <i>v.</i> Castell Careinion	147
<i>In re</i>	122	— <i>v.</i> Castle Morton	197
Queensland National Bank <i>v.</i>		— <i>v.</i> Castleton	4
Peninsular & Oriental, &c.,		— <i>v.</i> Castro	88, 117
Co.	362	— <i>v.</i> Central Criminal Court	
Quick <i>v.</i> Staines	1036	Justices	836
Quicke <i>v.</i> Chapman	698, 706	— <i>v.</i> Chambers	368

	PAGE		PAGE
R. v. Chawton	886	R. v. Halifax County Court	
— v. Cheshire	998	Judge	228
— v. Chester (Bishop)	203	— v. Hall	91, 737
— v. Chillesford	787	— v. Hammersmith Superin-	
— v. Chorley	700	tendant Registrar	910
— v. Christian	88	— v. Hardwick	63
— v. Clapham	194	— v. Hardy	154
— v. Colley	142	— v. Harrison	85
— v. Cooper	736	— v. Hartington	172
— v. Coote	58	— v. Haslingfield	137
— v. Cotton	47, 841	— v. Hatfield	810
— v. Cox	113, 154	— v. Haughley (Inhabitants)	118
— v. Creevy	738	— v. Haughton	167, 168
— v. Cresswell	911	— v. Hawkins	40, 85
— v. Crossley	189, 731	— v. Head	111
— v. Cumberland (Justices)	388	— v. Hebden	169, 170
— v. Cunninghame Graham	1032	— v. Herstonceux	887
— v. Davey	25	— v. Hertford Union	992
— v. Daye	139, 142	— v. Hill	145
— v. Debenham	50	— v. Hinchley	5
— v. De Berenger	72, 167	— v. Holt	167, 168
— v. Denio	5	— v. Holy Trinity, Kings-	
— v. Dixon	31	ton-upon-Hull	1
— v. Dodd	445	— v. Hopper	129
— v. Droitwich	403	— v. Horsley	1004
— v. Dukinfield	55	— v. Howard	40, 102
— v. Duncombe	159	— v. Hoyte	703
— v. East Mark	712	— v. Huggins	667
— v. Edmonton	810	— v. Hunt	2
— v. Edwards	151	— v. Hutchins	97
— v. Ellicombe	10	— v. Ivens	543
— v. Ellis	77	— v. Jackson	1023
— v. Elworthy	6	— v. James	102
— v. Ely	74	— v. Johnson	5, 48
— v. Entrehman	144	— v. Joliffe	32, 87
— v. Eriswell	925	— v. Jones	154
— v. Erith	42	— v. Kenilworth	49
— v. Essex County Court		— v. King	109
Judge	181	— v. Kinghorn	110
— v. Exeter Union	53	— v. Kingston (Duchess)	
— v. Farley	154	151, 154	
— v. Fontaine Moreau	183	— v. Knight	750
— v. Frances	157	— v. Koops	99
— v. Francklin	168	— v. Landulph	810
— v. Garbett	58, 156	— v. Langhorn	164
— v. Gardner	167	— v. Latchford	179
— v. Garrett	795	— v. Layer	157, 164
— v. Gilham	58, 143	— v. Leake	712
— v. Gompertz	199	— v. Leatham	4
— v. Gordon	94, 109	— v. Ledgard	189
— v. Grant	206	— v. Lepille	713
— v. Gray	751	— v. Lichfield	388
— v. Greene	167	— v. Light	995
— v. Grimes	170	— v. Lister	642
— v. Grimwood	189	— v. Llanfaethly	4
— v. Grundon	184	— v. Llangunnor	18
— v. Gwyn	111	— v. Lloyd	711
— v. Hains	104	— v. Local Government	
		Board	93

	PAGE		PAGE
R. v. Lolley	918	R. v. Rawden	5
— v. London & N. W. Ry.	175	— v. Rea	912
— v. Londonderry Ry. ...	981, 983	— v. Reeks	202
— v. Long Buckby	198	— v. Rhodegaidio	5
— v. Lord	559	— v. Richards	183
— v. Lower Heyford	51	— v. Richardson	154
— v. Luellin	543	— v. Ridgwell	197
— v. Luffe	43, 917	— v. Rishworth	42
— v. Lumley	39	— v. Robinson	794
— v. Lushington	841	— v. Rogers	113
— v. M'Naghten	157	— v. Rowton	164
— v. Mansfield	917	— v. Rymer	543
— v. Manwaring	91, 114, 912, 913	— v. Ryton	127
— v. Marsden	993	— v. Saffron Hill	5
— v. Martin	190	— v. St. George's Union ...	806
— v. Mashiter	25	— v. S. Giles	887
— v. Merceron	58	— v. St. Giles, Camberwell	126
— v. Mertbyr Tidvil	2	— v. S. Katharine	194
— v. Metropolitan Board of Works	719	— v. S. Margaret's	31
— v. Miles	794	— v. St. Martin's, Leicester 3, 121, 158,	881
— v. Millis	914, 915	— v. St. Mary, Nottingham	150
— v. Montague	32	— v. St. Mary, Warwick ...	55
— v. Moore	144	— v. S. Maurice	74
— v. Morgan	143	— v. S. Peter's, Exeter ...	37, 191
— v. Morton	5	— v. Sanders	993
— v. Mothersell	92, 193	— v. Scammonden	18
— v. Murphy	145	— v. Scott	99
— v. Musson	32, 810	— v. Senior	455
— v. Mytton	47, 91, 92	— v. Silverlock	127
— v. Naguib	108	— v. Silvester	555
— v. Nash	982	— v. Skinner	745
— v. Negus	404	— v. Smith	96, 104, 154
— v. Netherthong	127	— v. Sourton	918
— v. Neville	57	— v. Stoke Golding	4
— v. Newman ...	96, 97, 186, 755	— v. Stoke-upon-Trent	24
— v. North Petherton	194	— v. Stourbridge	5
— v. Oldroyd	156	— v. Strafford (Lord)	164
— v. Padstow	199, 257	— v. Sutton	167, 170
— v. Page	2	— v. Sympton	75
— v. Parke	96	— v. Tankard	551
— v. Parker	163	— v. Thruscross	106, 187
— v. Parsons	89, 90, 164	— v. Tolson	112
— v. Paulson	904	— v. Tooke	97
— v. Pease	654, 672	— v. Train	713
— v. Pendleton	200	— v. Tucker	145
— v. Petrie	712	— v. Turner	85
— v. Piddlehinton	5	— v. Twiss	180
— v. Plumer	109, 192	— v. United Kingdom Tele- graph Co.	713
— v. Port of London Autho- rity	992	— v. Upper Boddington	151
— v. Porter	505, 552	— v. Verelst	40
— v. Povey	106, 107, 914	— v. Varls	25, 26
— v. Powell	836	— v. Waite	39
— v. Preston	203	— v. Walker	995
— v. Prosser	765	— v. Wallace	94
— v. Ramsbottom	180	— v. Ward	97
— v. Ramsden	159	— v. Warden of the Fleet ...	183
		— v. Washbrook	195

PAGE	PAGE
R. v. Watson ... 3, 150, 151, 154, 155, 164, 192, 737	Ramozotti v. Bowring 590
— v. Watts 199	Ramsay v. Margrett...803, 824, 1028, 1045, 1046, 1049
— v. Wavertree 45	Ramsbottom v. Buckhurst ... 98, 923
— v. Weaver 91, 112, 113	— v. Davis 201
— v. Weil 993	— v. Mortley 257
— v. Wells 1068	Ramsbottom's Case 105
— v. West Mark 713	Ramsden v. Brearley 1021
— v. Wheeler 58	— v. Chessum 472
— v. White 641	— v. Lupton 1039
— v. Whitehead 145, 146	— v. Manchester Ry. Co. 816, 818
— v. Whitley 63	Ramsgate Victoria Hotel Co. v. Goldsmid 961
— v. Whitnash 555	Ramskill v. Edwards...482, 483, 1007
— v. Whittles 75	Ramuz v. Crowe 277
— v. Wick St. Lawrence ... 171	Rand v. Vaughan 944
— v. Wickham 18	Randall v. Moon 544
— v. Widdop 58	— v. Newson 379
— v. Williams 145, 151, 157, 647, 651	— v. Raper 379
— v. Willshire 39	— v. Stevens 936, 937
— v. Wilson 2, 910	Randell v. Trimen 381
— v. Winterset 407	— v. Wheble 1067
— v. Withers 75, 167	Randle v. Blackburn 71
— v. Woodley 141, 151	Randolph v. Gordon 91
— v. Worth 56	Randt Gold Mining Co., <i>In re</i> 967
— v. Wrangle 3	Rankine's Estate, <i>In re</i> 1001
— v. Wright 810	Ranson v. Platt 870
— v. Wroxton 911	Raper v. Birkbeck 546
— v. Yeoveley 97	Raphael v. Bank of England 318
— v. Yewing 164	— v. Goodman 1033
— v. York (Mayor) 170	— v. Pickford 517
Rabe v. Otto 457	Rapier v. London Tramways Co. 641
Rabey v. Birch 143	Rapson v. Cubitt 648
— v. Gilbert 311	Rashleigh v. South E. Ry. Co. 596
Race v. Ward 717	Ratcliff v. Ratcliff 115
Racine, The 667	Ratcliffe v. Evans 734, 759
Rackham v. Marriott 573	Rath v. M'Mullan 856
Radcliffe, <i>In re</i> 1014	Rathbone v. MacIver 360, 363
Radford v. M'Intosh 40, 62	Ratt v. Parkinson 997
Radley v. London County Council 793	Raulin v. Fischer 185
— v. L. & N. W. Ry. 662	Ravee v. Farmer 195
Ragget v. Musgrave 33	Ravenga v. Mackintosh 764
Railton v. Mathews 370	Rawley v. Rawley 561, 588
Rainbow v. Howkins...240, 250, 253, 421, 431	Rawlings, <i>Ex parte</i> 820, 830, 1046, 1059, 1060, 1061
— v. Juggins 373	— v. Morgan 620
Raines v. Welch 258	Rawlins v. Briggs 625
Rains v. Buxton 934	— v. Desborough 212, 213, 215, 338
Rainsford v. James Keith, &c., Co. 960	— v. Rickards 55
Rainy v. Bravo 4, 220, 732	Rawlinson v. Marriott 632
— v. Vernon 474	— v. Scholes 1008
Raleigh v. Goschen 220, 813	Rawlins v. Vandyke 452
Ralli v. Sarell 283	Rawson v. Eicke 255, 885
Ralph v. Harvey 449	— v. Johnson 432
Ram v. Lamley 744	— v. Walker 14
Ramage v. Womack 599	
Rambert v. Cohen 1, 198	

	PAGE		PAGE
Rawstorne v. Preston Corpora- tion	140	Reed v. Nutt	794
Rawstron v. Taylor	719	— v. Passer	910
Ray v. Barker	438	— v. R. Exch. Assur. Co....	336
— v. Hazeldine	697	— v. Thoyts	1035, 1065
— v. Newton	391	— v. Wilmot	1038
Raybould, <i>In re</i>	483	Reedie v. L. & N. W. Ry. Co.	648
Raymond v. Fitch	606	Rees v. Barrington	372
— v. Minton	409	— v. Bowen	100, 101, 102
Rayner, <i>In re</i>	29	— v. De Bernardy	550
— v. Mitchell	656	— v. King	900
Rayson v. Adcock	921	— v. Lloyd	39
— v. South London Tram- ways	760	— v. Morgan	942
Read v. Blunt	1012	— v. Smith	205
— v. Brown	507	— v. Watts	169, 1005
— v. Burley	779, 783	— v. Williams	119, 391
— v. Coker	790	Reese River Co. v. Smith	968
— v. Edwards	813	Reeve v. Bird	260, 263
— v. Fairhanks	828, 854	— v. Gibson	223
— v. Gamble	319	— v. Jennings	411
— v. Goldring	592, 593, 594	— v. Palmer	868
— v. Gt. E. Ry.	690	— v. Whitmore	830
— v. Joannon	1062	Reeves v. Barlow	830, 1048, 1056
— v. King	157	— v. Butcher	566
— v. Legard	453, 562	— v. Capper	829
— v. Lincoln (Bishop)	192	— v. Pope	508, 591
— v. Victoria Station & Pimlico Ry.	175	Regnart v. Porter	883, 945
Read's Case	1010	Reid v. Batte	3, 198, 469
Reader v. Kingham	367	— v. Dickens	571
Readhead v. Midland Ry. 373,	537, 660	— v. Explosives Co.	407
Real & Personal Advance Co. v. Clears	1058	— v. Hoskins	65, 354
Rearden v. Minter	128	— v. Margison	88
Recher v. North Brit. & Merc. Insurance Co.	387	— v. Reid	1027
Red "R." S.S. Co. v. Allatini	512	— v. Righy	287, 502
Red Sea, The	357	Reid, Hewitt & Co. v. Joseph	225, 226
Reddall v. Union Castle S.S. Co.	864	Reignolds v. Edwards	715
Reddie v. Scoolt	790	Reilly v. Fitzgerald	44
Rede v. Farr	903	Reinhardt v. Mentasti	642
Rederi Aktienholaget Trans- Atlantic v. Drughorn	15	Remfry v. Butler	494
Redford v. Birley	76	Remmett v. Lawrence	1069
Redgrave v. Hurd	547	Remmie v. Hall	161
Redhead v. Westwood	1046	Reneaux v. Teakle	451
Redmond v. Dainton	619	Reney v. Kirkcudbright, Magistrates of	666
Redpath v. Roberts	259	Renner v. Tolley	61
Reece v. Taylor	792	Rennie v. Robinson	256
— v. Trye	151	— v. Wynn	450
Reed v. Deere	200	Renteria v. Ruding	346
— v. Fairless	138	Repetto v. Millar's Karri, &c., Forests	345
— v. Harrison	814	Reuss v. Picksley	239, 419
— v. Jackson	19, 170	Reuter v. Electric Telegraph Co.	954
— v. Lamb	91, 109	— v. Sala	424, 428, 429
— v. Taylor	760	Reversion Fund & Insurance Co. v. Maison Cosway	486
		Revett v. Brown	806
		Revis v. Smith	745
		Rew v. Pettet	571
		Reynell v. Lewis	449, 450

	PAGE		PAGE
Reynolds, <i>Ex parte</i>	75, 150	Richardson v. Goss	864
— v. Ashby	844	— v. Graham	697
— v. Beerling	590	— v. Gt. E. Ry.	537
— v. Caswell	393	— v. Hall	260
— v. Chettle	299	— v. Harris	1050
— v. Doyle	566	— v. Jackson	595
— v. Fenton	107	— v. Langridge	884
— v. N. E. Ry.	657	— v. Mellish	189
— v. Waring	241	— v. Metropolitan Ry.	676
— v. Wheeler	482	— v. North E. Ry. Co.	518
Rhoades, <i>In re</i>	1016	— v. Rowntree	538
Rhodes, <i>In re</i>	562	— v. Silvester	725
— v. Felder, Jones & Harri- son	396	— v. Stanton	363
— v. Forwood	407	— v. Stormont, Todd & Co. 465, 467, 589	589
— v. Gent	289	— v. Williamson	220, 381
— v. Moules	398	— v. Willis	90, 96
— v. Rhodes	509	— v. Younge	941
— v. Smethurst	569, 1017	Richardsons & Samuel, <i>In re</i> ...	353
— v. Swithenbank	211	Richdale, <i>Ex parte</i>	325
Rhymney Railway v. Grice ...	941	Riche v. Ashbury Ry. Carriage Co.	955
— v. Rhymney Iron Co. 512, 526	526	Richmond v. Nicholson	1007
Rice v. Baxendale	534	Rickards v. Lothian	670
— v. Howard	157	— v. Murdock	157
— v. Reed	503, 586	Ricket v. Metropolitan Ry. 175, 639, 714	714
Rich v. Basterfield	650	Rickett v. Green	898, 899, 900
— v. Johnson	812	— v. Tullick	266
— v. Kneeland	516	Ricketts v. Bennett	487, 952
— v. Woolley	944	— v. E. & W. India Docks, &c., Ry.	675
Richards, <i>In re</i>	844	— v. Tilling	656
— v. Barton	246	— v. Weaver	606
— v. Bassett	45, 187	Rickford v. Ridge	326
— v. Bostock	389	Riddell v. Pakeman	793
— v. Browne	1009, 1014	Rideal v. Fort	1036
— v. Davies	611	— v. Gt. W. Ry.	544
— v. Gellatly	60	Rideout's Trusts, <i>In re</i>	918
— v. Jenkins	1072, 1073	Rider v. Malbone	42
— v. Johnston	1073	— v. Wood	75
— v. Kidderminster	1062	Ridgway v. Hungerford Market Co.	403, 406
— v. L., Brighton & S. C. Ry.	539, 540	— v. Philip	216
— v. May	470	— v. Staffort	771
— v. Morgan	61, 101, 178	— v. Wharton	236
— v. Richards	756, 909	Riding v. Hawkins	221
— v. Rose	35, 692, 693	— v. Smith	741, 759
— v. Starck	503, 504	Ridler, <i>In re</i>	1038
— v. W. Middlesex Water- works Co.	786	Ridley v. Gyde	162
Richards & Home Assur. Assoc., <i>In re</i>	963	— v. Plymouth Baking Co.	65
Richardson, <i>In re</i>	480, 565, 600, 1018	— v. Plymouth Grinding Co.	975
— v. Anderson	109	— v. Taylor	285
— v. Atkinson	846	Riga, The	473
— v. Brown	376	Rigny v. Bennett	692
— v. Chasen	247, 253	— v. Connel	556
— v. Du Bois	452	— v. Hewitt	662
— v. Dunn	60, 440, 728	Riggs, <i>In re</i>	612, 902
— v. Gifford	267	Right v. Beard	872, 881

	PAGE		PAGE
Right v. Cuthell	891	Roberts v. Phillips	131
— v. Darby	261, 888	— v. Read	655
— v. Price	131	— v. Roberts	1050, 1056, 1057, 1060
Rigley v. Daykin	388	— v. Rowlands	251
Riley v. Baxendale	219	— v. Securty Co.	125, 344
— v. Halifax Corpn.	815	— v. Smith	471, 681
— v. Packington	450	— v. Watkins	470, 1023
Rileys, <i>In re</i>	1064	— v. Wyatt	840
Rimini v. Van Praagh...319, 512, 555		Robertson (or Robinson) v.	
Rimington v. Cannon ...	934, 940	Balmain New Ferry Co.	798
Ringham v. Clements	867	Robertson v. Hartopp	705
Ringland v. Lowndes	386	— v. Jackson	19, 20
Rippener v. Wright	197	— v. Jenner	403
Risdon Iron Works v. Furness	972	— v. Money	19
Riseley v. Ryle	1065, 1066	— v. Skelton	248
Rishton v. Nesbitt	42	— v. Smith	30
— v. Watmore	420	— v. Wait	20
Risk Allah Bey v. Johnstone ...	757	Robin, The	227
— v. Whitehurst	742, 753	Robins v. Gibson	305
Rist v. Faux	788	— v. Goddard	470
Ritchie v. Van Gelder	219	— v. Gray	857
Ritso's Case	961	Robinson, <i>In re</i>	553, 564, 565
River Steamer Co., <i>In re</i> ;		— v. Ainge	235
Mitchell's Claim	58	— v. Bland	509
Rivers (Lord) v. Adams	37	— v. Briggs	1049
Rivers v. Griffiths	595	— v. Chartered Bank	964
Riviere v. Bower	698	— v. Collingwood	1055
Rivington v. Garden	227	— v. Continental Insur. Co.	
Roach v. Wadham	609	of Mannheim	557
Robarts v. Tucker	284	— v. Cook	206, 593
Robb v. Gow	579	— v. Cowpen Local Board	715
Robbins v. Fennell	396, 491	— v. Currey	637
— v. Heath	396, 491	— v. Davison	407
— v. Jones	645, 713	— v. Dhuleep Singh	98, 177, 705, 819
Roberts, <i>In re</i>	509, 1046	— v. Emanuel	395, 398
— v. Allatt	150	— v. Fenner	185
— v. Barber	396	— v. Geisel	82
— v. Barker	24, 270	— v. Gt. Western Ry. Co.	519
— v. Battersea Borough		— v. Gregory	91
Council	992	— v. Harkin	568
— v. Berry	245	— v. Hawksford	326
— v. Bethell	284, 562	— v. Hewer	556
— v. Bradshaw	304	— v. Hindman	403
— v. Brennan	108	— v. Hofman	948
— v. Bury Commissioners ...	469	— v. Kilvert	644
— v. Crowe	480	— v. Knights	357
— v. Davey	903	— v. Learoyd	632
— v. Eberhardt	500	— v. L. & S. W. Ry. Co. ...	530
— v. Evans	82, 1022	— v. Lyall	485
— v. Fortune	172	— v. Lynes	1020
— v. Gray	559	— v. Markis	49
— v. Havelock	477	— v. Mollett	24, 427
— v. Holland	599	— v. Montgomeryshire Brew-	
— v. Hunt	713	ery Co.	979
— v. Jones	224	— v. Musgrove	249
— v. Karr	711	— v. Nahon	454
— v. Macord	698	— v. Pickering	1022
— v. Marsh	272		
— v. Oppenheim	11		

	PAGE		PAGE
Robinson v. Rayley	819	Roff v. British & French Chemical, &c., Co.	735, 746
— v. Rutter	439	Roffe v. Roscoe	960
— v. Vernon (Lord)	204	Roffey v. Henderson	820, 843
— v. Waddington	774	Roger's Case	961
— v. Yarrow	291	Rogers, <i>Ex parte</i>	464
Robinson's Case	169	— v. Allen	49
Robinson's Settlement, <i>In re</i> 506, 549,	553	— v. Brooks	36, 722
Robson v. Alexander	58	— v. Clifton	739, 747
— v. Andrade	63	— v. Custance	9
— v. Biggar	773, 775	— v. Hadley	14
— v. Drumond	469	— v. Hull Dock Co.	25, 889
— v. Edwards	697	— v. Humphreys	922
— v. Godfrey	467	— v. Ingham	488, 496, 498
— v. Kemp	152	— v. James	203
— v. N. E. Ry.	675	— v. Jones	999
— v. Olliver	583	— v. Kennay	1072
— v. Rolls	847	— v. Lambert	855
— v. Turnbull	220	— v. Martin	782
Rochefoucauld v. Boustead ...	242	— v. Pitcher	256, 947
Rochester (Bishop) v. Le Fanu	257	— v. Rice	907
Rochester (Dean) v. Pierce ...	955	— v. Taylor	693
Rock v. Leighton	1018	— v. Whiteley	327
Roddam v. Morley	604	— v. Whittaker	343
Roddy v. Williams	252	— v. Wood	47, 177, 196
Roden v. Eytton	774	Rogerson v. Ladbroke	590
— v. Ryde	121	Rohmann v. Rohmann	107
Rodger v. Comptoir d'Escompte de Paris	347, 866	Roles v. Davies	220
Rodgers v. Parker	773, 783	Rolf v. Dart	88
Rodocanachi v. Milburn ...	346, 434, 534	Rolfe v. Abbott	454
Rodriguez v. Tadmire	766	— v. Flower	447
Rodwell v. Phillips	233	— v. Maclaren	222
— v. Redge	39	Rolin v. Steward	326
Roe v. Birkenhead Ry.	956	Rollason v. Leon	886
— v. Bradshaw	1054	Rolls v. Miller	615
— v. Davies 3, 219, 881,	899	— v. Rock	808
— v. Doe	888	Rolph, <i>Ex parte</i>	1049, 1050
— v. Ferrars	176	— v. Crouch	379, 621, 629
— v. Harrison 611, 612,	904	Romer and Haslam, <i>In re</i>	397
— v. Hayley	891	Romford Canal Co., <i>In re</i>	986
— v. Hersey	2, 872	Romney Marsh, Lords of v. Trinity House	666
— v. Kemmis	127	Rondeau, Le Grand & Co. v. Marks	451, 829
— v. Loveless	921	Rook v. Hopley	376
— v. Minshall	904	Roope v. D'Avigdor	503, 791
— v. Mutual Loan Fund ...	503	Rooth v. N. E. Ry. Co.	528
— v. Naylor	422	— v. Quin	66, 176
— v. Paine	905	Roots v. Dormer (Lord)	244
— v. Parker	186	— v. Williamson	960, 978
— v. Pierce	892	Roper, <i>In re</i>	1022
— v. Rawlings	41, 53, 126	— v. Harper	820
— v. Sales	611	— v. Holland	514
— v. Siddons	18	— v. Johnson	433, 434
— v. Street	882, 892	— v. Levy	387
— v. Ward	889	Rordasz v. Leach	294
— v. Wiggs	892	Roscow v. Hardy	297
Roelands v. Harrison	355	Rose v. Bryant	34
		— v. Groves	714

	PAGE		PAGE
Rose v. N. E. Ry.	675	Rowlands v. De Vecchi	56
— v. Rowcroft	293	— v. Samuel	765
— v. Savory	71	Rowles v. Senior	813
— v. Tomlinson	203	Rowley v. L. & N. W. Ry. 158, 664, 691	
Rosefield v. Provincial Union Bank	1059	— v. Tottenham Urban Council	712
Rosenbaum v. Belson	240	Rowning v. Goodchild	537
Rosenberg v. Cook	251	Rownsong, <i>In re</i>	1015
Rosevear China Clay Co., <i>Ex parte</i>	863	Rowntree v. Jacob	61
Rosewell v. Prior	650	Rowson v. Earle	395
Rosin and Turpentine, &c., v. Jacobs	522	Roxburghe v. Cox	507, 591
Roskruge v. Caddy	943	Royal Aquarium, &c., Soc. v. Parkinson	739, 745, 747, 991
Ross v. Army & Navy Hotel Co.	1062	Royal Baking Powder Co. v. Wright, Crossley & Co. 758,	759
— v. Clifton	785	Royal Bank of Canada v. Regem	492
— v. Estates Investment Co.	973	Royal Bank of India's Case ...	966
— v. Fedden	670	Royal Bank of Scotland v. Greenshields	371
— v. Glasgow Cor.	664	— v. Tottenham	326
— v. Hill	516, 522	Royal Bristol Permanent Build- ing Soc. v. Bomash	252, 254
— v. Hunter	84	Royal British Bank v. Turqu- and	118, 976
— v. Johnson	534, 846	Royal College of Veterinary Surgeons v. Collinson	402
— v. London County West- minster, &c., Bank	325	— v. Kennard	402
— v. Shaw	431	— v. Robinson	402
Rossdale v. Denny	237	Royal Exchange Shipping Co. v. Dixon	361, 363
Rossiter v. Miller	236, 237	Royal Mail Steam Packet Co. & River Plate S.S. Co., <i>In re</i>	351
Rothery v. Wood	1064	Royal Naval School, <i>In re</i>	953
Rotherham Alum Co., <i>In re</i> ...	972	Ruabon Brick, &c., Co. v. Gt. W. Ry.	695
Rothfield v. North British Ry.	543	Ruabon S.S. Co. v. London Assurance Co.	482
Rothwell v. Humphreys	486	Rubel Bronze, &c., Co. & Voss, <i>In re</i>	405
Rouard, <i>In re</i>	1050	Ruben v. Great Fingall Con- solidated	955, 956, 979
Rouldes v. Willoughby	845	Ruck v. Hatfield	865
Rourke v. White Moss Col- liery Co.	658, 678, 683	— v. Ruck	147
Rouse v. Bradford Banking Co.	371	— v. Williams	651
— v. Dixon	688	Rucker v. Cammeyer	420, 421
Rousillon v. Rousillon	553	— v. Hiller	307
Routh v. Macmillan	350	— v. Palsgrave	68
— v. Roublot	1052	Ruckmaboye v. Mottichund ...	569
Routledge v. Grant	232, 240	Rudge v. Bowman	458, 459, 465
— v. Hislop	181	Ruding v. Smith	910
— v. Ramsay	575, 576, 577	Rugby Charity Trustees v. Merryweather	712
Roux v. Wiseman	868	Rugg v. Weir	457
Rowbotham v. Wilson	694	Rumball v. Ball	289, 333
Rowe v. Brenton ... 35, 53, 77, 99, 101, 106, 129, 148, 174, 175, 187, 205, 841		— v. Metropolitan Bank...70,	837
— v. Grenfel	35, 812	— v. Wright	261
— v. London School Board	254	Rummens v. Hare	829, 868
— v. Osborne	422		
— v. Pickford	864		
— v. Roach	758		
— v. Tipper	302		
— v. Young	284		
Rowland v. Ashby	18		
— v. Blaksley	79		

	PAGE		PAGE
Rumsey v. King	210	SACHS & Henderson, <i>In re</i> 229, 230	
— v. N. E. Ry.	541	Sack v. Ford	360
Rundle v. Beaumont	188	Sackville West v. Att.-Gen. ...	919
— v. Little	804	Sadd, <i>In re</i>	396
Ruoff v. Long	645	Saddler v. S. Staffordshire, &c., Tramways Co.	654
Ruppell v. Roberts	444	Saddler's Co. v. Badcock	341
Rushby v. Scarlett	441	Sadgrove v. Hole	735, 746
Rush v. Baker	851	Sadler v. Robins	186
— v. Peacock	63	— v. Smith	489
— v. Smith	142, 162	Saffery, <i>Ex parte</i>	1049
Rushforth v. Hadfield	855	— v. Mayer	478
Rushmere v. Polsue	655	Sahlgreen & Carrall's Case ...	961
Rushworth v. Craven ... 46, 47, 189		Sailing Ship Garston Co. v. Hickie	355
— v. Taylor	850	Saint v. Pilley	843
Russel v. Corn	814	St. Albans (Bishop) v. Battersby	614
Russell, <i>Ex parte</i>	1038	St. Aubyn v. Smart	398
—, <i>In re</i>	391, 480, 621	S. Cross (Master) v. Howard de Walden	24
— v. Amalgamated Society of Carpenters	556	St. Enoch Shipping Co. v. Phosphate Mining Co.	358
— v. Jackson	152, 154	S. George & S. Margaret	917
— v. Langstaffe	298	St. Leonards (Lord) v. Ash- burner	811
— v. Men of Devon	651	St. Leonards Guardians v. Franklin	637
— v. Phillips	283	St. Saviour's v. Smith	606
— v. Shenton	650	Salaman, <i>Ex parte</i>	1064
— v. Watts	697, 698	— v. Halford	625
Russian S. Navigation Co. v. Silva	21	Sale v. Lambert	236
Russo-Chinese Bank v. Li Yau Sam	491, 728	Sales Agency v. Elite Theatres	1050
Rust v. Victoria, &c., Dock Co.	640	Salford (Mayor) v. Lever ... 489, 729	
Rustell v. Macquister	740	Salisbury v. Gould	990
Rustomjee v. The Queen	566	— v. Gt. N. Ry.	809
Ruston's Case	145	Salisbury, Jones and Dale's Case	963
Rutherford, <i>In re</i>	34, 35	Salkill v. Shelton	942
— v. Evans	731	Salmon v. Bensley	647
Rutland's (Countess) Case...26, 796,		— v. Isaac	751
	868	— v. Ward	376
Rutter, <i>In re</i>	912	— v. Watson	515
— v. Chapman	68, 231	Salomon v. Salomon & Co. ...	972
Ruttinger v. Temple	454	Salomons v. Nissen	866
Ryall v. Kidwell	265, 650	— v. Pender	477
— v. Rich	632	Saloucci v. Woodmas	181
Ryalls v. Leader	751	Salt v. Cooper	924
Ryan v. Clark	808	Salt Union v. Brunner	692, 719
— v. Jenkinson	405	Saltash Cor. v. Goodman	36, 37
— v. Sams	454	Salte v. Thomas	189
— v. Shilcock	778	Salter v. Woollams	416, 440
— v. Thompson ... 266, 786, 948		Salts v. Battersby ... 258, 263, 609	
— v. Wood	752	Salvesen v. Rederi Aktieholaget 382, 437	
Ryberg v. Ryberg	163	Salvin v. N. Brancepath Coal Co.	643
Ryder v. Townsend	594, 595	Salybia, The	216
— v. Wombwell	217, 558, 559, 560	Sammell v. Wright	657
Ryland v. Jackson	215		
Rylands v. Fletcher	670, 671		
Rymer v. Cook	79		

	PAGE		PAGE
Sampson <i>v.</i> Easterby	596	Saunders <i>v.</i> White	1050, 1058
— <i>v.</i> Hoddinott	720	Saunders' Case	920
Samson, <i>In re</i>	1013	Saunderson <i>v.</i> Jackson ...	237, 239, 418, 419
— <i>v.</i> Aitchison	656	Savage <i>v.</i> Aldren	567
— <i>v.</i> Rhodes	245	— <i>v.</i> Canning	412, 468
Samuel <i>v.</i> Duke	1037	— <i>v.</i> Norton	124
San Roman, The	363	Savill <i>v.</i> Barchard	856
Sandeman <i>v.</i> Scurr	365	— <i>v.</i> Dalton	181
Sanders <i>v.</i> Davis	845	— <i>v.</i> Roberts	760
— <i>v.</i> Jameson	428	Sawyer <i>v.</i> Sawyer	217
— <i>v.</i> Maclean 347, 424,	440	Saxby <i>v.</i> Easterbrook	759
— <i>v.</i> Meredith	35	— <i>v.</i> Fulton	553
— <i>v.</i> St. Neots Union	954	— <i>v.</i> Manchester & Sheffield Ry.	650, 721
Sanders-Clark <i>v.</i> Grosvenor Mansions Co.	641	Sayer <i>v.</i> Glossop	2, 112
Sanderson <i>v.</i> Aston	370, 371	— <i>v.</i> Kitchen	11
— <i>v.</i> Bell	579, 592	Sayers <i>v.</i> Collyer 240, 248,	653
— <i>v.</i> Berwick Cor.	627, 628	— <i>v.</i> L. & Birmingham Glass Co.	457
— <i>v.</i> Blyth Theatre Co.	226	Sayles <i>v.</i> Blane	485, 981
— <i>v.</i> Bowes	279	Scaife <i>v.</i> Farrant	516
— <i>v.</i> Collins	656	Scales <i>v.</i> Lawrence	619
— <i>v.</i> Graves	26, 234, 424	Scaltock <i>v.</i> Harston	898
Sandford <i>v.</i> Alcock	869	Scaramanga <i>v.</i> Stamp	363
— <i>v.</i> Clarke	888	Scarborough <i>v.</i> Cosgrove	543
— <i>v.</i> Porter	388	Scarf <i>v.</i> Jardine	399, 447
Sandilands, <i>In re</i>	123	Scarfe <i>v.</i> Morgan 555, 858,	859
Sandill <i>v.</i> Franklin	889	— <i>v.</i> Hallifax	489, 1070
Sandon <i>v.</i> Jervis	794	Scarlett <i>v.</i> Hanson	1068
Sands <i>v.</i> Clarke	333	Scarpetta <i>v.</i> Lowenfeld	185
— to Thompson	936, 940	Scarr <i>v.</i> General Accident Assur. Cor., <i>In re</i>	340
Sandys, <i>Ex parte</i>	962, 965	Scarth <i>v.</i> Rutland	390, 394
Saner <i>v.</i> Bilton	618, 622	Scattergood <i>v.</i> Sylvester	836
Sanguinetti <i>v.</i> Pacific Steam Nav. Co.	351, 354	Schaverien <i>v.</i> Morris	282
Sankey Brook Coal Co. <i>v.</i> Marsh	969	Schawel <i>v.</i> Reade	376, 378
Santos <i>v.</i> Illidge	553	Schibsy <i>v.</i> Westenholz	185
Sapsford <i>v.</i> Fletcher	948	Schloss <i>v.</i> Heriot	349, 350
Saqui and Lawrence <i>v.</i> Stearns	344	Schmalzing <i>v.</i> Thomlinson	472
Sarch <i>v.</i> Blackburn	669	Schmalz <i>v.</i> Avery	83
Sarell <i>v.</i> Wine	1004	Schneider <i>v.</i> Foster	457
Sargent, <i>Ex parte</i>	960	— <i>v.</i> Heath	429
— <i>v.</i> Gannon	393	— <i>v.</i> Morris	729
— <i>v.</i> Morris	840	— <i>v.</i> Norris	238, 419
— <i>v.</i> Reed	426	Scholes <i>v.</i> Hilton	138
— <i>v.</i> Wedlake	587	Scholey <i>v.</i> Walshy	295
Sarjeant <i>v.</i> Cowan	1070	— <i>v.</i> Walton	573
Sarl <i>v.</i> Bourdillon	419	Scholfield <i>v.</i> Londesborough (Earl)	314
Sarson <i>v.</i> Roberts	264	— <i>v.</i> Robb	378
Satterthwaite <i>v.</i> Dewhurst	787	Shotsmans <i>v.</i> Lancashire, &c., Ry.	863
Saunders, <i>In re</i>	959	Schreger <i>v.</i> Carden	68
— <i>v.</i> Edwards	756	Schulze <i>v.</i> Gt. E. Ry.	535
— <i>v.</i> Graham	593	Schumack <i>v.</i> Lock	64
— <i>v.</i> Holborn District Board	652	Schuster <i>v.</i> Wheelright	221
— <i>v.</i> Merryweather 605,	879	Schwann, The	361
— <i>v.</i> Mills	757	Schwann <i>v.</i> Cotton	718
— <i>v.</i> Milsome	487, 596		
— <i>v.</i> Musgrave	945, 1065		
— <i>v.</i> Newnan	721		

	PAGE		PAGE
Schwinge v. Dowell	715	Sear v. House Property & In-	
Scobie v. Collins	946	vestment Soc.	612
Scones v. Dowles	15	Searby v. Tottenham Ry.	934
Scott v. Scot	899	Searle, <i>In re</i>	886
Scothorn v. S. Staffordshire Ry.		— v. Barrington	34, 54
Co.	522	— v. Cooke	255, 268
Scotland, Bank of v. Watson	377	— v. Keeves	416
Scott v. Alvarez	243	— v. Laverick	679
— v. Attorney-General ...	910, 918	— v. Lindsay	682
— v. Avery	545	Searles v. Sadgrave	592, 593
— v. Brown ...	459, 505, 549,	— v. Scarlett	751, 752
— v. Clare	59	Sears v. Lyons	815
— v. Denton	775	Seath v. Moore	828
— v. Director of Public Prose-		Seaton v. Burnand	206, 345
cutions	551	— v. Heath	345, 370
— v. Dixon	727	— v. Henson	597
— v. Eastern Counties Ry.		Seaward v. Drew	892
Co.	416	— v. Willcock	251
— v. Ehury (Lord)	450	Secombe v. Wood	666
— v. England	827	Secretary of State for War v.	
— v. Firth	641, 644	Wynne	784
— v. Gilmore	554	Seddon v. Bank of Bolton	699
— v. Irving	580	— v. N. E. Salt Co. ...	500, 548,
— v. Jones	6	— v. Tutop	724
— v. Littledale	437	Sedgwick v. Daniell	482
— v. London Docks Co.	677	Seed v. Bradley	1061
— v. Manchester (Mayor,		Seeger v. Duthie	350
&c.)	651	Selby v. Eden	284
— v. Marshall	1034	— v. Harris	99, 385
— v. Miller	151	— v. Nettlefold	818
— v. Morley	1023, 1027	— v. Greaves	945
— v. Newington	861	Seldon v. Wilde	139
— v. Nixon	871, 933	Sellen v. Norman	33
— v. Pape	700	Sellick v. Trevor	243, 244
— v. Parker	486	Sells v. Hoare	144, 770, 772
— v. Pettit	864	Selway v. Fogg	477
— v. Pilkington	185	— v. Holloway	532
— v. Porcher	490	Semenza v. Brinsley	590
— v. Sampson	756, 757	Senior v. Armytage	24
— v. Shearman	172	— v. Ward	682
— v. Shepherd	790	Serff v. Acton Local Board ...	716
— v. Stansfield	744, 998	Sergeson v. Sealey	173
— v. Uxbridge & Rickmans-		Serjeant v. Nash, Field & Co.	
worth Ry.	595	264, 611, 905, 946,	947
— v. Waithman	128	Serle, <i>In re</i>	902
Scott & Horton v. Godfrey	464	— v. Waterworth	1010
Scottish Equitable Life, &c.,		Serraino v. Campbell	346, 364
Co., <i>In re</i>	337	Seton v. Lafone	70
Scottish Petroleum Co., <i>In re</i> ...	973	— v. Slade	239
Scrace v. Whittington	396	Severin v. Keppell	849
Scrimgeour's Claim	479	Severn, &c., Bridge Co., <i>In re</i>	
Scrivener v. Pask	373	566, 603	
Scurfield v. Gowland	492	Sewell v. Burdick	347
Seago v. Deane	16	— v. Evans	121
Seal v. Claridge	121, 1052	— v. National Telephone Co.	
— v. Turner	231	761, 797	
Sealey v. Tandy	543, 792	Sewers Commissioners v. Gel-	
Seaman v. Netherclift	744	latly	177

	PAGE		PAGE
Sewers Commissioners <i>v.</i> Glasse	703	Shaw <i>v.</i> Stenton	627
Seymayne's Case	817	Shean <i>v.</i> Philips	141
Seymour, <i>In re</i>	122	Sheape <i>v.</i> Culpeper	942
— <i>v.</i> Bridge	459, 478	Shearm <i>v.</i> Burnard	322
— <i>v.</i> Maddox	646	Shearman <i>v.</i> Burnard	172
— <i>v.</i> Pickett	401, 581, 583	Shears <i>v.</i> Jacob	120, 1054
Seyton, <i>In re</i>	335	Shedden <i>v.</i> Patrick	43, 44
Shackell <i>v.</i> Rosier	550	Sheehan <i>v.</i> G. E. Ry.	82
Shackleford <i>v.</i> Dangerfield	958, 967	Sheen <i>v.</i> Bumpstead	728
Shackleton <i>v.</i> Sutcliffe	250	Sheffield (Earl) <i>v.</i> London Joint Stock Bank	838, 960
— <i>v.</i> Swift	768	Sheffield Building Society <i>v.</i> Harrison	844
Shadforth <i>v.</i> Cory	353	Sheffield Cor. <i>v.</i> Barclay	382, 980
Shadwell <i>v.</i> Hutchinson	653, 696, 701	Sheffield & Manchester Ry. <i>v.</i> Woodcock	982, 983
Shaffers <i>v.</i> General Steam Navi- gation Co.	687	Shelberry <i>v.</i> Briggs	66
Shanahan <i>v.</i> Shanahan	102	Sheldon <i>v.</i> Cox	439
Shand <i>v.</i> Bowes	21	Shelfer <i>v.</i> City of London Elec- tric Lighting Co.	640, 653
— <i>v.</i> Grant	498, 501	Shelton <i>v.</i> Livius	14, 421
Shapland <i>v.</i> Cockram	213	— <i>v.</i> Springett	454
Shardlow <i>v.</i> Cottrell	236	Shenstone <i>v.</i> Freeman	782
Sharland <i>v.</i> Mildon	491, 1010	— <i>v.</i> Hilton	834
Sharman, <i>In re</i>	132, 1013	Shenton <i>v.</i> Smith	408
— <i>v.</i> Brandt	239, 420, 421, 422, 427	Shephard, <i>In re</i>	910
— <i>v.</i> Merritt & Hatcher	754	— <i>v.</i> Payne	37
Sharp <i>v.</i> Bailey	307	Shepherd <i>v.</i> Bray	726, 1007
— <i>v.</i> Brown	1050, 1052, 1053, 1055	Shepherd <i>v.</i> Berger	905
— <i>v.</i> Fowle	774	— <i>v.</i> Bristol & Exeter Ry.	533
— <i>v.</i> Gray	660	— <i>v.</i> Broome	726
— <i>v.</i> Gt. W. Ry. Co.	457	— <i>v.</i> Croft	250
— <i>v.</i> Powell	653	— <i>v.</i> Harrison	348
Sharpe <i>v.</i> Birch	1054	— <i>v.</i> Johnson	467
— <i>v.</i> Lamb	7, 68	— <i>v.</i> Keatley	243
— <i>v.</i> Nosawa	435	— <i>v.</i> Shorthose	87, 105
Sharlington <i>v.</i> Fulham Guard- ians	577, 991	— <i>v.</i> Whehle	1035
Sharples <i>v.</i> Rickard	204, 278	Shepherd's Case	964
Shattock <i>v.</i> Carden	1069	Shepley <i>v.</i> Davis	867
Shatwell <i>v.</i> Hall	993	Sheppard <i>v.</i> Midland Ry.	519
Shaw <i>v.</i> Arden	395	— <i>v.</i> Sheppard	453
— <i>v.</i> Attorney-General	918	— <i>v.</i> Union Bank of London	833
— <i>v.</i> Barbor	882	Sheridan <i>v.</i> New Quay Co.	536, 850
— <i>v.</i> Beck	205	Sheriff of Herts, <i>Ex parte</i>	1064
— <i>v.</i> Benson	551	Sherratt <i>v.</i> Mountford	28
— <i>v.</i> Broom	316	Sherry, <i>In re</i>	583
— <i>v.</i> Crompton	602, 927	— <i>v.</i> Oke	253
— <i>v.</i> Gould	918	Sherwell <i>v.</i> Alton District Council	678
— <i>v.</i> Gt. W. Ry. Co.	526, 527	Sherwood <i>v.</i> Clark	923
— <i>v.</i> Hertfordshire Cy. Coun- cil	991	Shields <i>v.</i> Boucher	42
— <i>v.</i> Holland	310, 368, 467, 490	— <i>v.</i> Davis	345
— <i>v.</i> Kay	155, 619	Shilling <i>v.</i> Accidental Death Insurance Co.	336, 337
— <i>v.</i> Keighron	938	Shillito <i>v.</i> Biggart	357
— <i>v.</i> Picton	61, 70	Shillitoe <i>v.</i> Claridge	378
— <i>v.</i> Robberds	342, 343	Shine <i>v.</i> Dillon	259
— <i>v.</i> Rowley	465	Shingler <i>v.</i> Holt	1073
— <i>v.</i> Simmons	551		

	PAGE		PAGE
Ship v. Crosskill	493, 500	Silvester, <i>In re</i>	369
Shipman v. Thompson	1005	Simkin v. L. & N. W. Ry.	676
Shipman's Case	964	Simm v. Anglo-American Tele-	
Shipton v. Casson	439	graph Co.	979
— v. Thornton	202, 358	Simmonds v. Parminter	295
Shipton, Anderson & Co. v.		Simmons v. Liberal Opinion ...	380
Weil	424, 426	— v. Lillystone	848
Shipway v. Broadwood	549	— v. Mitchell	733
Shirreff v. Wilks	285	— v. Norton	815
Shoebottom v. Egerton	646	— v. Swift	439
Shoppee v. Nathan	1071	— v. Woodward	829, 1053, 1058, 1059
Shore v. Bedford	153	Simon v. Motivos	253
— v. Picton	490	Simons, <i>In re</i>	390
Shoreditch Borough v. Bull ...	652	— v. Gt. W. Ry.	527, 528
Shoreditch Vestry v. Hughes ...	75	— v. Patchett	381
Short v. Kalloway	206	Simper v. Foley	697, 698, 699
— v. Lee	50, 51, 53, 174	Simpson v. A.-G.	38
— v. M'Carthy	399, 566	— v. Crippin	429
— v. Simpson	347	— v. Dismore	401
— v. Spackman	84	— v. Eggington	581
— v. Stoy	60, 78	— v. Fogo	186
Shott's Iron Co. v. Inglis ...	644, 653	— v. Godmanchester Cor. ...	708
Shove v. Wehh	492	— v. Hartopp	779, 783, 784
Shrapnel v. Laing	222, 226	— v. Henderson	15
Shrewsbury v. Blount	728	— v. Henning	586
Shrewsbury (Earl) v. North		— v. Hill	799
Staffordshire Ry.	986	— v. Lamb	474
Shrewsbury's Case	808	— v. L. & N. W. Ry.	535
Shrewsbury Mercers v. Hart ...	111	— v. Margitson	16, 26
Shrewsbury Peerage Case ...	41, 42, 43, 44	— v. Metropolitan Water	
Shropshire Union Ry. v. Ander-		Board	652
son	984	— v. Pickering	169
— v. Reg.	979	— v. Robinson	60, 739
Shrosbery v. Osmaston	763	— v. Savage	640, 711
Shubbrook, <i>Ex parte</i>	856	— v. Thomson	667, 673
Shute v. Robins	297	— v. Thoreton	12
Shuttleworth, <i>Ex parte</i>	583	Simpson's Claim	972
— v. Fleming	702, 708, 819	Sims v. Landray	240, 420
— v. Nicholson	207, 215	— v. Marrayatt	74
— v. Stephens	280	— v. Midland Ry.	517, 533
Sibley v. Higgs	1060	— v. Thomas	602
— v. Minton	952	— v. Trollope	1058
Siboni v. Kirkman	1006	Simson v. Ingham	581, 582
Sichel v. Lambert	913	— v. L. General Omnibus	
Sideways v. Todd	516	Co.	660
Siddall, <i>In re</i>	551	Simultaneous Printing Syndi-	
Siddons v. Lawrence	225	cate v. Foweraker	1072.
— v. Short	692, 695	Sinclair v. Bowles	468, 476
Sidebotham v. Holland ...	888, 889	— v. Maritime Passengers	
Sievewright v. Archibald ...	421, 422, 423	Assur. Co.	340
Siffken v. Wray	862	— v. Stevenson	8, 159
Siffkin v. Walker	285	Siner v. Gt. W. Ry.	675
Siggers v. Brown	302	Singer Manufacturing Co. v.	
— v. Evans	606, 829, 1037	Clark	836
Sikes v. Wild	254	— v. L. & S. W. Ry.	858
Sillem v. Thornton	342	Singh v. Rajah of Faridkote ...	185
Sills v. Laing	485	Singleton v. Barrett	1, 198
		— v. E. Counties Ry. ...	663, 674

	PAGE		PAGE
Singleton v. Williamson	776, 949, 950	Small v. National Provincial Bank of England	1047
Sinnott v. Bowden	342, 617	Smallman v. Pollard	1066
Sisters, The	666	Smallpage & Brandon's Cases...	291
Six Carpenters' Case	773, 776, 814, 950	Smallwood v. Sheppards	258
Skeate v. Beale	501	Smart v. Harding	234
— v. Slaters	222	— v. Hutton	1033
Skeet v. Lindsay	574, 575	— v. Morton	694
Skelton v. Hawling	1018	— v. Nokes	201
— v. L. & N. W. Ry.	674	— v. Rayner	213
Skene v. Cook	600, 934	— v. Sandars	820
Skerry v. Preston	948	— v. Stisted	719
Skilbeck v. Garbett	304, 392	Smartle v. Williams	129
Skillett v. Fletcher	371, 372	Smeed v. Foord	436
Skinner v. City of London Marine Insur. Cor.	970	Smidt v. Tiden	357
— v. Hunt	266, 786, 948	Smith, <i>Ex parte</i>	962
— v. Lambert	987	—, <i>In re</i> (60 L. J. Ch. 57; 45 Ch. D. 632)	131
— v. L. & Brighton Ry. Co.	657, 659	—, <i>In re</i> (59 L. J. P. 5; 15 P. D. 2)	132
— v. Shew	759	— v. Accident Insur. Co.	339
— v. Stocks	83	— v. Adkins	136
Skinners' Co. v. Knight	902	— v. Anderson	551
Skipp v. E. Counties Ry.	681	— v. Andrews	190
Skipper v. Holloway	507	— v. Ashforth	771, 772, 774
Skipwith v. Green	18	— v. Associated Omnibus Co.	684
Skrine v. Elmore	376	— v. Baker (42 L. J. C. P. 155; L. R. 8 C. P. 350)	503
Skull v. Glenister	716	— v. Baker (60 L. J. Q. B. 683; [1891] A. C. 325)	678, 681, 683, 685, 687
Skyring v. Greenwood	61, 490	— v. Bank of N. S. Wales	298
Sladden v. Sergeant	161	— v. Battams	22, 32
Slade v. Tucker	154	— v. Baxter	698, 699, 700
Slade's Case	171	— v. Bedouin S. Navigation Co.	346
Slane Peerage Case	41, 88	— v. Biggs	162
Slaney v. Wade	42	— v. Bird	68
Slater v. Evans	555	— v. Birmingham Gas Co.	851, 892, 948, 956
— v. Hodgson	92	— v. Blakey	51, 56
— v. Hoyle & Smith	380, 434, 435, 534	— v. Blandy	71
— v. Jones	544	— v. Broadbent	472, 1071
— v. Swann	803	— v. Bromley	505
Slatford v. Erlebach	225	— v. Brownlow (Earl)	175
Slatterie v. Pooley	2, 7, 58, 881	— v. Butler	246, 252
Slattery, <i>In re</i>	337	— v. Chadwick	725
— v. Dublin, &c., Wicklow Ry.	217, 662	— v. Chance	439
Slaughter v. Brown	459, 505, 549, 551	— v. Cheese	1053
Slay v. Tillotson	757	— v. Clarke	293
Slazengers v. Gibbs	732	— v. Clegg	388
Sleat v. Fagg	536	— v. Clinton	482, 550
Sleigh v. Sleigh	481	— v. Cook	669
Slim v. Gt. N. Ry.	532	— v. Compton	483
Slipper v. Tottenham, &c., Ry. Co.	244	— v. Cuff	505
Slubey v. Hayward	865	— v. Daniell	153
Sly v. Sly	52, 55, 130	— v. Darby	694
Smailes v. Evans & Reid	357	— v. Dart	218, 359
Smale v. Burr	1039	— v. Davis	1011

	PAGE		PAGE
Smith v. Day	947, 1014	Smith v. Milles	802
— v. Dean	331	— v. Morgan	63, 158, 1013
— v. Dearlove	857, 858	— v. Mundy	869
— v. Dennis	537	— v. Musgrave	670
— v. Dimes	390	— v. Myers	426
— v. Dohson	665	— v. Neale ...	239, 243, 412, 457
— v. Eggington ...	271, 795, 814	— v. Peat	619, 620
— v. Eldridge	261	— v. Pocklington	599
— v. Enright	951	— v. Powditch	537
— v. Ferrand	584	— v. Prosser	288
— v. Feverel	704	— v. Pymon	356
— v. Fletcher	670	— v. Raleigh	263
— v. Forty	570	— v. Richardson	755
— v. Fox	399	— v. Robinson	243, 624
— v. General Motor Cab Co.	658	— v. Rosario Nitrate Co. ...	354
— v. Giddy	642	— v. Rummens	183
— v. Gold Coast, &c., Ex- plorers	411	— v. Russell	1066
— v. Goldsworthy	987	— v. S. Michael, Cambridge	806
— v. Goodwin	951	— v. Selwyn	503, 791, 835
— v. Goss	863	— v. Smith	115
— v. Gt. E. Ry.	668, 677	— v. Sorby	549
— v. Gt. W. Ry.	519, 695	— v. S. E. Ry.	674, 957
— v. Green	379	— v. Sparrow	554
— v. Gronow	903	— v. Steele	683
— v. Hartley	386	— v. Streatfield	743, 800
— v. Hayward	403, 409	— v. Surman	234
— v. Hodson	503	— v. Sydney	794
— v. Hudson	415, 416	— v. Tebhatt	41, 43
— v. Hughes	548	— v. Thackerab	692
— v. Hull Glass Co.	975	— v. Thompson	16, 406
— v. Humble	265, 625	— v. Thorne	575, 576, 577
— v. Jeffryes	23	— v. Troup	208
— v. Johnson	195, 291, 294	— v. Trowsdale	387
— v. Kay	787	— v. Union Bank of London	329
— v. Keal	804	— v. Vertue	284
— v. Kenrick	670, 720	— v. Wall	1048
— v. King	561	— v. Walton	25
— v. Land & House Property Cor.	723, 725	— v. Watson	237, 445
— v. Lewis	739	— v. Wehster	237, 238
— v. Lindo	479, 551	— v. White	266
— v. Lister	45	— v. Whiteman	1058
— v. Lloyd	934, 935	— v. Widlake	883
— v. London & N. W. Ry.	516	— v. Wilson	24
— v. L. & S. Katherine's Docks	646, 647, 676, 679	— v. Wiltshire	995
— v. L. & S. W. Ry.	672	— v. Winter	293
— v. Lovell	544	— v. Wood	736
— v. Lyon	62	— v. Woodfine	384
— v. Macdonald	765, 766	— v. Young	1, 849, 850
— v. Maclure	277, 844	Smith's Dock Co. v. Readhead	689
— v. M'Guire	198, 357	Smout v. Ilbery	443, 454
— v. Marrable	264	Smurthwaite v. Hannay	81
— v. Matthews	749	— v. Wilkins	348
— v. Mawhood	552	Smyth v. Anderson	443
— v. Maxwell	914	Snark, The	666
— v. Mercer	334, 496, 585	Snead v. Watkins	857
— v. Midland Ry.	519	Sneary v. Abdy	1037
		Snee v. Durkie	661
		Sneesby v. Lancashire & York- shire Ry.	664

	PAGE		PAGE
Snell <i>v.</i> Finch	949	South Eastern Ry. <i>v.</i> Hebble-	
Snelling <i>v.</i> Huntingfield (Lord)	411	white	984
Snook <i>v.</i> Mears	574	South Hetton Coal Co. <i>v.</i> N. E.	
Snow <i>v.</i> Phillips	925	News Assoc.	734, 753
Snowball <i>v.</i> Goodricke	65, 1035	South of England Natural Gas,	
Snowden, <i>Ex parte</i>	481	&c., Co., <i>In re</i>	726
— <i>v.</i> Bayues	686	South of Ireland Colliery Co.	
Soady <i>v.</i> Turnbull	1019	<i>v.</i> Waddle	884, 953, 954, 985
Soames <i>v.</i> Nicholson	889	South London Fish Market Co.,	
Soane <i>v.</i> Knight	753	<i>In re</i>	980
Soanes <i>v.</i> L. & S. W. Ry. ...	532, 540	South Marylebone Vestry <i>v.</i>	
Soar <i>v.</i> Ashwell	564	Sheriff of London	1065
Sobey <i>v.</i> Sobey	767	South Shields Waterworks Co.	
Soblomsten, The	358	<i>v.</i> Cookson	719
Société Coloniale Anversoise <i>v.</i>		South Staffordshire Tramways	
London & Brazilian Bank ...	489	Co. <i>v.</i> Sickness Assurance	
Société Générale de Paris <i>v.</i>		Co.	340, 341
Tramways Union Co. (or		South Staffordshire Water Co.	
Walker)	122, 959	<i>v.</i> Sharman	841
Softlaw <i>v.</i> Welch	1027	South Wales Atlantic Steam-	
Solarte <i>v.</i> Palmer	300	ship Co., <i>In re</i>	551
Solicitors & General Life Assur.		South Wales & Cannock Chase	
Soc. <i>v.</i> Lamb	339	Coal Co. <i>v.</i> Underwood	280
Solly <i>v.</i> Forbes	586	South Wales Miners' Federa-	
Solomon <i>v.</i> Mulliner	229	tion <i>v.</i> Glamorgan Coal Co.	
— <i>v.</i> Vintners Co.	693		768, 786
Soltykoff, <i>In re</i>	323	Southall <i>v.</i> Rigg	316
Solvency Mutual Guarantee Co.		Southam, <i>Ex parte</i>	1054
<i>v.</i> Freeman	19	Southampton, &c., Bridge Co.	
Solway, The	64	<i>v.</i> Southampton Local Board	651
Somerset, <i>In re</i>	568, 570	Southampton Dock Co. <i>v.</i>	
Somerset (Duke) <i>v.</i> France		Richards	983, 984
	76, 77, 106	Southampton Steam Colliery	
Somerville <i>v.</i> Hawkins	745, 746	Co. <i>v.</i> Clarke	356
Somerville & Turner's Con-		Southcote <i>v.</i> Stanley	646
tract, <i>In re</i>	924	Southernwood <i>v.</i> Ramsden	789
Somes <i>v.</i> British Empire Co.	858	Southey <i>v.</i> Tuff	216
Sommerville <i>v.</i> Mirehouse	997	Southport, &c., Banking Co. <i>v.</i>	
Soper <i>v.</i> Arnold	253	Thompson	844, 1047
Sorsbie <i>v.</i> Park	598	Southwark & Vauxhall Water	
Sotilichos <i>v.</i> Kemp	23	Co. <i>v.</i> Quick	140
Sottomayor <i>v.</i> De Barros	910	Southwell <i>v.</i> Bowditch	83
Souch <i>v.</i> East London Ry.	818	Sovereign Life Assur. Co. <i>v.</i>	
— <i>v.</i> Strawbridge	411	Dodd	973
Soulby <i>v.</i> Neving	632	Soward <i>v.</i> Leggatt	84, 211, 618
Souter <i>v.</i> Drake	243	Sowell <i>v.</i> Champion ...	789, 804, 813
South African, &c., Storage		Sowerby <i>v.</i> Smith	704
Co., <i>In re</i>	903	Spackman <i>v.</i> Evans	975
South African Territories <i>v.</i>		— <i>v.</i> Foster	867, 870
Wallington	487	Spaight <i>v.</i> Tedcastle	662, 665
South American & Mexican		Spain <i>v.</i> Arnott	405
Co., <i>In re</i>	168	Spalding <i>v.</i> Ruding	866
South Australian Insurance Co.		Spanish Steamship Sebastian	
<i>v.</i> Randell	342, 828	(Owners) <i>v.</i> Sociedad Altos	
South Carolina Bank <i>v.</i> Case	444	Hornos de Vizcaya	359
South Devereux <i>v.</i> Much Dew		Spargo <i>v.</i> Brown	40, 54
Church	910	Spark <i>v.</i> Heslop	370
		Spark's Lease, <i>In re</i>	613
		Sparling <i>v.</i> Haddon	731

PAGE	PAGE		
Spartali v. Benecke	21, 23	Staffordshire Canal Co. v. Birmingham Canal Co.	719
Speake v. Hughes	742	Stahlschmidt v. Lett	1015
Spear v. Travers	867	Staight v. Burn	701, 702
Spears v. Hartley	856, 861	Stainer v. Droitwich	193
Spedding v. Nevell	381	Stait v. Fenner	892
Speight v. Gosney	741	Stamford, &c., Banking Co. v. Smith	572, 573
— v. Oliviera	788	Stammers v. Dixon	25
Spence v. Spence	874	Standard Bank of British South America v. Stokes ...	811
Spenceley v. De Willett	159	Standard Manufacturing Co., In re	1062, 1072
Spencer v. Barough	68	Standen v. Christmas	186, 256, 270, 271
— v. Clarke	336	— v. Standen	50
— v. Handley	547	Standing v. Bowring	829
— v. Parry	485, 515	Standish v. Ross	488, 497
— v. Smith	554	Stanford, <i>Ex parte</i>	1058, 1060, 1061
— v. Swannell	637	— v. Hurlstone	62, 807
Spencer's Case ...	609, 617, 630, 706	— v. Roberts	391
Speyer v. Int. Rev. Comrs. ...	197	Staniforth v. Fox	884
Spice v. Bacon	542	Stanley v. Dowdeswell	237
Spicer v. Burgess	122	— v. Hayes'	627
— v. Cooper	24, 418	— v. Powell	790, 803
Spiers v. Parker	85	— v. Stanley	1022
Spiers v. Hunt	382	— v. Towgood	617
Spiers & Pond v. John Bull, Ltd.	731	— v. Western Insur. Co. ...	343
Spike v. Harding	268	— v. White	77
Spill v. Maule	746, 750	Stanley & Nuneaton Corpn., In re	387
Spindler v. Grellett	279	Stannard v. Forbes	629
Spirett v. Willows	1038	Stanton v. Austin	358
Spong v. Wright	574, 575	— v. Richardson	18, 350
Spooner v. Brewster	811	— v. Southwick	265
— v. Browning	465	Stanyngought v. Cosins	823
— v. Gardiner	307	Staple v. Heydon	706
— v. Godfrey	383	Staples v. Young	229
— v. Payne	119	Stapleton, <i>Ex parte</i>	432
Spoor v. Green	220, 626, 627	— v. Hayman	828
Sprange v. Barnard	123	Stapley v. L., Brighton & S. C. Ry.	674
Spratt v. Hobbouse	488	Stapylton v. Clough	55, 56
— v. Jeffery	243	Star of India, The	667
Springer v. G. W. Ry.	533	Stark, <i>Ex parte</i>	962
Sproat v. Matthews	284	Starkey v. Bank of England	382, 980
Sproule v. Legg	279, 280	Starr-Bowkett Building Soc. and Sibun's Contract, <i>In re</i>	251
Spurrier v. Hancock	245	Startup v. Macdonald	424
Spybey v. Hide	595	Stathatos v. Stathatos	910
Squier v. Hunt	432	Stead v. Dawher	26
Squire, <i>Ex parte</i>	199	— v. Liddard	201
— v. Tod	251	— v. Thornton	491
— v. Wheeler	542	Steadman v. Hockley	858
Squire (Henry), Cash Chemist v. Ball, Baker & Co.	680	Stearn v. Mills	1011
Stace v. Griffith ...	155, 732, 746, 747	— v. Prentice	643, 814
Stacey v. Wallis	332, 970		
Stackwood v. Dunn	591		
Stacy v. Firth	559		
Stadhard v. Lee	470		
Stafford v. Clark	184		
— v. Coyney	712		
— v. Gardner	271		
Stafford Corporation v. Till ...	955		

	PAGE		PAGE
Stebbing v. Liverpool & London & Globe Insur. Co.	344	Steward v. Gromett	761
— v. Spicer	121	— v. North Metropolitan Tramways	219, 220
Stedman v. Duhamel	204	— v. Young	217, 758
— v. Gooch	103, 584	Stewart, <i>In re</i>	828
— v. Smith	812, 817, 878	— v. Aberdeen	580
Steeds v. Steeds	635	— v. Adams	649
Steel v. Dixon	482	— v. Alliston	249
— v. Prickett	46, 809	— v. Austin	493
— v. State Line S. Ship Co.	361, 363	— v. Eddowes	239
Steel Wing Co., <i>In re</i>	507	— v. Lawton	25
Steele v. Brown	1038	— v. Lee	580
— v. Haddock	19	— v. L. & N. W. Ry. Co.	530
— v. Mart	17	— v. Lupton	467
— v. Williams	500, 501	— v. Rogerson	359
Steers v. Midland Ry.	532, 540	— v. Smith	246
Steeven's Hospital v. Dyer	111	— v. West India, &c., Steamship Co.	349
Steigenberger v. Carr	448, 449, 466	Stewart's Case	968
Steiglitz v. Eggington	66	Stickney v. Keeble	245, 246
Stein, Forbes & Co. v. County Tailoring Co.	429	Stierneld v. Holden	847
Steinman v. Augier Line	361	Stileman-Gibbard v. Wilkinson	722
Stella, The	362, 531, 690	Stiles v. Cardiff S. Navigation Co.	65, 669, 956
Stenning, <i>In re</i>	582	Still v. Halford	100, 176, 385, 386
Stephen v. Gwenap	54	Stillwell, <i>In re</i>	1008
Stephens, <i>Ex parte</i>	843	Stimson v. Farnham	1068, 1069
—, <i>In re</i>	600, 612, 1018	Stirling v. Burdett	481
— v. Badcock	491	— v. Maitland	407
— v. De Medina	466	Stobart v. Dryden	546
— v. Dudbridge Ironworks Co.	688	Stock v. Harris	537
— v. Elwall	851	— v. Meakin	626
— v. L. & S. W. Ry.	525, 526	Stockdale v. Ascherberg	624
— v. Reynolds	286	— v. Hansard	72, 179, 754
— v. Robinson	550	Stocken v. Collin	40, 192, 303
Stephenson v. Hart	534, 846	Stocken's Case	512
Stettin, The	363	Stocker v. Berny	871
Stevens v. Austen	242	Stockfleth v. De Tastet	58
— v. Biller	856	Stockport Waterworks Co. v. Potter	717
— v. Chown	213	Stocks v. Booth	722
— v. Clark	183	— v. Wilson	558
— v. Copp	898	Stoddart v. Palmer	1067
— v. Gourley	550	— v. Union Trust	508, 591
— v. Hudson's Bay Co.	954	Stoessiger v. S. E. Ry. Co.	280, 524
— v. Jackson	560	Stogdon v. Lee	1022
— v. Marston	1046	Stoke Parish Council v. Price	639
— v. Midland Counties Ry.	762	Stokell v. Niven	235
— v. Sampson	751	Stokes v. Cooper	263
— v. Thacker	64	— v. Cox	343
— v. Tillett	173	— v. La Rivierre	863
Stevenson v. Blakelock	856, 861	— v. Lewis	478
— v. Lambard	263, 607	— v. Mason	74
— v. Liverpool (Mayor)	875, 920	— v. Russell	605
— v. McLean	232	— v. Spencer	1053
— v. Newnham	770, 850	— v. Twitchen	505
— v. Watson	470	— v. Whicher	236
Steward v. Dunn	31, 301, 987, 988	Stokes' Case	564
— v. Greaves	987		

	PAGE		PAGE
Stokoe v. Singers	700	Strother v. Barr	2
Stollmeyer v. Petroleum Deve-		Stroud	155
lopment Co.	721	—, <i>In re</i>	24
— v. Trinidad Lake Petro-		— v. Dandridge	1010
leum Co.	717	— v. Lawson	81
Stone, <i>In re</i>	446	Stroughill v. Buck	69
— v. City & County Bank		Stroyan v. Knowles	693
499, 967, 973		Strutt v. Bovingdon	103, 169
— v. Compton	547	— v. Smith	457
— v. Hyde	688	Stuart v. Bell	746, 750
— v. Marsh	502, 503, 835	— v. Diplock	614, 615
— v. Midland Ry.	520	— v. Evans	684, 685, 687
Stoneham, <i>In re</i>	828	— v. Freeman	335
— v. Davies	1022	— v. Joy	606
— v. Ocean, &c., Accident		— v. Lovell	78, 740
Insur. Co.	340	— v. Whittaker	1069
Stooke v. Taylor	226, 229, 588	— v. Wilkins	376
Storey v. Ashton	656	Stubbing v. Heintz	441
— v. Fulham Steel Works ...	408	Stubbs v. Holywell Ry. ...	403, 1002, 1007
Storr v. Crowley	532	— v. Lainson	1067
Stourbridge Canal Co. v.		— v. Mazure	738, 752
Dudley	694	— v. Parsons	948
Stoveld v. Hughes	867	— v. Russell	738
Stowe v. Querner	2, 9, 59, 203	— v. Slater	462, 477, 848
Stowell v. Robinson	26	Stubley v. L. & N. W. Ry. ...	674
Strachan v. Universal Stock		Stubs v. Stubs	869
Exchange (No. 2)	503	Stuckey v. Hooke	625
Stracy v. Blake	67	Stuckey, <i>In re</i>	601
Straker v. Kidd	352	— v. Baily	376
Strang v. Scott	350, 366	Studdy v. Sanders	24, 444, 467
Stranks v. St. John	243, 630	Stumore v. Breen	349
Stratford-upon-Avon Corpora-		— v. Campbell	588, 589, 590
tion v. Parker	608, 1010	Sturch v. Clarke	994
Straton v. Rastall	61	Sturge v. Buchanan	10, 12, 32, 101, 162
Stratten v. Lawless	797, 813	Sturgeon v. Wingfield	605
Stratton v. Mathews	485	Sturges v. Bridgman	643, 653, 655, 708
— v. Pettit	886	— v. Derrick	308
Strauss v. County Hotel, &c.,		Sturgis v. Darell	1018
Co.	541	Sturla v. Freccia	40, 188
— v. Francis ...	210, 221, 734, 753	Sturm v. JEFFREE	10
Stray v. Russell	461, 494	Styart v. Rowland	514
Streatley, <i>In re</i>	131	Submarine Telegraph Co. v.	
Street v. Blay	375, 376, 641	Dickson	666
— v. Tugwell	641	Sucksmith v. Wilson	271
Streeter v. Bartlett	60, 99, 120	Suffell v. Bank of England	314, 545
Stretton, <i>In re</i>	395	Suffield v. Brown	718
— v. Busnach	1021	Sugden v. S. Leonards (Lord)	130
Stretton's Brewery Co. v.		Sullivan v. Bishop	633
Derby (Mayor)	650	— v. Magill	139
Strickland v. Maxwell	30	— v. Mitcalfe	969
— v. Turner	492	Summers, <i>In re</i>	1015
— v. Ward	999	— v. Moorhouse	27
— v. Williams	248	Sumner v. Bromilow	843, 844
Strithorst v. Græme	1004	Sumpter v. Hedges	468
Ströms Bruks Aktie Bolag v.		Sun Fire Office v. Hart	341
Hutchison	534		
Strong v. Bird	828		
— v. Hadden	132, 133		
— v. Harvey	593, 595		

	PAGE		PAGE
Sunbolf v. Alford	857	Sweeting v. Pearce	580
Sunderland Orphan Asylum v. Wear (River) Commissioners	605	— v. Turner	827
Surcome v. Pinniger	241	Sweetland v. Smith	253
Surman v. Wharton	1028	— v. Sweetland	131
Surplice v. Farnsworth	265	Swelt v. Pym	861
Surtees v. Woodhouse	625, 626	Swift v. Jewsbury	727, 730, 987
Suse v. Pompe	22, 312	— v. Pannell	1056
Sussex Brick Co., <i>In re</i>	964	— v. Swift	150
Sussex Peerage	44, 50, 51, 55, 106, 107, 108	Swiftsure, The	51
Sutcliffe v. Booth	718	Swinbanks, <i>Ex parte</i>	579
— v. G. W. Ry.	527, 529	Swindell v. Bulkeley	1018
Suter v. Burrell	8	Swindon Waterworks Co. v. Wilts & Berks Canal ..	717, 720
Sutherland (Dowager Duchess), <i>In re</i>	1016	Swinfen v. Bacon	632
Sutton, <i>Ex parte</i>	293	— v. Chelmsford (Lord)...211, 724	724
— v. Bath	1053, 1054	— v. Swinfen	210
— v. Buck	841	Swinford v. Burn	471
— v. Ciceri	522, 524	Swinerton v. Stafford (Mar- quis)	13, 92
— v. Davenport	31	Swire v. Francis	547
— v. Gt. W. Ry.	500, 520	— v. Leach ... 779, 780, 785, 853	853
— v. Grey	366, 367	Sybray v. White	64
— v. Spectacle Makers Co. 388	388	Sydenham v. Rand	138
— v. Sutton	602	Sydney Municipal Council v. Bourke	651
— v. Temple	265	Syed Mohamad Yusuf-ud-Din v. Secretary of State for India	801
— v. Tatham	479	Syeds v. Hay	846
— v. Toomer	201, 333	Syers v. Chapman	791
Sutton Hospital Case	954	— v. Jonas	20, 428
Suzor v. Buckingham	748	— v. Syers	446
Swain v. Ayres	886, 901, 944	Sykes, <i>In re</i>	130
— v. Lewis	7, 304	— v. Dunbar	155, 761, 765
— v. Shepherd	532	— v. Giles	579, 580
Swaine v. Wilson	556	— v. N. E. Ry.	691
Swainson v. N. E. Ry.	683	— v. Sykes	1010, 1036
Swainston v. Clay	1047	Syllivan v. Stradling	255
Swan, <i>Ex parte</i>	590, 979	Sylph, The	181
— v. Cox	283	Symes v. Chaplin	525
— v. North British Austra- lasian Co.	70, 979	Symmons, <i>Ex parte</i>	1048
— v. Steele	285	— v. Blake	740
Swanley Coal Co. v. Denton ...	1059	Symon's Case	964
Swann v. Falmouth (Earl) 770, 779	770, 779	Symonds v. Atkinson	847, 851
— v. Phillips	730	— v. Gas Light Co.	56
— v. Sowell	575	— v. Hallett	1023
Swansborough v. Coventry ...	697	— v. Lloyd	21
Swansea Bank v. Thomas	257	Syms v. Chaplin	536
Swansea (Mayor) v. Thomas 605, 607, 609	605, 607, 609	Synge v. Synge	383
Swanwick v. Sothern	867	TABART v. Tipper	732, 753
Swatman v. Ambler	598	Tabram v. Warren	396
Sweeney v. Coote	768	Tackey v. McBain	723
Sweet v. Lee	239	Tadcaster Tower Brewery Co. v. Wilson	245
— v. Seager	624	Tadman v. Henman	947
— v. Sweet	1028	Taddy v. Sterious	410, 556
Sweeting, <i>In re</i>	389	Taff Vale Ry. v. Amalgamated Soc. of Ry. Servants	769
— v. Asplin	477		
— v. Halse	201		

PAGE	PAGE		
Taff Vale Ry. v. Jenkins	691	Taylor v. Briggs	20
Tagart Beaton & Co. v. Fisher	358	— v. Burgess	323
Tailby v. Official Receiver 506, 830		— v. Caldwell	476
Taite's Case	968	— v. Chester	549, 557, 870
Talbot v. Hodson	120, 122	— v. Chichester, &c., Ry.	986, 550
— v. Lewis	47	— v. Clemson	182
— v. Shrewsbury (Earl)	196	— v. Cole	42, 817
— v. Von Boris	148, 317, 499	— v. Cook	126, 180
Talbot de Malahide (Lord) v.		— v. Corporation of St.	
Cusack	158	Helens	717
Talbutt v. Clark	757	— v. Forster	151
Talley v. Gt. W. Ry.	539	— v. Glassbrook	396
Talver v. West	417, 439	— v. Goodwin	661
Tamvaco v. Lucas	424, 426, 433	— v. Gt. E. Ry. Co.	413, 414, 825, 864
— v. Simpson	358, 860	— v. Great N. Ry.	517
Tancred v. Allgood	1036	— v. Greenhalgh	651
— v. Delagoa Bay, &c., Ry.		— v. Hamstead Colliery Co.	688
Co.	507	— v. Hare	492
— v. Leyland	769	— v. Hawkins	739, 745, 748
— v. Steel Co. of Scotland	426	— v. Henniker	770
Tanham v. Nicholson	894	— v. Higgins	477
Tanner v. Bean	311	— v. Hodgson	393
— v. European Bank	1073	— v. Hollard	186, 601
— v. Scovell	865	— v. Holt	512
— v. Smart	573, 577, 1004	— v. Horde	932, 941
Tanqueray - Willaume &		— v. Johnston	829
Landau, <i>In re</i>	874	— v. Laird	406
Tapley v. Wainwright 560, 704, 819		— v. Liverpool & Gt. W.	
Taplin v. Atty	8, 1034	Steam Co.	361
— v. Florence	820	— v. Lendey	495
Tapling v. Jones	701, 702	— v. M'Keand	830
Tappenden v. Randall	504	— v. Meads	136
Tarback v. Bispham	515	— v. Metropolitan Ry.	520
Tarleton v. Tarleton	184	— v. Parry 77, 167, 202, 812, 841	
Tarlton v. Fisher	796	— v. Richardson	1033
Tarpley v. Blahey	737	— v. Robinson	860
Tarrant v. Webb	681	— v. Shum	606
Tarry v. Ashton	645	— v. Smith	236, 414
Tasker v. Shepherd	407, 1007	— v. Stray	479
Tatam v. Reeve	478	— v. Taylor	589, 1006
Tate v. Humphrey	740	— v. Wakefield	416
— v. Latham	685	— v. Whitehead	818
Tatham v. Haslar	317	— v. Willans	764
— v. Wright	132	— v. Witham	51
Tatton v. Wade	730	— v. Zamira	948
Taunton	155	Teal v. Anty	412, 514
— v. Royal Insur. Co.	972	Tealby v. Gascoigne	1034
Taurine Co., <i>In re</i>	960, 964	Tebb v. Cave	628
Taylor v. Fisher	820	— v. Hodge	844
— v. Great Indian Peninsula		Tebbutt v. Bristol & Exeter	
Ry.	122, 979	Ry. Co.	656
Taylorson v. Peters	943	Tebbay v. Manchester, &c., Ry.	697, 706
Tayleur v. Wildin	895	Temperley S.S. Co. v. Smyth	346, 364
Taylor, <i>Ex parte</i>	194, 446	Temperton v. Russell	786
—, <i>In re</i>	28, 29, 210	Tempest v. Kilner 413, 458, 466, 467	
— v. Barclay	72		
— v. Beal	610		
— v. Bowers	504		
— v. Brewer	471		

	PAGE		PAGE
Templar v. M'Lachlan	395	Thomas v. Lulham	905
Templeton v. Tyree	912	— v. Mirehouse	1066
Tenant v. Elliott	506	— v. Morgan	668
— v. Goldwin	697	— v. Newton	155
Tennant, <i>Ex parte</i>	445	— v. Owen	716
— v. Field	950	— v. Packer	883
— v. Hamilton	643	— v. Patent Lionate Co. ...	1015
Tennants v. Wilson	476	— v. Phillips	802
Tennent v. City of Glasgow		— v. Price	1022
Bank	973	— v. Quartermaine 681, 685,	687
Tenny v. Jones	37	— v. Rhydney Ry.	537
Terrell v. Murray	619	— v. Roberts	1052
Terry v. Hutchinson	787, 788	— v. Russell	801
Teutonia, The	355, 359, 363	— v. Searles ... 1049, 1055,	1057
Tew v. Jones	258	— v. Sylvester	255
Thacker v. Hardy	464, 503	— v. Thomas	492, 716,
Thackeray v. Wood	627, 628	890, 936	
Thackray v. Blackett	307	— v. Williams 406, 408,	743
Thairwall v. Gt. Northern Ry.		Thomas & Co. v. Portsea S.S.	
325, 580, 956, 985		Co.	346
Thames Haven Dock v. Brymer	585	Thompson, <i>In re</i>	31
Thames Sack & Bag Co. v.		— v. Adams	341
Knowles	437	— v. Blackburn	104, 182
Tharpe v. Smallwood	802, 925	— v. Brighton Cor.	652
Tharsis Sulphur & Copper Co.		— v. Brown	582
v. M'Elroy	470	— v. City Glass Bottle Co.	685
Thellinson v. Cosling	167	— v. Cohen	830
Thellusson v. Liddard	881	— v. Davenport	16
— v. Shedden	2	— v. Dominy	347
Thetford Case	111, 193	— v. Donaldson	180
Thetford (Mayor) v. Tyler	262	— v. Equity Fire, &c., Co.	342
Thetis, The	656	— v. Gardiner	420, 422
Theyer v. Purnell	816	— v. Gibson	641
Theys, <i>Ex parte</i>	973	— v. Gillespie	355
This v. Byers	352	— v. Hakewell	598, 599
Thimbleby v. Barron	586	— v. Hervey	452
Thirkell v. Cambi	418, 420	— v. Hickman	809, 935
Thistlewood v. Cracroft	505	— v. Hill	653
Thöl v. Hinton	493	— v. Hndson	634
Thom v. Bigland	724	— v. Lacy	541, 543, 856
Thomas, <i>In re</i>	1071	— v. Lapworth	624, 625
— v. Ansley	2	— v. London County Council	81
— v. Bird	201	— v. Maberley	886
— v. Bishop	286	— v. Maceroni	416
— v. Bradbury	752	— v. Mashiter	779
— v. Brown	236, 253	— v. Miles	246
— v. Churton	744	— v. Morgan	289
— v. Clarke	356	— v. N. E. Marine Engi-	
— v. Cook	259, 367	neering Co.	689
— v. Cross	578	— v. Nye	757
— v. Dey	508	— v. Ross	788
— v. Evans	594	— v. Shackell	753
— v. Exeter Flying Post Co.	221	— v. Shirley	850
— v. Fredricks 262, 267,	610	— v. Trail	861
— v. Harris	210, 950	— v. Trevaniou	48
— v. Harrowing S.S. Co. 355,	357	— v. Wood	771
— v. Hawkes	515	Thomson v. Austen	71
— v. Jenkins	45	— v. Brocklebank	357, 361
— v. Kelly 1058, 1060,	1061	— v. Clanmorris (Lord) 637,	726

	PAGE		PAGE
Thomson <i>v.</i> Clydesdale Bank	492, 838	Tichborne <i>v.</i> Lushington	140
— <i>v.</i> Davenport	83, 442	— <i>v.</i> Weir	609, 933
— <i>v.</i> Eastwood	602	Tickle <i>v.</i> Brown	55, 699, 709, 710, 812
— <i>v.</i> Harding	1006	Tidd, <i>In re</i>	567
— <i>v.</i> St. Catherine's College, Cambridge	694	Tidey <i>v.</i> Mollett	886
— <i>v.</i> Waterlow	716	Tidman <i>v.</i> Ainslie	756
— <i>v.</i> Weems	337	Tidswell <i>v.</i> Whitworth	625
Thorburn <i>v.</i> Barnes	387	Tiedemann <i>v.</i> Ledermann	410
Thorley's Cattle Food Co. <i>v.</i> Massam	743, 759	Tigress, The	862, 866
Thorley (Joseph) <i>v.</i> Orchis S.S. Co.	362	Tilbury <i>v.</i> Silva	36, 810
Thorman <i>v.</i> Dowgate S.S. Co.	353	Tildesley <i>v.</i> Harper	219
Thorn <i>v.</i> City Rice Mills	599	Tilk <i>v.</i> Parsons	741
— <i>v.</i> Mayor of London	373	Till <i>v.</i> Ainsworth	11
Thornbury <i>v.</i> Bevill	238	Tillett <i>v.</i> Ward	813
Thorne <i>v.</i> Heard	565	Tilley <i>v.</i> Thomas	242, 245
— <i>v.</i> Smith	320	Tilley's Case	178
— <i>v.</i> Thorne	920	Tilling <i>v.</i> Dick Kerr & Co.	991
— <i>v.</i> Tilbury	855	Times Insurance Co. <i>v.</i> Hawke	220, 616
Thornett <i>v.</i> Haines	250, 251	Timmins <i>v.</i> Gibbins	487, 583
Thornett & Fehr <i>v.</i> Beeres	375	— <i>v.</i> Rowlinson	633
Thornley <i>v.</i> Thornley	1028	Timmis, <i>In re</i>	600
Thornton <i>v.</i> Adams	944	Timothy <i>v.</i> Simpson	791, 800, 995
— <i>v.</i> Charles	422	Tinckler <i>v.</i> Prentice	611
— <i>v.</i> France	938	Tindall <i>v.</i> Baskett	213
— <i>v.</i> M'Kewan	370	Tinkley <i>v.</i> Tinkley	1025
— <i>v.</i> Meux	421	Tinline <i>v.</i> White Cross Insur. Assoc.	341, 483
— <i>v.</i> Place	475	Tippets <i>v.</i> Heane	570
— <i>v.</i> Royal Exchange Assur- ance Co.	157	Tipping <i>v.</i> S. Helen's Smelting Co.	643
Thorogood <i>v.</i> Robinson	849	Toal <i>v.</i> North British Ry.	677
Thorold <i>v.</i> Smith	580	Tobacco Pipe Co. <i>v.</i> Loder	564
Thorp <i>v.</i> Booth	567	Todd <i>v.</i> Anderson	75, 94
— <i>v.</i> Browne	1053	— <i>v.</i> Emly	441, 597
Thorpe <i>v.</i> Bestwick	134	— <i>v.</i> Flight	650
— <i>v.</i> Brumfitt	650, 713	— <i>v.</i> Hoggart	251
— <i>v.</i> Cooper	171, 195	— <i>v.</i> Kerrich (or Kellage)	404
— <i>v.</i> Eyre	196	Todd-Heatley <i>v.</i> Benham	615, 641
Thorsa, The	363	Tofts <i>v.</i> Pearl Life Assur. Co.	337
Threfall <i>v.</i> Borwick	857	Toke <i>v.</i> Andrews	588
Threfall, <i>In re</i>	945	Toleman <i>v.</i> Porthury	85, 86, 264, 897, 905
Thrift <i>v.</i> Youle	361	Toler <i>v.</i> Slater	598
Throgmorton <i>v.</i> Whelpdale	896	Tolhurst <i>v.</i> Associated Portland Cement, &c.	410
Thrusell <i>v.</i> Handyside	678, 681, 685	Toll <i>v.</i> Lee	449
Thuman <i>v.</i> Best	240	Tollemache, <i>In re</i>	96
Thurgood <i>v.</i> Richardson	1065	Tolman <i>v.</i> Johnstone	159
Thurle <i>v.</i> Madison	129	Tomkins <i>v.</i> Jones	228
Thurn & Taxis (Princess) <i>v.</i> Moffitt	557	— <i>v.</i> Saffery	465
Thursby <i>v.</i> Eccles	234, 241	Tomkinson <i>v.</i> Balkis Consoli- dated Co.	970
Thurston <i>v.</i> Charles	853	— <i>v.</i> S. E. Ry.	985
— <i>v.</i> Slatford	12	— <i>v.</i> Staight	415
Thwaites <i>v.</i> Sainsbury	212	Tomlinson <i>v.</i> Broadsmith	388
— <i>v.</i> Wilding	776, 782	— <i>v.</i> Consolidated Credit Cor.	944, 1062
Thynne, <i>In re</i>	1045		
— <i>v.</i> Glengall (Earl)	241		
— <i>v.</i> Protheroe	198		

	PAGE		PAGE
Tomlinson v. Day	262	Trelawney v. Colman	33
— v. Shynn	1067	Treloar v. Bigge	612, 613
Tompkinson v. Russel	807	Trench v. Newgass	350
Toms v. Wilson	804, 830	Trent v. Hunt	774, 949
Tone v. Preston	693, 709	Trent Navigation v. Wood	517
Tonnevold & Finn Friis, <i>In re</i>	359	Tress v. Savage	883, 886, 887
Toogood v. Spyring	745, 748	Trevillian v. Pine	948
Tooker v. Beaufort (Duke)	72, 87, 174	Trevor v. Whitworth	971
Toomey v. L. Brighton & S. C. Ry.	676	Trew v. Ry. Passengers Assur. Co.	339
Topham v. Booth	601	Trewhitt v. Lambert	3
— v. Braddick	33, 867	Tribe v. Taylor	475
— v. Dent	805	Trim Joint District School v. Kelly	340
— v. Greenside Glazed Fire-brick Co.	1048	Trimbey v. Vignier	107, 291
Topley v. Corsbie	1061	Trimble v. Hill	504
Toppin v. Lomas	235	Trimlestown v. Kemmis	52
Topping, <i>Ex parte</i> 513, 570, 573,	576	Trinidad Asphalte Co. v. Ambard	692
Torbryan, The	362	Tripp v. Thomas	741
Toronto Power Co. v. Paskwan	681	Trotter, <i>In re</i>	134
Torrance v. Bank of Brit. N. America	323	Trotter v. Maclean	815, 821
Torrens v. Walker	618, 622	Trowel v. Castle	100
Torriano v. Young	269	Trueman v. Hurst	515
Torrington (Viscount) v. Lowe	460	— v. Loder	23, 421, 422
Tottenham, &c., Council v. Williamson	639	Trueman's Estate, <i>In re</i>	388
Totterdell v. Fareham Blue Brick Co.	971	Trufort, <i>In re</i>	186
Tough v. North British Ry. ...	677	Truman v. London, Brighton, &c., Ry.	641
Towers v. Barrett	375	Truman's Case	961
Towerson v. Jackson	922	Truscott v. Diamond Rock Boring Co.	618
Town & County Advance Co. v. Provincial Bank of Ireland ...	281	Truslove v. Burton	67
Towne v. D'Heinrich	258	Trustees Co. v. Short	933, 934
— v. Lewis	850	Tryon v. National Provident Institution	82
Townesend v. Crowdy	497	Tuck v. Southern Counties Deposit Bank 1050, 1055, 1057,	1073
Townsend v. Deacon	1004, 1005	Tucker v. Barrow	58, 513
— v. Neale	475	— v. Inman (or Southcote)	74
Townsend's Case	961	— v. Linger	24
Townshend (Marquis) v. Stan-groom	241	— v. Newman	640
Towse v. Henderson	349	— v. Oldhury U.C.	51
Towson v. Tickell	920	— v. Tucker	572
Toynbee v. Brown	710	— v. Wilkins	92, 191
Tozeland v. W. Ham Guardians	678, 683	Tuckey v. Hawkins	603
Traae, <i>In re</i>	354	Tuckwood v. Rotherham Cor.	991
Tracy Peerage	4, 158	Tuff v. Warman	662, 665
Trail v. Kibblewhite	113	Tugham v. Craig	744
Travers v. Cooper	522	Tugman v. Hopkins	491
— v. Sen	451, 453	Tull v. Parlett	17, 48
Travis v. Chaloner	170	Tullidge v. Wade	787, 789, 791
Traviss v. Hargreave	204	Tulloch v. Dunn	573, 1017
Treadwin v. Gt. E. Ry. Co. ...	524	Tully v. Howling	350
Trebeck v. Crondace	801	— v. Terry	357
Tredwen v. Bourne	448, 952	Tummons v. Ogle	636
Tregany v. Fletcher	74	Tanley v. Evans	66
		Tunney v. Midland Ry.	682
		Tunncliffe v. Moss	741

	PAGE		PAGE
Tunncliffe v. Wilmot	636, 957	Tuton v. Sanoner	1053
Tunno v. Morris	1, 33	Tutton v. Darke	777
Tupper v. Foulkes	122, 123	Tweedale, <i>Ex parte</i>	1050
Turberville v. Whitehouse	559	Tweedy, <i>Ex parte</i>	1048
Turcan, <i>In re</i>	336, 830	Twist v. Johnson	10
Turner, <i>In re</i>	41, 108, 194	Twycross v. Grant ...	726, 728, 1002
— v. Ambler	763, 764	Twynam v. Pickard	605
— v. Barnes	943, 946	Twyne's Case	1038
— v. Beaurain	253	Tyerman v. Smith	386
— v. Bennett	882, 937	Tyers v. Rosedale, &c., Iron Co.	432, 435
— v. Cameron	779	Tyler v. Cork County Council	1032
— v. Cameron's Coalbrook		— v. Leeds (Duke) ...	1068, 1069
Co.	258, 808	— v. Merchant Taylors' Co.	131
— v. Crisp	34	Tyne, &c., Shipping Co. v.	
— v. Deane	501	Leach	352
— v. Diaper	588	Tynte, <i>Ex parte</i>	602
— v. Ford	841	Tyrwhitt v. Wynne	77, 909
— v. Goldsmith	407	Tyte v. Jones	198
— v. Green	211, 548, 724		
— v. Haji, &c., Azam ...	346, 358	UDNY v. Udney	910
— v. Hayden	284	Uhde v. Walters	19
— v. Hellard	129	Ultzen v. Nichols	543
— v. Heyland	225	Underhay v. Read	948
— v. Horton	756	Underhill v. Durham	174
— v. Leech	302	— v. Matthews	654
— v. Mason	406	— v. Witts	190
— v. Merryweather	738	Underwood v. Lewis	397
— v. Metropolitan Live		— v. Underwood	544
Stock Co.	975	— v. Wing	39
— v. Midland Ry. Co.	568	Ungley v. Ungley	241
— v. Moon	626	Union Bank of London v. Len-	
— v. Power	197	anton	828, 1047
— v. Reynall	401	— v. Munster	250
— v. Ringwood Highway		Union Bank of Manchester v.	
Board	713	Beech	372, 586
— v. Robinson	403	Union Castle Mail Co. v.	
— v. Sampson	833	Borderdale Shipping Co.	360
— v. Samson	307	Union Credit Bank v. Mersey	
— v. Sawdon	405	Docks & Harbour Board	70, 846, 847
— v. Sheffield Ry. Co.	696	Union Lighterage Co. v. L.	
— v. Spooner	700	Graving Dock	692, 706, 718
— v. Stallibrass	229	Union Steamship Co. v. Clar-	
— v. Stones	583	idge	683
— v. Thomas	591	United Forty Pound Loan	
— v. Thompson	918	Club v. Bexton	1046
— v. Trishy	559	United Land Co. v. Gt. E. Ry.	716
— v. Turner	764, 1016	United Service Co., <i>In re</i>	70
— v. Walsh	712	United States Steel Products	
— v. Willis	390	Co. v. Gt. E. Ry.	855
Turner and Skelton, <i>In re</i>	252	Universal Stock Exchange v.	
Turney v. Dodwell	571	Strachan	464, 504
Turpin v. Pain	210	— v. (No. 2)	504
Turquand, <i>Ex parte</i>	1047, 1055	Unwin v. Clarke	409
— v. Dawson	139	— v. Leaper	505
— v. Knight	152	— v. Wolseley	471
— v. Rhodes	250	Upfil v. Wright	266, 557
Turrill v. Crawley	857		
Turton v. Barber	152		
Tuson v. Evans	749		

	PAGE		PAGE
Upjohn v. Hitchens ...	20, 342,	Vaux Peerage	41, 191, 193
Upsdell v. Stewart	475	Veitch v. Russell	402
Upton v. Townend	263, 264	Venables v. Baring	837
Urmoston v. Newcomen	454	— v. Smith	658
Urquhart v. Macpherson ...	499,	Venafrá v. Johnson	18, 764
Usber v. Martin	1072	Venezuela Railway v. Kisch ...	968
Usill v. Hales	751	Vennall v. Garner	662, 665
Ussher v. Ussher	910	Vera Cruz, The	662
Utopia, The	666	Vere v. Ashby	444, 445, 447
		Vernon v. Boverie	584
VACHER v. Cocks	48,	— v. Keys	248
— v. London Society of Com-	128	— v. St. James' Vestry	711
positors	769	— v. Smith	617
Vadala v. Lawes	185	Verrall v. Robinson	849
Vaillant v. Dodemead	153	Verschures Creameries v. Hull ·	
Valentine v. Hyde	768	& Netherlands S.S. Co.	503
Valentini v. Canali	561,	Vertue v. Beasley	776
Valier v. Wright & Ball	606,	— v. Jewell	867
Valieri v. Boyland	828	Vezey v. Rashleigh	26
Vallance, <i>In re</i>	365	Vibart v. Coles	1014
— v. Savage	557	Vic Mill Co., <i>In re</i>	425
Valle v. Dumergue	640	Vicars v. Wilcocks	536, 742
Valpy v. Gibson	185	Vice v. Anson	9, 138,
— v. Manley	867	Vickers v. Hertz	449
— v. Oakeley	501	Victorian Ry. Commissioners	
Van v. Corpe	425,	v. Coultas	664
Van Dieman's Land, Bank of,	435	Victorian, &c., Syndicate v.	
v. Bank of Victoria	241	Doit	553
Van Dieman's Land Co. v.		Vigers v. Cook	468
Table Bay Board	25,	— v. Sanderson	428
909		Villers v. Beaumont	17
Van Gelder v. Sowerby Bridge		Vince, <i>In re</i>	446
Flour Society	82	Vincent v. Cole	198,
Van Grutten v. Foxwell	874	— v. Slaymaker	392
— v. Trevenen	891	Vinden v. Hughes	281
Van Liewen v. Hollis Bros. ...	353	Viner v. Hawkins	497
Van Omeron v. Dowick	74	Viney v. Bignold	341
Van Oppen v. Tredegars	845	— v. Chaplin	579
Van Praagh v. Everidge ...	239,	Vinnicombe v. Butler	133
541		Viola's Lease, <i>In re</i>	891
Van Toll v. S. E. Ry. Co. 530,	541	Virany v. Warne	471
Van Wart v. Wolley	67	Virginia Carolina Chemical Co.	
Vandenbergh v. Spooner	418	v. Norfolk & North American	
Vander Douckt v. Thellusson		S.S. Co.	362
107, 108,	279	Vivian v. Champion	620
Vandewall v. Tyrrell	306,	— v. Moat	896
481		Vizetelly v. Mudie's Select	
Vane v. Vane	940	Library	736
Vanquelin v. Bonard	184	Vlierboom v. Chapman	358
Vansandau v. Browne	395	Vogemann v. Zanzibar S.S. Co.	357
Varley v. Coppard	611	Voisey, <i>Ex parte</i>	945
— v. Whipp	427,	Volant v. Soyer	141
825		Von Freeden v. Hull	473
Varney v. Hickman	549	Von Hatzfeldt-Wildenburg v.	
Vaspor v. Edwards	813	Alexander	237
Vaughan v. Fuller	299	Von Lindenau v. Desborough	157
— v. Hsneck	234	Voogh v. Winch	168,
— v. Martin	158	19	821
— v. Matthews	496	Vorby v. Barrett	19
— v. Menlove	671	Vortigern, The	363
— v. Taff Vale Ry. Co. 656,	672		
Vaughton v. L. & N. W. Ry. ...	526		

	PAGE		PAGE
Vose <i>v.</i> Lancashire, &c., Ry.	683	Walker <i>v.</i> Giles	946
Vowles <i>v.</i> Miller	811	— <i>v.</i> Goe	651
— <i>v.</i> Young	43	— <i>v.</i> Gt. W. Ry.	402
Vulcan Ironworks Co., <i>In re</i> ...	1046	— <i>v.</i> Hatton	618, 621
WACKERBARTH <i>v.</i> Masson	439	— <i>v.</i> Hobbs	265
Waddell <i>v.</i> Blockey	728	— <i>v.</i> Jackson	516, 536
— <i>v.</i> Wolfe	243	— <i>v.</i> Macdonald	293
Waddington <i>v.</i> Francis	202	— <i>v.</i> Matthews	836
— <i>v.</i> Newton	53, 187	— <i>v.</i> Nevill	586
— <i>v.</i> Roberts	40, 129	— <i>v.</i> Nussey	417
Waddy <i>v.</i> Gray	55	— <i>v.</i> Olding	804
Wade <i>v.</i> Dowling	386	— <i>v.</i> Retter	775
— <i>v.</i> L. & N. W. Ry.	530	— <i>v.</i> Richardson	259
Wade's Case	593	— <i>v.</i> Rostron	506
Wadhams <i>v.</i> Marlowe	610	— <i>v.</i> S. E. Ry.	762, 763, 956, 957
— <i>v.</i> N. E. Ry.	714	— <i>v.</i> Wildman	152
Wadsworth <i>v.</i> Marshall	137	— <i>v.</i> Wilsher	58, 225
Wagstaff, <i>In re</i>	28	— <i>v.</i> York & N. Midland Ry.	518, 526
— <i>v.</i> Anderson	84	Walker's Case	263, 964
— <i>v.</i> Wilson	67	Walkers & Shaw & Co., <i>In re</i>	20, 428
Wagstaffe <i>v.</i> Bentley	226	Wallace <i>v.</i> Bergius	661
Wain <i>v.</i> Bailey	277	— <i>v.</i> Cook	188
— <i>v.</i> Warlters	412	— <i>v.</i> Kelsall	544
Wainwright <i>v.</i> Bland	336, 338	— <i>v.</i> King	773, 774
Wainman <i>v.</i> Kynman	570	— <i>v.</i> Roe	238
Wait <i>v.</i> Baker	440	— <i>v.</i> Small	58
Waite <i>v.</i> Gale	105	— <i>v.</i> Woodgate	861
— <i>v.</i> Jennings	613, 903	Waller, <i>In re</i>	27, 28
— <i>v.</i> N. E. Ry.	663	— <i>v.</i> Andrews	585, 624
Waithman <i>v.</i> Wakefield	450	— <i>v.</i> Lacy	393, 571, 574
— <i>v.</i> Weaver	756	— <i>v.</i> Lock	746, 750
Wake <i>v.</i> Harrop	19, 332	— <i>v.</i> S. E. Ry.	682
— <i>v.</i> Parker	1022	Walley <i>v.</i> M'Connell	797
Wakefield <i>v.</i> Brown	598	Wallingford <i>v.</i> Mutual Society	546, 634
— <i>v.</i> Newbon	501	Wallis <i>v.</i> Alpine	764
Wakelin <i>v.</i> L. & S. W. Ry.	217, 659, 662, 674	— <i>v.</i> Anderson	79
Wakeman <i>v.</i> Lindsey	774	— <i>v.</i> Broadhenth	197, 267
— <i>v.</i> Robinson	660, 791	— <i>v.</i> Delmar	882
— <i>v.</i> West	109	— <i>v.</i> Hands	259, 630, 808
Waland <i>v.</i> Elkins	657	— <i>v.</i> Littell	14
Walcott <i>v.</i> Lyons	82	— <i>v.</i> L. & S. W. Ry.	857
Waldegrave Peerage	916	— <i>v.</i> Pratt	373, 375, 379, 427, 456
Waldridge <i>v.</i> Kennison	58, 331	— <i>v.</i> Savill	777
Waldock <i>v.</i> Winfield	658	— <i>v.</i> Smith	247
Waldron <i>v.</i> Coombe	192	— <i>v.</i> Warren	405
Wale <i>v.</i> Inland Rev. Comms.	197	Wallis & Grout's Contract, <i>In re</i>	243
Walker, <i>In re</i>	39, 372, 829	Walls <i>v.</i> Atcheson	260, 263
— <i>v.</i> Barnes	510	Walmsley <i>v.</i> Cooper	586
— <i>v.</i> Bartlett	461	Walmsley <i>v.</i> Milne	844
— <i>v.</i> Beauchamp	112	Walrond <i>v.</i> Hawkins	906
— <i>v.</i> Bradford Old Bank	508	Walsh <i>v.</i> Lonsdale	886, 994
— <i>v.</i> Brewster	642	— <i>v.</i> Pemberton	610
— <i>v.</i> Brogden	753		
— <i>v.</i> Butler	570		
— <i>v.</i> Clay	830		
— <i>v.</i> Clements	588		
— <i>v.</i> Constable	253		

	PAGE		PAGE
Walsh v. Southwark Borough Council	991	Waring v. Hoggart	249
— v. Walley	406	Warlow v. Harrison	250, 421
— v. Whiteley	686	Warman v. Faithfull	885
Walstab v. Spottiswoode	494	Warne v. Chadwell	740
Walter v. Brogden	733, 754	— v. Terry	765
— v. Everard	559	Warner v. M'Kay	590
— v. Gunner	722	— v. Riddiford	798
— v. Haynes	303	— v. Willington	236, 418
— v. James	581	Warren v. Cunningham	392
— v. Rumbal	772, 774	— v. Murray	935, 936
— v. Selfe	641, 643, 644	— v. Peabody	356
— v. Yalden	933, 936	— v. Warren	736, 749
Walter D. Walleth, The	768	Warrick v. Queen's Coll., Oxford	36, 45, 704
Walters v. Green	81	Warriner, <i>In re</i>	624
— v. Pfeil	693, 1003	Warrington v. Early ...	279, 314, 333
— v. Smith	800	Warter v. Warter	919
— v. Walters	1016	Wartski v. Meaker	615
— v. Webb	935	Warwick v. Bruce	382
Walton v. Cook	373	— v. Foulkes	800
— v. Green	67	— v. Rogers	326, 488
— v. Kersop	942	Warwicke v. Noakes	578
— v. Potter	207	Washborn v. Black	774
Walwyn v. St. Quintin	323	Wason v. Walter	747, 751, 753
Wandsworth Guardians v. Worthington	571	Watcham v. Att.-Gen. for East Africa Protectorate	26
Wankford v. Wankford	920	Waterford, &c., Ry. v. Pidcock	982
Wansbrough v. Maton	850	Waterhouse v. Jamieson	968
Wanstead Local Board v. Hill	643	— v. Skinner	432
Want v. Stallibrass	253	— v. Waterhouse	816
Warburton v. Co-operative Wholesale Society	409	Waterlow v. Sharp	986
— v. Gt. W. Ry.	683	Waterman v. Soper	811
— v. Heyworth	403	Waterpark (Lord) v. Fennell ...	26
Ward, <i>Ex parte</i>	463, 1061	Waters v. Monarch Assur. Co. ...	341
— v. Andrews	803	— v. Thanet (Earl)	567, 577
— v. Byrne	556	Waterton v. Baker	1071, 1073
— v. Dalton	339	Watkin, <i>Ex parte</i>	388
— v. Day	904	— v. Hall	756
— v. Dwelley	75	Watkins v. Cottell	516
— v. Evans	583	— v. Evans	1059, 1060
— v. Eyre	512	— v. Hewlett	495
— v. Felton	358	— v. Nash	125
— v. Hobbs	429, 729	— v. Robb	593
— v. Hunter	1004	— v. Rymill	518, 538
— v. Lawson	396	— v. Vince	65
— v. Lloyd	552	— v. Woolley	849
— v. Lumley	607	Watling v. Lewis	599
— v. Mason	258	— v. Oastler	681
— v. National Bank of New Zealand	372	Watson, <i>Ex parte</i>	863
— v. Robins	721	—, <i>In re</i>	1008, 1046, 1055
— v. S. E. Ry.	978	— v. Black	235
— v. Swift	136	— v. Charlemont	494, 499
— v. Wallis	501	— v. Christie	802
— v. Ward	715, 933	— v. Denton	378
— v. Weeks	741, 742	— v. England	38
Ward & Garfit's Case	964	— v. Gray	811, 812
Wardle v. Brocklehurst	718	— v. Heatherington	592
		— v. Home	625
		— v. Horne	265

	PAGE		PAGE
Watson v. King	4, 38, 124, 188	Webber v. Lee	234
— v. Lane	620, 630	— v. Stanley	28, 29
— v. Little	97, 163, 183, 918	Weblin v. Ballard	685, 687
— v. M'Ewan	744	Webster, <i>Ex parte</i>	1055
— v. McLean	853	— v. Bosanquet	247, 248
— v. Mid Wales Ry. Co. ...	589	— v. British Empire, &c., Assur. Co.	512
— v. Reynolds	758	— v. Kirk	567
— v. Russell	499	— v. Seekamp	473
— v. Smith	762	— v. Webster	454, 1025
— v. Spratley...235, 413, 449,	952	— v. Whewall	206
— v. Strickland	1060	Webster's Case	968
— v. Threlkeld	454	Wedd v. Porter	616
— v. Turner	455	Wedge v. Berkeley	207
— v. White	1033	Wedlake v. Hurley	490
— v. Woodman	564, 572	Weed v. Ward	208
Watteau v. Fenwick	442	Weeks v. Argent	153
Watters v. Smith	586	— v. Goode	861
Watts v. Ainsworth	419	— v. Propert	381
— v. Fraser	735	— v. Sparke	44, 45, 47
— v. Kelson	716, 718	Weeton v. Woodcock	843
— v. Shuttleworth	372	Wegener v. Smith	364
Waud, <i>Ex parte</i>	504	Wegg Prosser v. Evans	82, 448
Waugh v. Cope	571	Weguelin v. Cellier	357, 859
— v. Morris	552	Webner v. Dene S.S. Co. ...	346, 358
Wauton v. Coppard	615	Weiner v. Harris	832, 833
Way v. Gt. E. Ry. Co.	526	Weiner v. Gill	826
— v. Hearn	18, 547	Weikersheim's Case	966
Wayde v. Carr	661	Weir v. Bell	727
Waygood v. James	172	— v. Girvin	356
Wayland's Case	441	Welch v. Meyers	944
Wayman v. Hilliard	513	— v. Seaborn	485
Waynam v. Bend	293, 295, 333, 334	Welchman v. Sturgis	925
Weardale Coal & Iron Co. v. Hodson	1059, 1060, 1061	Welcome v. Upton	819
Weary v. Alderson	65	Weld v. Baxter	605
Weatherston v. Hawkins	747	Weld-Blundell v. Stephens ...	483
Weaver v. Bush	792	Welden v. Bridgewater ...	807, 808
— v. Ward	790	Welfare v. L., Brighton & S. C. Ry.	649, 677
Webb v. Alexandria Water Co. 70,	837	Weldon v. De Bathe	1023
— v. Austin	605	— v. Gould	856
— v. Beavan	730	— v. Neal	220
— v. Bird	700	— v. Times Book Club	736
— v. East	140	Welford v. Beazeley	238
— v. Fairmaner	282, 457	Welland Ry. v. Blake	564
— v. Herne Bay Commis- sioners	986	Wellaway v. Courtier	807, 813
— v. Hewitt	635	Welldon v. Butterley Co.	694
— v. Hughes	246	Weller v. L., Brighton & S. C. Ry.	675
— v. James	633	— v. Toke	999
— v. Page	138, 536, 663	Wellock v. Constantine	503
— v. Plummer	24	Wells v. Abrahams	503, 791
— v. Rhodes	388	— v. Kingston-upon-Hull	234, 953
— v. Russell	880	— v. Moody	771
— v. Smith	64, 76, 507, 591	— v. Smith	547, 723
— v. Spicer	319	— v. Wells	28
Webber v. Corbett	29	— v. Williams	167
— v. Gt. W. Ry.	521	Welsh v. Roe	210, 388
		Welsh Flannel, &c., Co., <i>In re</i>	512

	PAGE		PAGE
Welstead v. Levy	63, 316	Westmoreland Slate Co. v.	
Welton v. Saffery	962	Fielden	169, 965
Wenlock v. River Dee Co.		Weston v. Arnold	811
208, 210, 550, 954, 955,	986	— v. Beeman	762
Wenman v. Ash	735	— v. Carter	942
— v. Lyon	1047	— v. Dobinet	744
— v. Mackenzie	46, 169, 196	— v. Fidler	888
Wennak v. Adney	455	— v. Metropolitan Asylum	902
Wennhak v. Morgan	735, 804	Weston's Case	964
Wentworth v. Lloyd	152	Westport Coal Co. v. McPhail	362
— v. Onthwaite	864	Westropp v. Congested Dis-	
Wentworth Loan Co. v.		tricts Board	703
Lefkowitz	553	— v. Solomon	479
Werner v. Humphreys	1004	Westwood v. Cowne	78, 774
Wertheim v. Chicoutimi Pulp		Wetzlar v. Zachariah	765, 766
Co.	434, 435, 534	Wey v. Yally	106
West v. Blakeway	26	Whaite v. Lancashire & York-	
— v. Diprose	1062	shire Ry. Co.	524
— v. Fritchie	945	Whaley, <i>In re</i>	844
— v. Gwynne	613, 903	— v. Carlisle	54
— v. Houghton	616	Whaley Bridge Calico Print-	
— v. Nibbs	776, 802	ing Co. v. Green	475, 489
— v. Sackville	102	Whalley v. Lancashire & York-	
— v. West	155	shire Ry.	670
West Cornwall Ry. v. Mowatt	984	— v. Pepper	799
West Counties Manure Co. v.		Wharam v. Routledge	11
Lawes Chemical Manure Co.	759	Wharton v. Brook	732
West Cumberland Iron, &c.,		— v. Lewis	384
Co. v. Kenyon	670	— v. Mackenzie	559, 560
West of England Fire Insur.		— v. Naylor	1066
Co. v. Isaacs	344	— v. Walker	506
West Ham, &c., Central		Wharton Peerage	42, 100
Charity Board v. E. L.		Whatman v. Pearson	656
Waterworks Co.	268	Wheat Buller Consols, <i>In re</i> ...	963
West Ham Union v. S.		Wheatley v. Boyd	260
Matthew, Bethnal Green ...	577	— v. Patrick	657
West Leigh Colliery Co. v.		— v. Smithers	286
Tunncliffe	695	— v. Williams	152, 153, 566
West London Commercial		Wheaton v. Maple	697, 710
Bank v. Kitson	381, 724	Wheeldon v. Burrows 697, 706, 718	
West London Ry. v. Bernard	983	Wheeler, <i>In re</i>	1026
West Yorkshire Darracq		— v. Branscombe	922
Agency v. Coleridge	544	— v. Collier	250, 548
Westacott v. Hahn	622	— v. Keeble	905
Westbourne Grove Drapery		— v. Le Marchant	140
Co., <i>In re</i>	1015	— v. Louth	103
Westbury v. Aberdeen	157	— v. Montefiore	803, 808
Western v. Bailey	840	— v. Stevenson	264, 900
Western Bank of Scotland v.		— v. Stratton	468
Addie	547	— v. United Telephone Co.	222
Western Electric Co. v. Gt.		Wheelton v. Hardisty	338
Eastern Ry.	530	Whelan, <i>In re</i>	369
Westhead v. Sproson	367	Whelpdale v. Milburn	177
Westlake v. Adams	513	Whelpdale's Case	123, 597
— v. Westlake	107	Whincup v. Hughes	407, 493
Westmacott v. Westmacott ...	115	Whipple v. Manley	563, 592
Westminster Fire Office v.		Whippy v. Hillary	575
Glasgow Provident Invest.		Whistler v. Forster	317, 326
Soc'y.	342	Whitaker, <i>In re</i>	1014

	PAGE		PAGE
Whitaker v. Edmunds	316	Whiteley v. Edwards	1027
— v. Izod	140	— v. Hilt	853
Whitbourne v. Williams	788	— v. Reg.	500
Whitcomb v. Whiting	572	Whiteley's Case	973
Whitcombe v. Steere	574	Whitelocke v. Baker	41, 43
White, <i>In re</i>	39	— v. Musgrove	121
— v. Bailey	806	Whitely v. Pepper	648
— v. Bartlett	489	Whiteman v. Hawkins	399
— v. Bass	697	— v. Newey	504
— v. British Empire, &c., Assur. Co.	339	— v. Sadler	553
— v. France	647	Whitfield v. Aland	159, 162
— v. Grand Hotel, East- bourne	716	— v. Brand	2
— v. Gt. W. Ry. Co.	529	— v. Langdale	29
— v. Hill	810	— v. Le Despencer (Lord)	537
— v. Hindley Local Board	651	— v. S. E. Ry.	734, 956
— v. Hunt	260, 609	Whitford v. Tutin	1, 3
— v. Jamieson	649	Whitham v. Kershaw	269, 815
— v. Lisle	45	Whiting to Loomes	244
— v. London General Omni- bus Co.	640	Whitley Partners, <i>In re</i>	958
— v. Mellin	734, 759	Whitmore v. Black	854
— v. Morris	803, 842, 1037	— v. Humphries	880, 937
— v. Parker	874	— v. Smith	387
— v. Parkin	16, 349	Whitmores (Edenbridge) v. Stanford	717, 718
— v. Proctor	239	Whitnash v. George	53
— v. Riley	768	Whitney v. Moignard	741
— v. Sayer	24	Whittaker v. Jackson	169
— v. South E. Ry.	221	— v. London County Council	792
— v. Southend Hotel Co. ...	898	— v. Manchester & Sheffield Ry.	675
— v. Spettigue	835	— v. Mason	23
— v. Steadman	538, 668, 679	— v. Wisbey	2
— v. Tyndall	598	Whittal v. Whittal	146
— v. White	717	Whittington v. Seale Hayne ...	724
White's Case	543, 964	Whitton v. Peacock	898
White's Charities, <i>In re</i>	809	— v. Whitton	114
Whiteacre v. Symonds	895	Whittuck v. Waters	194
Whitechurch v. Cavanagh ...	70, 460, 956, 976, 980	Whitwham v. Westminster Coke Co.	815
Whitehall Court v. Ettlinger	607	Whyler v. Bingham, &c., Council	652
Whitehead v. Anderson ...	864, 865	Whyman v. Garth	7, 119
— v. Clifford	258, 260, 263	Wickenden v. Webster	615
— v. Izod	459, 479	Wickens, <i>Ex parte</i>	1057
— v. Lord	397	— v. Steel	221
— v. Scott	6	Wickham v. Hawker	704
— v. Tattersall	195	Wicks v. Fentham	761
— v. Taylor	948, 949	Widders v. Gorton	584
— v. Vaughan	861	Widgery v. Tepper	171
— v. Walker	567, 590	Wiedemann v. Walpole	60, 383
Whitehorn v. Davison	831	Wiffen v. Bailey	760
Whitehouse v. Fellowes ...	651, 655	Wiggett v. Fox	649, 683
— v. Hugh	711	Wigglesworth v. Dallison ...	19, 24, 616
— v. Pickett	542	Wightman v. Townroe	445
Whitehouse's Case	968	Wigley v. Treasury Solicitor	113, 194
Whitehouse & Co., <i>In re</i>	969	Wigmore v. Jay	680
Whiteland v. Grant	138	When v. Law	194
Whitelegg, <i>In re</i>	107		
Whiteley v. Adams	750		

	PAGE		PAGE
Wilberforce v. Hearfield	45	Williams v. Taylor	764, 765
Wilby v. Elgee	573	Willaume v. Gorges	34
— v. Henman	563	Willes v. Bridger	795
— v. Warren	594	Willetts v. Watt	685
— v. W. Cornwall Ry.	522	Willey v. Great N. Ry. Co. ...	224
Wilcoxon v. Searby	1052	— v. Hucks	1066, 1069
Wild v. Harris	382	— v. Parratt	494
— v. Holt	812, 815	Williams, <i>Ex parte</i> ...	839, 840, 1057
— v. Simpson	394	—, <i>In re</i>	336, 986; 1016
— v. Tucker	555	— v. Agius	434, 534
— v. Waygood	686	— v. Allsup	474
— v. Williams	587	— v. Archer	869
Wilde v. Clarkson	634	— v. Barber	393
— v. Gibson	724	— v. Bayley	552
— v. Minsterley	692	— v. Birmingham, &c., Co.	681
— v. Walters	844, 849	— v. Bosanquet	608
Wilder v. Speer	774	— v. Bryant	634
Wilders v. Stevens	311	— v. Burrell	629
Wildes v. Dudlow	367	— v. Byrnes ...	235, 368, 405, 418
— v. Russell	502	— v. Clarke	311
Wilding v. Sanderson	211	— v. Colonial Bank	70
Wiley v. Crawford	869	— v. Cranston	532
Wilkes v. Hopkins	68	— v. Davies	205, 589
— v. Hungerford Market Co.	714	— v. Earle	614, 898
— v. Jacks	311	— v. E. India Co.	85
Wilkin v. Reed	219	— v. Evans	241, 580
— v. Wilkin	488	— v. Everett	490
Wilkins v. Birmingham Cor- poration	196	— v. Eyton	39, 137
— v. Bromhead	828	— v. Frith	394
— v. Day	653	— v. Goose	215
— v. Jadis	299, 303	— v. Graves	53
— v. M'Ginty	858	— v. Gt. W. Ry.	674, 854
— v. Weaver	786	— v. Griffiths	575, 577
Wilkinson v. Alston	474	— v. Grotcott	645
— v. Calvert	888	— v. Hathaway	599
— v. Candlish	579	— v. Hayward	264, 605
— v. Colley	631, 891	— v. Headland	1012
— v. Collyer	624	— v. Heales	608, 1010
— v. Downton	664, 729	— v. Hedley	505
— v. Evans	418	— v. Holland	662
— v. Fairrie	646	— v. Holmes	779
— v. Godefroy	489	— v. Howarth	408
— v. Hall	631, 872, 922	— v. Innes	64, 1011
— v. Haygarth	812, 817	— v. James	321, 716
— v. Johnson	495, 546	— v. Jones ...	182, 656, 772, 775, 785, 790, 799
— v. Jonghin	28	— v. Jordan	235
— v. King	824, 830	— v. Lake	235, 368
— v. Kirby	822	— v. Lee	1009
— v. Lancashire, &c., Ry. Co.	530, 541	— v. Lewis	270
— v. Lloyd	466	— v. Linotype Co.	681
— v. Peel	943	— v. Lister	483, 484
— v. Unwin	311	— v. Mannings	4
— v. Verity	867, 870	— v. Mersey Docks & Board	690, 992
Wilkinson's Case	968	— v. Midland Ry.	530
Wilks v. Atkinson	432	— v. Millington	439
Willans v. Ayres	313	— v. Morris	820

PAGE	PAGE		
Williams v. Namlooze Vennoot- schap Berghuys Kolenhandel	354	Wilson v. Carnley	382
— v. Paul	555	— v. Conolly	504
— v. Pigott	450	— v. Coupland	506
— v. Pott	938	— v. Craven	988
— v. Quebrada Ry.	154	— v. Cutting	514
— v. Rawlinson	583	— v. Finch Hatton	264
— v. Reynolds	436	— v. Ford	389, 452
— v. Roberts	943, 944	— v. Furness Ry.	986
— v. Smith	752, 798	— v. Gabriel	589
— v. South E. Ry.	227	— v. Glossop	453
— v. Stern	15	— v. Hart	15
— v. Stiven	943	— v. Hodson	1019
— v. Stott	738	— v. Kymer	358
— v. Thomas	58, 932	— v. Lancashire, &c., Ry. Co.	535
— v. Waring	279	— v. London, Italian & Adriatic S. Navigation Co.	359
— v. Wentworth	562	— v. Mackay	990
— v. Wilcox	6, 12	— v. Macreth	807, 808
— v. Williams	600, 620, 843	— v. Marshall	513, 514
Williams' Estate, <i>In re</i>	1013	— v. Merry	681, 683
Williamson, <i>Ex parte</i>	486, 560	— v. Newberry	642
— v. Allison	378	— v. Nightingale	774
— v. Freer	735, 746	— v. Norman	1066
— v. Hine	489	— v. Queen's Club	697, 923
— v. Johnson	293	— v. Rastall	152, 153
— v. Naylor	1014	— v. Ray	505
— v. North of Scotland, &c., Co.	538	— v. Robinson	739
— v. North Staffordshire Ry.	227	— v. Smith	203
— v. Watts	323, 560	— v. Smyth	453
— v. Williamson	511, 613	— v. Strugnell	505
Willis v. Farley	1039	— v. Taverner	820
Willins v. Smith	573	— v. Tumman	803, 851
Willis v. Barrett	279	— v. Twanley	615
— v. Beauchamp (Earl)	600	— v. Waddell	670
— v. Bernard	48	— v. Whitehead	444
— v. De Castro	586	— v. Wilson	108, 513, 1016
— v. Howe	940	— v. Woolfryes	598
— v. Ward	704	Wilson's Deed, <i>In re</i>	1063
Willmot v. Smith	592	Wilson & Coventry v. Otto Thoresen Line	351
Willoughby, <i>Ex parte</i>	858	Wilson, Holgate & Co. v. Bel- gian Grain, &c., Co.	433
— v. Backhouse	26, 771, 772	Wilson and Scottish Insurance Corpor., <i>In re</i>	341
— v. Horridge	516	Wilson Sons & Co. v. Balcarres Brook S.S. Co.	82
Wills v. Bridge	201	Wilton v. Atlantic Mail	519
— v. Maccarmick	387	— v. Dunn	263
— v. Murray	982, 988	— v. Girdlestone	849
— v. Sutherland	987	Wiltshire v. Prince	912
Willson v. Love	248	Wiltshire Iron Co. v. Gt. W. Ry.	855
Wilmot v. Wilkinson	246	Wiltzie v. Adamson	33
Wilmott v. London Road Car Co.	613	Wimble v. Rosenberg	441
— v. Smith	456, 579	Wimbledon Conservators v. Dixon	715, 716
Wilmshurst v. Bowker	866	Wimbledon Local Board v. Underwood	1062
Wilson, <i>In re</i>	557, 1063		
— v. Anderton	850		
— v. Barker	803, 813		
— v. Barry Ry.	645		
— v. Bowie	11		
— v. Bury (Lord)	491		

	PAGE		PAGE
Wimbledon Olympia, <i>In re</i> ...	726	Wolverhampton Corporation v. Emmons	623
Wimshurst v. Deeley	431	Wolverhampton Waterworks Co. v. Hawkesford	102, 980, 983
Winans v. Attorney-General	910	Wolveridge v. Steward	606
Winch v. Thames Conservators	650	Wontner v. Shairst	410, 499
Windhill Local Board of Health v. Vint	552	Wood v. Adcock	386
Windle v. Andrews	305	— v. Argyle (Duke)	449
Winfrey & Chatterton, <i>In re</i> ...	613	— v. Beard	884
Wing v. Angrave	39	— v. Bell	828, 854
— v. Earle	24	— v. Braddick	63, 66
— v. London General Omnibus Co.	644	— v. Conway Corporation	644
— v. Mill	455	— v. Cooper	159
Wingfield v. Tharp	137	— v. Copper Miners' Co.	596
Wingfield and Blew, <i>In re</i> ...	389, 452, 453	— v. Dixie	1058
Winkfield, The ...	665, 841, 853, 855	— v. Drury	119
Winn v. Bull	237	— v. Dwarris	338
Winship v. Hudspeth	709	— v. Edinburgh Evening News	733
Winsor v. Pratt	131	— v. Fenwick	559
Winspear v. Accident Insurance Co.	340	— v. Gunston	745
Winter v. Anson (Lord)	61	— v. Hewett	803
— v. Bancks	823	— v. Leadbitter	819, 820
— v. Butt	156	— v. Lewis	1027
— v. Dumergue	243, 612	— v. Mackinson	162
Winterbottom v. Derby	639, 712, 714	— v. Manley	820
— v. Ingham	261	— v. Morewood	174, 815, 854
— v. Wright	657	— v. Nunn	771
Winterbourne v. Morgan	773, 774	— v. Priestner	368
Winterstoke Hundred Case	1031	— v. Pringle	213
Wintle, <i>In re</i> ...	113	— v. Rowcliffe	832, 833
— v. Freeman	1068	— v. Saunders	716
Wise, <i>In re</i> ...	1038	— v. Smith	376
— v. Gt. W. Rly. Co.	529	— v. Tassell	433
— v. Perpetual Trustee Co.	441, 480	— v. Tate	267, 884
Wiseman v. Booker	669, 674	— v. Veal	712
Witchcot v. Nine	627	— v. Waud	717, 718, 720
Witham v. Vane	227	Woodburn v. Motherwell	430
Withernsea Brickworks, <i>In re</i>	1014	Woodcock v. Houldsworth	109
Withers v. Lyss	867	— v. L. & N. W. Ry.	689
— v. N. Kent Ry.	659	— v. Nuth	260
Withnell v. Garthan	25	Woodgate v. Godfrey	1046
Withy v. Cottle	245	— v. Knatchbull	1033, 1070
Witt v. Banner	1056, 1057	— v. Potts	213
Wittersheim v. Carlisle (Countess)	566	— v. Ridout	753
Woking Urban Council (Basingstoke Canal) Act, <i>In re</i> ...	93	Woodger v. Gt. W. Ry.	535, 539
Wolenberg v. Royal Co-operative Collecting Society	337	Woodham v. Edwardes	106
Wolf v. Summers	858	Woodhouse v. Hooney	882, 937
Wolfe v. Horne	421	— v. Walker	268, 269, 1007
— v. Matthews	556	Woodin v. Burford	64, 377
Wollaston v. Hakewill	129, 608	Woodland v. Fear	327
Wolmershausen v. Gullick	481, 568	— v. Fuller	839
Wolton v. Gavin	40, 555	Woodley v. Brown	190
		— v. Coventry	826
		— v. Metropolitan District Ry.	678
		Woodroffe v. Williams	176
		Woods v. Dean	307
		— v. Durrant	774

	PAGE		PAGE
Woods v. Finnis	1033	Wright v. Hickling	583
— v. Pope	621	— v. Horton	1000
— v. Russell	827	— v. Laing	583
Woodthorpe v. Lawes	301	— v. Lawson	618
Woodward, <i>In re</i>	112, 194	— v. Leonard	1021
— v. Aston	502	— v. Lethbridge	671
— v. Buchanan	76	— v. L. & N. W. Ry. ...	676, 681
— v. Goulstone	130	— v. Maidstone (Lord) ...	277
— v. Lander	747	— v. Midland Ry.	537
— v. Larking	69, 1037	— v. Ramscot	803, 805
— v. L. & N. W. Ry.	524	— v. Robotham	869
— v. Pell	320	— v. Rogers	133
Woodyer v. Hadden	711	— v. Sanderson	121, 133
Woolcott v. Peggie	251	— v. Shaw	225
Wooler v. North Eastern Breweries	266	— v. Smith	632
Wooley v. Clark	1006	— v. Snell	855
Woolf v. City Steam Boat Co.	953	— v. Stavert	234
— v. Hamilton	318	— v. Tatham ... 49, 132, 133, ...	177
Woolfe, <i>Ex parte</i>	830, 1057	— v. Wakeford	136
— v. Horne	250, 253, 431	— v. Wilcox	206
Woolford's Estate (Trustee) v. Levy	1071	— v. Williams	710, 719
Woolen v. Wright	804	— v. Wilson	248, 249, 798
Woolley v. Clarke	794, 1005	— v. Woodgate	739, 746
Woolmer v. Toby	84, 953	— v. Wright	216
Woolston v. Ross	949	— v. Zetland (Marquis) ...	408
Woolway v. Rowe	47, 55, 812	Wright's Trust, <i>In re</i>	915
Wordsworth v. Harley	655	Wrightson v. McArthur & Hutchinsons	440, 1045, 1062
— v. Willan	661	Wrottesley v. Bendish	67
Working Men's Mutual Society, <i>In re</i>	138	Wulff v. Jay	372
Wormald v. Neale	912	Wyatt v. Berry	132
Worrall v. Grayson	482	— v. Gore	154, 736
Worsley, <i>Ex parte</i>	192	— v. Gt. W. Ry.	674
— v. Wood	341	— v. Harrison	692
Worsam v. Vanderbrande ...	937	— v. Palmer	767
Worth v. Gilling	668	Wych v. Meal	176
Worthington v. Barlow	1011	Wyld v. Pickford ... 518, 522, ...	524
— v. Grinson	718	Wylde v. Radford	856, 860
— v. Warrington	254	Wylie v. Birch	1068
— v. Wigley	584	Wynne v. Price	461
Wray v. Milestone	514, 544	— v. Tyrwhitt	52, 127
Wren v. Holt	375	— v. Wynne	216
— v. Weild	758, 767	Wynne's Case	598
Wrexham, Mold, &c., Ry., <i>In re</i>	986	XANTHO, The	361
Wride v. Dyer	893, 894	Xenos v. Wickham 61, 122, 123, ...	125
Wright, <i>Ex parte</i>	444, 507	Ximenes v. Jaques	202
— v. Anderton	541	YARBOROUGH v. Bank of England	851, 956
— v. Beckett	156	Yardley v. Hine	802
— v. Bigg	233	Yarmouth v. France 681, 684, 685, ...	686, 687
— v. Bunyard	8	Yarmouth Exchange Bank v. Blethen	121
— v. Child	1033		
— v. Colls	173		
— v. Court	994, 995		
— v. Dannah	239, 420		
— v. Dewes	783		
— v. Glyn	441		

	PAGE		PAGE
Yates, <i>In re</i>	1047	Young <i>v.</i> Austen	319, 585
— <i>v.</i> Aston	467	— <i>v.</i> Bankier Distillery	
— <i>v.</i> Dalton	286	Co.	670, 720
— <i>v.</i> Dunster	£20	— <i>v.</i> Brander	473
— <i>v.</i> Eastwood	501	— <i>v.</i> Clare Hall (Master) ...	50
— <i>v.</i> Freckleton	579	— <i>v.</i> Cole	493
— <i>v.</i> Pym	22	— <i>v.</i> Davis	651
— <i>v.</i> South Kirby, &c., Co.	340	— <i>v.</i> Geiger	79
— <i>v.</i> Terry	327	— <i>v.</i> Grote	496
— <i>v.</i> Whyte	667	— <i>v.</i> Hitchens	803
Ydun, The	990, 991	— <i>v.</i> Hoffman, &c., Co. ...	681
Yea <i>v.</i> Fouraker	576	— <i>v.</i> Holloway	140
Yelland's Case	408	— <i>v.</i> Kitchin	507, 508, 591
Yellowly <i>v.</i> Gower	268, 269	— <i>v.</i> Leamington Cor.	954, 955
Yeoman <i>v.</i> Ellison	945	— <i>v.</i> Mantz	617
— <i>v.</i> Rex	351	— <i>v.</i> Raincock	69, 627
Yglesias <i>v.</i> River Plate Bank	585	— <i>v.</i> Schuler	16, 124
Yonge <i>v.</i> Toynbee ...	380, 443, 454	— <i>v.</i> Spencer	268
York Tramways Co. <i>v.</i> Wil-		— <i>v.</i> White	472
lows	958, 963	— <i>v.</i> Wright	67
Yorke <i>v.</i> Grenough	858	Youngman <i>v.</i> Briesmann	848
— <i>v.</i> Yorkshire Insur. Co.	337	Yrisarri <i>v.</i> Clement	62, 731
Yorkshire Banking Co. <i>v.</i>			
Beatson	285, 445	ZENOPIO <i>v.</i> Axtell	738
Yorkshire Engine Co. <i>v.</i>		Zimble <i>v.</i> Abrahams	886
Wright	767	Zouch <i>d.</i> Ward <i>v.</i> Willingale	895,
Yorkshire Miners Assoc. <i>v.</i>		904, 943
Howden	556	Zouche <i>v.</i> Dalbiac	934
Youl <i>v.</i> Harhottle	846	Zunz <i>v.</i> S. E. Ry. ...	518, 521, 528
Young, <i>Ex parte</i>	196, 370	Zwinger <i>v.</i> Samuda	867
— <i>v.</i> Ashley Gardens Pro-			
perties	613		

TABLE OF STATUTES CITED.

*** The pages at which the sections of the Statutes are set out, or their effect stated, are indicated by the figures in black type.*

	PAGE		PAGE
51 Hen. 3, stat. 4	784	17 Car. 2, c. 7, s. 2	942
52 Hen. 3, c. 4	769	19 Car. 2, c. 11, s. 1	38
52 Hen. 3, c. 23 (or 24)	268	s. 4	38
4 Edw. 1, stat. 1	99	29 Car. 2, c. 3 (Stat. of Frauds),	
6 Edw. 1, c. 5	268	s. 1	124, 267, 886
4 Edw. 3, c. 7	1002	s. 2	267, 886
25 Edw. 3, stat. 5, c. 5	1002	s. 3	124
31 Edw. 3, stat. 1, c. 11	1002	s. 4 ... 15, 124, 267, 233 , 234, 235,	
5 Hen. 4, c. 14	98	240, 366, 408, 410, 411, 412,	
21 Hen. 8, c. 11	836	413, 473, 820, 971, 1009	
c. 19	942	s. 5	130
23 Hen. 8, c. 5	175	s. 7	242
27 Hen. 8, c. 16	129	s. 8	242
c. 26	1008	s. 17 ... 238, 239, 240, 412, 413,	
32 Hen. 8, c. 1, s. 1	130	414, 415, 422, 423, 1046	
c. 34	609, 897	c. 27, s. 1	554
s. 1	271, 604	s. 3	555
s. 2	271, 604	2 W. & M. sess. 1, c. 5, s. 1 ...	772,
c. 37, s. 1	942	773, 774	
s. 4	942	s. 2 ...	782
37 Hen. 8, c. 12	934	s. 3 ...	637
2 & 3 Edw. 6, c. 13, s. 2	150	s. 4 ...	776,
2 & 3 Ph. & M. c. 7	836		785
13 Eliz. c. 5	1038	3 W. & M. c. 11, s. 6	75
18 Eliz. c. 3, s. 2	150	8 & 9 Will. 3, c. 11, s. 8	633
23 Eliz. c. 3	98	c. 30	122
29 Eliz. c. 4	1070	10 & 11 Will. 3, c. 22	872
31 Eliz. c. 5, s. 5	637	12 & 13 Will. 3, c. 2, s. 3	150
c. 12	836	4 Anne, c. 16, s. 10	265
43 Eliz. c. 2, s. 7	454	4 & 5 Anne, c. 3	569, 635
7 Jac. 1, c. 12	56	s. 9	605
21 Jac. 1, c. 4, s. 4	637, 638	s. 12	634
c. 14	941	s. 19	568
c. 16 (Limitation Act,		s. 27	817
1623) ...	568, 570, 603,	6 Anne, c. 68	551
634, 707, 795, 939		c. 72, s. 5	809
s. 1 ...	599, 926, 932	8 Anne, c. 9, s. 39	513
s. 2	926, 932	c. 18	904, 1068
s. 3 ...	563, 564, 636,	s. 1	1064, 1065
655, 756, 801, 821,		s. 6 ...	777, 895, 943,
867, 870, 951		944, 1065	
s. 5	817	s. 7 ...	777, 895, 943,
s. 7	568, 1004	944, 1065	

	PAGE		PAGE
9 Anne, c. 19	318	52 Geo. 3, c. 146, s. 5	111, 112
10 Anne, c. 28, s. 3	129	s. 7	112
1 Geo. 1, stat. 2, c. 5	1028	54 Geo. 3, c. 168	136
2 Geo. 2, c. 23	390	55 Geo. 3, c. 194, s. 20	400
s. 23	392 , 393	s. 21 ...	400, 401
4 Geo. 2, c. 28 (Landlord and Tenant Act, 1730), s. 1	631	56 Geo. 3, c. 50	1036
s. 2 ...	899, 905	s. 11	774
s. 5	947	57 Geo. 3, c. 93, s. 1	775
11 Geo. 2, c. 19 (Distress for Rent Act, 1737), s. 1	944	58 Geo. 3, c. 45, ss. 75, 76	723
ss. 1-7 ...	778	c. 75	830
s. 2	944	c. 84	115
s. 7	944	c. 91	191
s. 8	782	1 & 2 Geo. 4, c. 87	190
s. 10 ...	770, 774, 950	3 Geo. 4, c. 72, ss. 23-25	723
s. 12	785	4 Geo. 4, c. 76	912
s. 14 ...	255, 262	s. 2	911
s. 15	257	s. 3	911
s. 18	632	s. 10	911
s. 19 ...	769, 772, 774, 775, 778, 785	s. 14	911
s. 20	775	s. 16	911
s. 21 ...	772, 775, 785	s. 22	911, 912
s. 22 ...	943, 946, 949	s. 26	911
17 Geo. 2, c. 38, s. 8	773, 814	c. 83	832
24 Geo. 2, c. 40, s. 12	554	c. 91, s. 1	915
c. 44, s. 6 ...	7, 993 , 999	6 Geo. 4, c. 16, s. 96	13
s. 8	995	c. 50, s. 34	231
25 Geo. 2, c. 36	745, 747	c. 94	832
s. 2	638	7 Geo. 4, c. 6, s. 3	331
26 Geo. 2, c. 33	914	c. 46 ...	730, 952, 986, 987, 988
2 Geo. 3, c. 28	183	s. 4	988
9 Geo. 3, c. 16	941	s. 6	89, 987, 988
14 Geo. 3, c. 48	341	s. 8	988
s. 1	336, 337	s. 9	986, 987
s. 2	336	c. 64, s. 3	2
s. 3	337	7 & 8 Geo. 4, c. 27	1028
c. 78	811	c. 31	1028, 1031
s. 83	342, 617	9 Geo. 4, c. 14 (Lord Tenter- den's Act)	577
s. 86	671	s. 1 ...	569 , 572, 573, 1017
35 Geo. 3, c. 125, s. 7	577	s. 3	34, 569
s. 8	577	s. 4	570
s. 9	577	s. 5	588
41 Geo. 3, c. 90, s. 9	94, 107	s. 6	729
c. 109, s. 8	714	s. 7	412
s. 10	714	s. 8	573
s. 11	714	c. 32, s. 3	755
42 Geo. 3, c. 116, s. 123 ...	600, 934	10 Geo. 4, c. 44, s. 4	993
s. 125 ...	600, 934	11 Geo. 4 & 1 Will. 4, c. 40 ...	940
43 Geo. 3, c. 46, s. 2	799	c. 64, s. 31	614
46 Geo. 3, c. 37	149	c. 68 (Car- riers Act, 1830) ..	515
47 Geo. 3, sess. 2, c. 68, s. 29 ...	189	s. 1	523 , 524, 525, 526, 536
48 Geo. 3, c. 88, s. 2	277, 325	s. 2	523, 524, 525, 527

	PAGE		PAGE
11 Geo. 4 & 1 Will. 4, c. 68		3 & 4 Will. 4, c. 27	
s. 3	523, 525	s. 18...926, 930, 939	
s. 4	518, 519,	s. 20	930
523, 526		s. 21	930, 940
s. 5	523	s. 22	930, 940
s. 6	518, 523	s. 23...926, 931, 940	
s. 7	523	s. 24	931
s. 8	523, 525,	s. 25	931
526		s. 26	931, 940
s. 9	524	s. 28	926, 931,
1 & 2 Will. 4, c. 37, s. 5	589	940, 941	
c. 38, ss. 4, 21,		s. 29	932, 941
22	723	s. 34	871, 932,
c. 41, s. 5	993	933, 934, 948	
2 Will. 4, c. 1, s. 26	129	s. 35	932
c. 39	563	s. 36	268
2 & 3 Will. 4, c. 42, s. 3	568	s. 37	942
c. 71 (Prescrip-		s. 39	932
tion Act, 1832)		s. 40	600, 926
35, 693, 703,		s. 42	599, 602,
705, 723, 818		611, 770, 943	
s. 1	698, 702,	c. 42 (Civil Pro-	
703, 704		cedure Act,	
s. 2	698, 707,	1833)	34, 508
708, 719		s. 2...1002, 1007,	
s. 3	696, 698,	1013	
699		s. 3	564, 601,
s. 4	696, 698,	602, 611, 632,	
699, 704		637, 927,	
s. 5	696, 707	969, 984	
s. 6	36, 696	s. 4	568, 601
s. 7	696, 703,	s. 5...35, 601, 603	
710		s. 7	568, 602
s. 8	708, 710	s. 12	279
c. 98	309	s. 28 ... 510, 511,	
3 & 4 Will 4, c. 27 (R. P. L.		512	
Act, 1833)	878, 926	s. 29 ... 337, 511,	
s. 1...927, 932, 933,		512, 805,	
934		854, 1007	
s. 2...926, 927, 932,		s. 38 777, 943	
933, 934, 935,		c. 49, s. 1	144
937, 938, 939,		c. 87, s. 2 89, 137	
940, 941		s. 4	137
s. 3...927, 932, 934,		c. 98, s. 6	594
935, 948		c. 102	914
s. 4	923, 936	c. 106	921
s. 5	926, 928	s. 1	908
s. 6	925, 929	s. 2	908
s. 7...929, 936, 937		s. 4	909
s. 8...929, 937, 938		s. 10 ... 909	
s. 9...926, 929, 935,		4 & 5 Will. 4, c. 22, s. 1	257
938		c. 76	190
s. 10	929, 937	s. 71	454
s. 11	929	5 & 6 Will. 4, c. 41 (Gaming	
s. 12	926, 929	Act, 1835)	318, 478, 551
s. 13	929	s. 1	503
s. 14...929, 938, 939		s. 2	505
s. 16...926, 930, 939			
s. 17...926, 930, 939			

	PAGE		PAGE
5 & 6 Will. 4, c. 50 (Highway Act, 1835)	651, 713	1 Vict. c. 26, s. 13	131
s. 46	549	s. 14	134
s. 65	645	s. 15	134
s. 71	674	s. 16	134
s. 72	645, 711	s. 17	134
s. 78	661	s. 24	134
c. 82	98	s. 30	875
6 & 7 Will. 4, c. 58	309	s. 31	875
c. 71, s. 64	45	s. 34	131
c. 76, s. 8	737	c. 71, s. 49	68
s. 19	737	1 & 2 Vict. c. 74	816
c. 85 ... 113, 114, 194, 913		c. 77	144
s. 1	912	c. 94	98
s. 2	913	s. 12	88
s. 4 ... 912, 913		s. 13	88
s. 7	912	c. 96	987
s. 11	912	c. 105, s. 1	143
s. 18	912	c. 106, s. 77 ... 40, 745	
s. 19	912	c. 110	766
s. 20	912	s. 11	923
s. 21	912	s. 12	839
s. 26	911	2 & 3 Vict. c. 11	1013
s. 34	911	c. 47, s. 66	995
s. 42	912	s. 69	995
c. 86, ss. 19, 20, 25	114	c. 54	452
s. 31 ... 112, 113, 194		c. 71, s. 30	841
s. 38 ... 88, 113		s. 36	795
s. 35	113	s. 40	870
c. 115	137	s. 55	993
7 Will. 4 & 1 Vict. c. 22	913	c. 93, s. 8	993
s. 33	911	3 & 4 Vict. c. 9, s. 1	754
s. 36	912	s. 2	754
c. 28 ... 926, 938		s. 3	755
c. 53	74	c. 31	137
c. 73	952	c. 72	913
s. 2	988	s. 5	913
s. 3	988	c. 88, s. 35	993
s. 4	988	c. 92	112
s. 5	988	s. 6	194
s. 6-16..	988	s. 20	194
s. 17	988	c. 113, s. 50	941
s. 18	989	4 Vict. c. 32, s. 2	98
s. 22	989	4 & 5 Vict. c. 35, s. 86	920
s. 26	989	s. 88	920
s. 27	989	s. 89	920
s. 29..953, 989		s. 90	920
1 Vict. c. 22	113	5 & 6 Vict. c. 27, s. 14	89
c. 26 (Wills Act, 1837)	137	c. 39	832
s. 1	131	c. 55, s. 10	674
s. 3	920, 921	c. 108, s. 29	89
s. 9...130, 132, 136, 920		c. 109, s. 15	993
s. 10	134, 136	6 & 7 Vict. c. 73 (Solicitors Act, 1843)	390, 588, 731
s. 11	132	s. 2	389
		s. 31	389
		s. 37...7, 389, 390, 392, 393, 394	
		s. 48	392

	PAGE		PAGE
6 & 7 Vict. c. 85	134	8 & 9 Vict. c. 18 (Lands Cl.	
s. 1	146, 147	Consol. Act, 1845) 196	
c. 86, s. 16	89	s. 50	89
c. 96, s. 1	757	s. 68	175
s. 2	757	s. 132	597
7 & 8 Vict. c. 56, s. 2	911	c. 20 (Rlys. Cl.	
c. 70	576	Consol. Act, 1845)	
c. 96, s. 57	794	s. 10	89
c. 81	114, 913, 914	s. 47	673
s. 32	914	s. 68	674
c. 85, s. 19	986	s. 73	674
c. 96, s. 9	1036	s. 77	695
s. 67	1064	s. 78	695
c. 101, s. 69	89	s. 79	695
c. 105, s. 71	941	s. 86	516
c. 110	65, 952, 974	s. 89	516
s. 7	974	s. 90	520
s. 15	974	s. 97 ... 857, 977	
s. 18	974	s. 103	957
s. 44	975	s. 104	957
s. 45 ... 975, 976		ss. 108 - 111	91
s. 46	976	s. 109	957
s. 54	981	s. 115	950
s. 55	975	s. 116	950
c. 113, s. 47	987	s. 138	977
8 & 9 Vict. c. 16 (Cos. Cl. Con-		s. 139	977
sol. Act, 1845)	952	s. 154	957
s. 1	976	c. 37, s. 6	594
s. 8 ... 977, 980,		c. 38, s. 15	594
981		c. 42, s. 5	516
s. 9 ... 978, 981,		s. 6	516
983		c. 106 (Real Pro-	
s. 11	978	perty Act, 1845)	
s. 12	978	s. 3	267, 606,
s. 13	978	607, 883,	
s. 14	978	886, 944,	
s. 15 ... 978, 981		945	
s. 16	981	s. 4	597
s. 18	978	s. 5 ... 124, 599	
s. 19	978	s. 9	880
s. 20	978	c. 109 (Gaming	
s. 21 ... 980, 981		Act, 1845), s. 18	
s. 22	980	319, 464, 478,	
s. 23	984	503, 504, 549	
s. 26	982	c. 112	875
s. 27 ... 982, 983		s. 1	876
s. 28	978	s. 2	876
s. 29	984	c. 113 (Evidence	
s. 65	985	Act, 1845), s. 1	
s. 85	985	89, 104, 118,	
s. 86	985	188, 873,	
s. 91	985	911, 988	
s. 97	985	s. 2 ... 73, 100	
s. 98 ... 983, 985		s. 3	93, 97
s. 99	983	c. 118, s. 146	89
s. 135	986	c. 127, s. 8	1071
s. 136 ... 984, 986		9 & 10 Vict. c. 93 (Fatal Acci-	
s. 137 ... 984, 986		dents Act, 1846)	991
s. 139	986		

	PAGE		PAGE
9 & 10 Vict. c. 93, s. 1	689	15 & 16 Vict. c. 24, s. 1	131
s. 3	689	s. 2	131
s. 5	690	c. 51	921
c. 95 (Ct. Cts. Act, 1846), s. 96	783	c. 76 (C. L. P. Act, 1852)	905
10 & 11 Vict. c. 15, s. 14	780	s. 18	568
c. 58	913	s. 19	568
c. 69	390	s. 35	873
11 & 12 Vict. c. 15, s. 29	654	s. 129	602
c. 42	751	s. 155	97
s. 21	795	s. 157	97
c. 43	751	s. 181	877
s. 11	997	s. 188	878
c. 44	997	s. 189	878
s. 1...995, 997, 1000	999	s. 209	822
s. 2 ... 996, 997	996	s. 210	899
s. 3	996	s. 212	907
s. 4	996	s. 219	923
s. 5	996	s. 220	923
s. 6	996	s. 222...307,	873
s. 8...991, 1000	999	c. 86, s. 12	101
s. 13	999	s. 14	101
c. 45	63	16 & 17 Vict. c. 30	139
c. 70	98	c. 59, s. 19...324,	325, 580
c. 83, s. 6	129	c. 83, s. 1	146
12 & 13 Vict. c. 26	136	s. 2	146
c. 26	883	s. 3 ... 146,	151
c. 68	917	c. 137, s. 8	88
c. 78	390	17 & 18 Vict. c. 31 (Ry & Can. Traffic Act, 1854) ...	515, 527, 531
c. 103, s. 16	566	s. 1	526
c. 109, s. 11	72	s. 2	526
s. 17	72	s. 6 ... 526,	527
13 & 14 Vict. c. 17	136	s. 7 ... 520, 527, 530, 541	527
c. 17	883	c. 34, s. 1	137
14 & 15 Vict. c. 25, s. 1 ... 258, 887, 926, 946	783, 784	s. 5	137
s. 2 ... 783, 784	269	s. 6	137
s. 3	269	c. 36	1039, 1045
c. 40	915	c. 90, s. 1	512
s. 11	115	c. 125 (C. L. P. Act, 1854)—	
s. 12	115	s. 1	204
s. 13	915	s. 18	205
s. 21...115, 915	115	18 & 19 Vict. c. 111 (Bills of Lading Act, 1855), s. 1 ...	347, 348
s. 22	115	s. 2...347, 357, 866	357, 866
c. 97, s. 1	723	s. 3 ... 357, 364	651
c. 99 (Evidence Act, 1851)—		c. 120	88
s. 7 ... 75, 89, 108	90, 401	c. 124, s. 5	88
s. 8 ... 90, 401	73	19 & 20 Vict. c. 47, s. 31	970
s. 10	73	s. 43	332
s. 13...89, 90, 96	88, 90, 106, 113, 114, 188, 401, 873, 911, 1056	c. 69, s. 6	993
s. 14 ... 88, 90, 106, 113, 114, 188, 401, 873, 911, 1056		s. 31	993

	PAGE		PAGE
19 & 20 Vict. c. 96, s. 1	114, 914	21 & 22 Vict. c. 93, s. 1	919
s. 2	914	s. 8	919
c. 97 (Mercan.		c. 97, s. 7	89
Law Amend.		c. 98, s. 24	118
Act, 1856)—		c. 108, s. 8	453
s. 3	336, 368	22 Vict. c. 21	400, 401
s. 4	369	22 & 23 Vict. c. 35	137
s. 9	564	s. 1	903
s. 10	568, 602, 1004	s. 2	903
s. 11	602	s. 3	898
s. 12	569	s. 8	903
s. 13	572	s. 12	136
s. 14	602, 1017	s. 19	909
c. 104, ss. 5-8	723	s. 27	1012
c. 108, s. 39	230	s. 28	1012
s. 50	821	s. 29	1012
s. 51	821	c. 49, s. 1	577
c. 119	912, 913	c. 63	108
s. 17	913	23 Vict. c. 7	400
s. 24	114	c. 18	913
20 & 21 Vict. c. 43, s. 9	996	23 & 24 Vict. c. 27, s. 44	614
c. 77	920	c. 38, s. 3	1013
s. 22	72, 104, 106	s. 4	1013
s. 23	106	s. 6	906
s. 46	1000	s. 13	600
s. 47	1000	c. 53	941
s. 57	1000	c. 126 (C. L. P.	
s. 61	134	Act, 1860)—	
s. 62	134	s. 1	899, 907
s. 63	135	s. 13	1068
s. 64	105, 135	c. 127, s. 22	396
s. 65	135, 231	c. 10, s. 14	72
s. 70	1001	c. 11	108
s. 75	1001	c. 62	941
s. 76	1001	c. 96, s. 85	150
s. 77	1001, 1005	s. 103	801
s. 78	1001, 1005	c. 97, s. 61	800
s. 79	1001	c. 99, s. 31	800
s. 86	1001	c. 100, s. 43	794
s. 87	1001	s. 44	794
s. 95	1001	s. 45	794
c. 85, s. 13	72, 104	c. 134 (Bkey.	
s. 21	1021, 1027	Act, 1861)—	
s. 26	453, 1021	s. 192	612
21 & 22 Vict. c. 25	112, 194, 914	25 & 26 Vict. c. 38	554
c. 27	240	c. 61	813
s. 2	248, 653	c. 89 (Cos. Act,	
c. 56, s. 12	1001	1862)—	
c. 90 (Medical		s. 16	564
Act, 1858)	400	s. 41	332
s. 27	400, 731	s. 42	332
s. 29	752	s. 67	238
s. 31	400, 401, 402	s. 75	564
s. 32	400, 401	s. 76	564
s. 46	401	s. 103	1013
s. 55	400	s. 131	459, 551
		s. 153	459
		s. 161	387
		s. 162	387

	PAGE		PAGE
25 & 26 Vict. c. 102, s. 77	626	31 & 32 Vict. c. 110	537
s. 96	266, 623, 786, 948	s. 20	155
26 & 27 Vict. c. 27	114, 914	c. 119 (Regul. of Rys. Act, 1868)	515
c. 29, s. 2	551	s. 14	530
c. 41 (Innkeepers Liability Act, 1863), s. 1	542	s. 15	531
s. 2	542	s. 16	521, 531
s. 3	542	s. 17	521
s. 4	542	s. 18	531
c. 87, s. 4	109	s. 22	677
c. 91, s. 31	527, 531	s. 41	175
c. 118 (Cos. Cl. Act, 1863)	976	c. 122, s. 27	32, 810
27 & 28 Vict. c. 95 (Fatal Acci- dents Act, 1864), s. 1	690	c. 124, s. 11	172, 173
s. 2	690	32 & 33 Vict. c. 19	75, 952
c. 97, s. 5	112	s. 13	986
c. 101 (Highway Act, 1864)	713	c. 24, s. 1	737
c. 112, s. 1	923	sched. 2	737
28 & 29 Vict. c. 18 (Crim. Proc. Act, 1865), s. 1	118, 126, 161, 162, 164	c. 41, s. 1	266, 948
s. 4	162	c. 46	1012, 1013
s. 5	161	c. 48	976
s. 6	164	c. 62 (Debtors Act, 1869)—	
s. 7	118, 120	s. 4	766
s. 8	126, 291	s. 5	766, 767, 796, 1035
c. 63, s. 6	88, 107	s. 6	766, 767
c. 64, s. 1	915	c. 63, s. 64	89
c. 90, s. 12	343	c. 68, s. 2	147, 383
c. 94	523	s. 3	146, 147
29 & 30 Vict. c. 32, s. 2	146	c. 73, s. 23	155
c. 65, s. 1	593	33 & 34 Vict. c. 10, s. 4	593
c. 96	1039	s. 11	593
30 & 31 Vict. c. 29, s. 1	458, 478	c. 28, s. 4	390, 391, 395
s. 3	458	s. 7	399
c. 48, s. 4	250, 548	s. 11	395
s. 5	250, 548	c. 35 (Appor- tionment Act, 1870), s. 2	257
s. 6	250, 548	s. 3	257
c. 127, s. 23	986	s. 4	257
s. 38	986	s. 5	257
c. 131 (Cos. Act, 1867)—		c. 75, s. 83	89, 95
s. 37	388	c. 78, s. 28	652
s. 38	969	s. 29	649
c. 144, s. 1	335	c. 79, s. 21	95
s. 3	336	c. 93	1019, 1022
s. 4	336	c. 110	114, 914
s. 6	336	34 & 35 Vict. c. 17, s. 4	282
31 & 32 Vict. c. 37, s. 2	94	s. 5	282
c. 54, s. 1	108	c. 31, ss. 3, 4, 23	556
s. 3	109	c. 41, s. 9	654
s. 8	109	c. 43, ss. 29-36	1018, 1013
c. 61	917	c. 70	95
c. 71, s. 3 (2)	409	c. 78	531
		s. 12	531

	PAGE		PAGE
34 & 35 Vict. c. 79	780	37 & 38 Vict. c. 54, s. 8 ...	266, 948
s. 1	948	s. 9 ...	266, 948
s. 3	948	c. 57 (R. P. L.	
c. 112, s. 16	994	Act, 1874)—	
s. 18 ...	90, 97	s. 1 ...	871, 927,
35 & 36 Vict. c. 10	913	s. 2	928, 936
c. 19, s. 20	992	s. 3	930
c. 44	324	s. 4	930
c. 50, s. 2	780	s. 5	930
s. 3	780	s. 6	931
s. 5	780	s. 8	600, 602, 1018
c. 92, s. 13...501, 773,	773,	s. 9...600, 926, 930, 938	938
944	944	s. 7	931
c. 93, s. 10	836	s. 10 ...600, 602, 926,	926,
s. 24	487	931	931
s. 25	836	s. 8	933
s. 34	801	c. 62	385
c. 94, s. 12	801	s. 1...515, 560, 561	561
36 & 37 Vict. c. 12	452	s. 2 ...	515, 561
c. 16	114, 914	c. 68, s. 12	389
c. 36, s. 6	89	c. 78, s. 1	242
c. 48 (Regul. of		s. 2	242
Rys. Act, 1873)		c. 83	881
515, 527	515, 527	c. 88	194
c. 66 (J. Act,		ss. 1-8	114
1873)—		ss. 9-13 ...	114
s. 16	96, 104,	s. 37	115
106, 108, 109,	106, 108, 109,	s. 38	114
135, 1000	135, 1000	s. 44	114
s. 24...19, 74, 240,	241, 820, 830,	38 & 39 Vict. c. 13, s. 2	282
241, 820, 830,	873, 926, 1072	c. 36	196
873, 926, 1072	873, 926, 1072	c. 55 (Pub. Health	
s. 25 ...	221, 245,	Act, 1875)...196, 651	196, 651
268, 336	268, 336	s. 9	577
s. 25 (2)...564, 602,	926, 931	s. 19	652
926, 931	926, 931	s. 94	625
(4)	881	s. 150...625, 626	626
(5)...606, 610,	808, 874,	s. 174 ...	955
808, 874,	881	s. 186	89
881	881	s. 193	550
(6)...507, 591	507, 591	s. 214...266, 948	266, 948
(11)	566	s. 226...266, 948	266, 948
s. 29	87	s. 257...625, 626	626
s. 30	87	s. 265	471
s. 34	104, 106,	c. 63, s. 28 ...	380, 436
135, 919,	135, 919,	c. 77 (J. Act,	
1000	1000	1875), s. 2 ...	97
s. 45	210	s. 10 ...	969, 972,
s. 49	224, 230	973, 1014, 1015	973, 1014, 1015
s. 56	208	s. 14	396
s. 61	72	s. 18	104
s. 66	208	s. 20 ...	87, 100
s. 89	229	s. 22	217
c. 71, s. 64	95	c. 79	390
37 & 38 Vict. c. 42, s. 20	88	c. 87 (Land Trans-	
c. 48, s. 5	589	fer Act, 1875)..	134
c. 50	1019, 1022	s. 1	130
c. 54, s. 5 ...	266, 948	s. 2	130
s. 6 ...	266, 948		

	PAGE		PAGE
38 & 39 Vict. c. 87, s. 7	873	41 & 42 Vict. c. 31, s. 17	1043
s. 8	873	s. 20... 1043 ,	1056
s. 9	873	s. 22	1054
s. 10	873	s. 23	1039
s. 13	873	s. 24	1047
s. 14	873	c. 33, s. 5	401
s. 21	941	s. 29	401
s. 25	130	c. 38	857
s. 48	924	c. 49, s. 19	553
s. 80 ... 89, 873		s. 25	553
s. 103	150	c. 54, s. 1	766
s. 107	873	c. 76	537
s. 111	73	42 & 43 Vict. c. 8	116
s. 120 ... 89, 873		s. 3 ... 112 ,	188
c. 90	408	s. 4	113
s. 10	684	s. 5	113
39 & 40 Vict. c. 22, s. 16	556	c. 11 (Bankers	
c. 36, s. 263	97	Books Evidence	
c. 59	97	Act, 1879)	55
c. 81	328	s. 3	110
40 & 41 Vict. c. 21, s. 51	95	s. 4	110
s. 57	1035	s. 5	110
c. 39	832	s. 6	138
c. 41, ss. 4, 5	72	s. 7	110
41 & 42 Vict. c. 19, s. 4	453	s. 9	110
c. 31 (Bills of Sale		c. 17	390
Act, 1878), s. 2. 1039		c. 29, s. 2	917
s. 3... 1039 , 1045		c. 49, s. 16	794
s. 4 .. 1039, 1045,		s. 22 ... 97, 105	
1046, 1047, 1048,		s. 27 (3)... 836	
1049, 1058, 1061		s. 39 (4)... 773	
s. 5... 1040 , 1047		s. 41	104
s. 6 ... 946, 1040 ,		c. 59	757
1049, 1061		c. 78, s. 5	109
s. 7 .. 1039, 1041 ,		s. 5-7	1042
1047, 1048		43 & 44 Vict. c. 41, s. 10	112
s. 8 ... 17, 1015,		c. 42 (Employers'	
1041 , 1049, 1050,		Liab. Act,	
1051, 1052,		1880) 683 , 688	
1054, 1073		s. 1 ... 684 , 685,	
s. 9... 1041 , 1052		s. 2 (1) ... 686 ,	
s. 10 (1)... 1041 ,		687	
1047, 1049, 1052,		(2) ... 686 ,	
1054, 1055		687	
(2)... 1041 ,		(3) ... 684,	
1049, 1050, 1051,		686 , 687	
1052, 1053,		s. 3 ... 684, 687	
1054, 1056		s. 4 ... 684, 687	
(3)...1054,		s. 5 ... 684, 687	
1055		s. 6	684
s. 11... 1042 , 1055		s. 7	684, 687
s. 12... 1042 , 1056		s. 8 ... 684 , 687	
s. 13	1042	44 & 45 Vict. c. 41 (Convey. Act,	
s. 14... 1042 , 1054,		1881)	706
1056		s. 2	1060
s. 15	1042	(xv) ... 901 ,	
s. 16 ... 87, 1043,		903	
1052			

	PAGE		PAGE
44 & 45 Vict. c. 41, s. 3	243	45 & 46 Vict. c. 9	167
s. 6	597	s. 2	94
(2) ...	698	s. 4	95
s. 7 ... 626, 1060		c. 39 (Convey-	
(7) ...	626	ancing Act,	
s. 8	246	1882), s. 7	89
s. 10 ... 271, 604 ,		s. 8 ... 124, 246	
609, 898		s. 9 ... 124, 246	
s. 11 (1) ...	604	c. 43 (B. of S.	
s. 12 (1) ...	898	Act, 1882)	
s. 13	243	s. 3...1039, 1043 ,	
s. 14 ... 902, 903		1056	
(1) ... 897,		s. 4... 1043 , 1048,	
901 , 902, 903		1056	
(2) ...	907	s. 5... 1043 , 1048,	
(3) ...	901 ,	1057, 1073	
907		s. 6... 1043 , 1048,	
(5) ...	901 ,	1057	
907		s. 7... 1043 , 1057,	
(6) ...	901 ,	1058, 1061	
902, 903, 907		s. 8... 1044 , 1049,	
(8) ... 900,		1050, 1051, 1052,	
901		1054, 1058, 1073	
(9) ...	901	s. 9 ... 17, 1044 ,	
s. 16	141	1048, 1057,	
s. 18	923	1058, 1061	
(1) (13) ..	806	s. 10...1041, 1044 ,	
s. 19	1060	1049, 1052,	
(iii) ...	949	1055, 1056	
s. 30 ... 919, 921,		s. 12... 1045 , 1048,	
924, 925		1061	
s. 40	123	s. 13... 1045 , 1062	
s. 46	123	s. 14... 1045 , 1062	
s. 47	123	s. 15...1043, 1056	
s. 48 ... 87, 597		s. 17... 1045 , 1062	
ss. 49-64 ...	141	s. 18	1045
s. 55	61	c. 50, s. 191 (2) ...	993
s. 67	897	c. 61 (B. of Ex.	
(1) ...	901	Act, 1882)—	
(2) ...	901	s. 2 ... 282, 288,	
(3) ...	901	293, 310	
(4) ...	901	s. 3 (1) ...	272 ,
c. 44	393	280	
s. 2	391	(2) ...	272 ,
s. 8	391	280	
s. 9	391	(3) ...	272
c. 58 (Army Act,		(4) ...	272
1881), s. 69	75	s. 4 (1) (2) ...	273
s. 165	88	s. 5 (1) ...	273
c. 59, s. 15	89	(2) ...	280
c. 60, s. 1	737, 754	s. 6 (1) ...	273
s. 7	737	(2) ...	273 ,
s. 8	737	280	
s. 9	737	s. 7 (1) ...	273
s. 11	737	(2) ...	273 ,
s. 13	737	280	
s. 18	737	(3) ...	280 ,
c. 62, s. 17 (2) ...	401	281, 292	
		s. 8 ...	289 , 293

PAGE	PAGE		
45 & 46 Vict. c. 61, s. 9	273	45 & 46 Vict. c. 61, s. 40	296
(1) ...	333	s. 41	296
(2) ...	230	s. 42 (1) ...	296,
(3) ...	509		297
s. 10 ...	273, 281,	s. 43	296
289, 298, 333		s. 44 ...	296, 297
s. 11 ...	273, 274,	(1) ...	283
281		(2) ...	283
s. 12 ...	273, 274	s. 45	297
s. 13 ...	274, 325	(2) ...	326
s. 14 ...	281, 282,	(4) ...	298
333		(7) ...	298
s. 15	308	s. 46	299
s. 16	295	s. 47	299
s. 17	282	s. 48 ...	297, 299
s. 18	282	s. 49 ...	300, 301,
s. 19 ...	283, 284	302, 303	
s. 20 ...	274, 288,	s. 50 (1) ...	302
310		(2) ...	306,
s. 21 ...	274, 283,		307, 311, 326
286, 287, 291,		(4) ...	326
293, 310		s. 51 ...	304, 305
s. 22	274	s. 52 (1) ...	283,
s. 23 ...	84, 278	284	
(2) ...	284	(2) ...	283,
s. 24 ...	278, 286,		289
317, 321		(3) ...	283
s. 25 ...	278, 286	(4) ...	298
s. 26 ...	278, 286,	s. 53 (1) ...	276,
332		278, 326	
s. 27 ...	275, 315,	s. 54 ...	284, 289
317		(1) ...	283
s. 28	315	(2) ...	287,
s. 29 ...	278, 288,	289, 291, 292	
293		s. 55 (1) ...	295
(2) ...	318	(2) ...	310
s. 30 ...	275, 293,	s. 56 ...	310, 326,
317		334	
(2) ...	318	s. 57	312
s. 31 ...	289, 290	s. 58 ...	276, 278
s. 32 ...	290, 291,	s. 59 (1) ...	319
293, 310		(2) ...	320,
s. 33 ...	290, 319		321
s. 34 ...	290, 310	(3) ...	320
s. 35 ...	290, 310	s. 60 ...	320, 321,
s. 36 (1) ...	291	324, 580	
(2) ...	313,	s. 61	322
	325	s. 62 ...	27, 322,
(3) ...	313,	585	
	325, 331	s. 63	322
(4) ...	293,	(3) ...	314
	311, 313	s. 64 (1) ...	313,
(5) ...	313	329	
s. 37 ...	278, 291,	(2) ...	314
311		s. 65	308
s. 38 ...	275, 291	(5) ...	282
s. 39 ...	296, 296,	ss. 65-68 ...	299
297		s. 66	308

	PAGE		PAGE
45 & 46 Vict. c. 61, s. 67	309	45 & 46 Vict. c. 75, s. 1 (1)	257,
s. 68	309		1023
s. 69	277	(2) ...	257,
s. 70	277	813, 1019,	
s. 71	276	(3) ...	1019,
(2) ...	310		1020
(3) ...	320	(4) ...	1019
(4) ...	282,	s. 2...257, 1023,	
	283		1027
(5) ...	320	s. 3	1016
(6) ...	320	s. 4	1023
s. 72	276	s. 5...257, 1023,	
(1) ...	295	1027, 1028,	
(2) ...	291	s. 6	1024
(3) ...	298,	s. 7	1024
	302	s. 8	1024
s. 73 ...	323, 325	s. 9	1024
s. 74 ...	324, 326	s. 10	1028
s. 75	324	s. 11 ...	335, 336,
s. 76	327		1024
s. 77 (1) ...	327	s. 12	1025
(2)-(6) ...	328	s. 13...389, 1020,	
(3) ...	329	1025, 1027	
s. 78 ...	328, 329	s. 14...389, 1019,	
s. 79 ...	328, 329	1020, 1026	
s. 80 ...	328, 584	s. 15..1019, 1020,	
s. 81 ...	328, 329	1026	
s. 82 ...	325, 328,	s. 18..1019, 1024,	
	329, 330	1026	
s. 83 ...	330, 333	s. 19...1025, 1027	
s. 84	330	s. 23...1026, 1028	
s. 85	330	s. 24...1019, 1026	
s. 86 (1) ...	330	s. 25	1023
(2)-(3) ...	331		
s. 87 ...	333, 334	46 & 47 Vict. c. 49	240, 878
s. 88	331	s. 3 ...	248, 653
s. 89 ...	27, 331,	s. 4 ...	757
	333	c. 52 (Bky. Act,	
s. 90	318	1883), s. 137	72
s. 91 (1) ...	282	s. 145	1069,
(2) ...	331,		1070
	956	s. 146	839
s. 92	302	c. 55 (Rev. Act,	
s. 93	305	1883), s. 17 ...	328, 329
s. 94	305	c. 57, s. 84	72
s. 95	328		
s. 96 ...	277, 309,	47 & 48 Vict. c. 20	913
	325	c. 56	989
s. 97 (2) ...	312,	c. 61 (J. Act, 1884)	
	332	s. 8	210
(3) ...	313	s. 14	124
c. 72, s. 11 (2) ...	111	c. 62, s. 11.....	105
c. 75 (Married		c. 71	1013
Women's Pro-			
perty Act,		48 & 49 Vict. c. 54, s. 3	40, 745
1882),		c. 69, s. 10 ...	765, 766
s. 1...1021, 1022,		c. 72, s. 12	265
1027		49 & 50 Vict. c. 3	912

	PAGE		PAGE
49 & 50 Vict. c. 38 (Riot (Dam- ages) Act, 1886),		51 & 52 Vict. c. 43 (Cty. Cts. Act, 1888),	
s. 2 (1) ...	1029 , 1032	s. 28 ...	89, 104
(2) ...	1029	s. 54	993
s. 3 (1) ...	1029	s. 55	993
(2) ...	1029, 1030	s. 56 ...	228, 384
(3) ...	1029	s. 57	228
s. 4 (1) ...	1029, 1032	s. 58	1009
(2) ...	1029	s. 59 ...	182, 228, 821
s. 5	1029	s. 60	228
s. 6	1029	s. 61	181
s. 7	1030	s. 62	230
s. 9	1030	s. 108	635
c. 48 (Medical Act, 1886), s. 6 ...	401, 401, 402	s. 109	635
s. 23	89	s. 116...223, 228, 229, 230, 870, 951	
s. 24	400	s. 134	635
s. 28	400	s. 135	635
50 & 51 Vict. c. 26	267	s. 137	635
c. 28, s. 3	375	s. 138	181
s. 17	375	s. 147	783
s. 18	375	s. 154	839
c. 58, s. 37	645	s. 156	839
c. 46	589	s. 160...943, 1064, 1065	
c. 49, s. 3	88	s. 182	554
c. 55 (Sheriffs Act, 1887), s. 14	796	Part VI. ...	951
s. 15	1033	c. 46 (Oaths Act, 1888)—	
s. 16 (2) ...	1035	s. 1	144 , 145
s. 20 ...	472, 1069	s. 2	144
s. 28...1035, 1067		s. 3	144
s. 29 (2) ...	1070 , 1071	s. 5	143
(7) ...	1070	c. 51, s. 5	923
c. 57	1047	s. 6	923
c. 59, s. 4	551	c. 59 (Trustee Act, 1888)—	
c. 73, s. 45	925	s. 8 ...	568, 600, 602, 931
51 & 52 Vict. c. 8, s. 18	203	(1)..	399 , 565 , 1018
c. 21, s. 5	773	(3) ...	565, 1018
s. 6	773	c. 62, s. 1	1014
s. 7	777	s. 3	1014
s. 8	773	c. 64, s. 1	754
s. 9	773	s. 3 ...	745 , 751
c. 25, s. 2	72	s. 4	744
s. 8	527	s. 5	743
s. 20	73	s. 6	738
c. 41 (Local Govt. Act, 1888),		52 & 53 Vict. c. 10, s. 3 ...	73 , 103, 192
s. 3	1030	s. 6	73 , 103, 192
s. 28	997	s. 11	192
s. 40 (8) ...	343	c. 21, s. 6	554
s. 62	992	c. 30, s. 6	73
s. 85 (1) ...	661		
s. 100	997		

	PAGE		PAGE
52 & 53 Vict. c. 30, s. 7	73	53 & 54 Vict. c. 39, s. 12 ...	398 , 725
c. 42, s. 19 ...	105, 335	s. 13	399
c. 45 (Factors Act,		s. 14	444
1889) ...	856	s. 15 ...	68 , 286, 725
s. 1 ...	832 , 833	s. 16	446
s. 2 (1) ...	832	s. 17 ...	446 , 447
(2) ...	832	s. 18	369
(3) ...	833	s. 24 (2) ...	482
(4) ...	833	s. 29	490
s. 3	833	s. 36	447
s. 4	833	s. 38	447
s. 5	833	s. 41	724
s. 6	833	s. 53 (3) ...	552
s. 7	833	c. 44 (J. Act,	
s. 8	834	1890),	
s. 9	834	s. 1	217
s. 11	834	s. 5	223
s. 12	834	c. 47	917
s. 13	834	s. 12	916
c. 49 (Arbitration		c. 53, s. 1	1039
Act, 1889),		c. 63, s. 8 (2) ...	744
s. 1	386	Sched. I.	
s. 2	386	(3)	744
s. 9 ...	209, 386	c. 64 (Directors	
s. 10	209	Liab. Act,	
s. 11	209	1890)	725
s. 12	209	s. 3 ...	483, 637, 1007
s. 13 ...	208, 209	s. 5 ...	483, 1007
s. 14 ...	208, 209	c. 71 (Bky. Act,	
s. 15	209	1890),	
s. 16	209	s. 3 (15) ...	373
s. 18 ...	137, 139	54 & 55 Vict. c. 15, s. 1	375
s. 19	209	c. 17, s. 5	191
c. 63 (Interpreta-		(2) ...	255
tion Act, 1889),		c. 35, s. 1 ...	1039, 1043, 1045 , 1058, 1061
s. 9	93	c. 39 (Stamp Act,	
s. 19	990	1891) ...	197
s. 38	114	s. 3	201
(2) ...	1013	s. 8	202
s. 39	93	s. 14 ...	197 , 199, 202, 203, 204
53 & 54 Vict. c. 5 (Lunacy Act,		s. 15 ...	197, 202, 203
1890)	176, 767	s. 17	197
s. 144	89	s. 41	197
s. 330	763	s. 43 (1) ...	389
c. 21, s. 24	89	s. 49	202
s. 29 (2) ...	992	s. 65 (3) ...	106
c. 39 (Partner-		s. 72	199
ship Act,		s. 92 (2) ...	522
1890),		s. 100	335
s. 2 (3) ...	445, 446	s. 101 (2) ...	595
s. 5	443	s. 103	595
s. 6 ...	285, 293, 443	c. 40	692
s. 7	446		
s. 8	446		
s. 9	448		
s. 10 ...	398 , 725		
s. 11 ...	398 , 725		

	PAGE		PAGE
54 & 55 Vict. c. 50, s. 2	73	56 & 57 Vict. c. 61 (Public Auths. Protection Act, 1893)	943, 977, 995, 1032
c. 51 (Slander of Women Act, 1891) ...	223, 730, 732, 743	s. 1 ...	224, 225, 227, 398, 577, 689, 775, 801, 989, 990, 991, 992, 994, 995, 999, 1000
c. 74	917	s. 2 ...	801, 816, 990, 994, 999
c. 75, s. 7 (2) ...	625	c. 63 (Married Women's Property Act, 1893),	s. 1...1021, 1022, 1026, 1027
c. 76, s. 29	652	s. 2	1028
s. 114	89	c. 69, s. 6	111
55 & 56 Vict. c. 4, s. 5	323, 661	c. 71 (Sale of Goods Act, 1891)	409
c. 6	1001	s. 2 ...	558, 562, 563
c. 9 (Gaming Act, 1892) ...	551	s. 4...13, 15, 26,	124, 233, 420, 423, 437, 441, 455, 458, 473, 549, 825, 1046
s. 1	318, 478, 504	(1) ...	412, 413, 417
c. 13 (Conveyancing Act, 1892),		(2) ...	412, 413
s. 1	901	(3) ...	412, 413, 414
s. 2 (1) ...	902, 908	s. 5	413
(2) ...	902, 903, 907	s. 7	438
(3) ...	902, 903	s. 8	455
s. 3	613, 903	s. 10 (1) ...	429, 431, 842
s. 4	907	(2) ...	457
s. 5	901, 907	s. 11 (1) ...	373
c. 23	917	s. 12	374
s. 1	116, 916	s. 13 ...	375, 427
s. 8	116	s. 14 ...	374, 375, 427
(2) ...	916	s. 15 ...	20, 375, 427, 428
s. 9	116	s. 16	824
s. 11...116,	915, 916	s. 17	823
s. 12 ...	115, 916	s. 18 ...	826, 826
s. 13	916	s. 19 (1) ...	825
s. 16	116	(2) ...	347
(2) ...	916	(3) ...	348
s. 17	116	s. 20 ...	430, 438
s. 18	116		
s. 21 ...	116, 916		
s. 22 ...	915, 916		
s. 24 ...	116, 916		
s. 26	916		
c. 43, s. 17	95		
c. 57, s. 12 ...	625, 626		
s. 13 ...	625, 626		
56 & 57 Vict. c. 5, s. 1	1002		
s. 2	1013		
s. 6 (2) ...	1001		
(6) ...	1002		
c. 39, s. 75	89		
c. 53 (Trustee Act, 1893),			
s. 17	579		
s. 23	1012		
s. 40	176		

	PAGE		PAGE
56 & 57 Vict. c. 71, s. 21	826	56 & 57 Vict. c. 71, s. 62 ...	373, 413, 458
s. 22	835		(1) ... 862
s. 23	831	c. 73	652
s. 24	836	57 & 58 Vict. c. 41, s. 1	455
s. 25	834	c. 46, s. 21	921
s. 26 (1) ...	838, 1036	s. 82	920
(2) ...	838	s. 84	920
s. 27 ...	423, 842	s. 85	920
s. 28 ...	423, 432, 842	s. 88...919,	921, 925
s. 29 ...	423, 433	s. 100	920
s. 30	426	c. 60 (Merch. Ship. Act, 1894),	
(3) ...	433	s. 2 (2) ...	666
s. 31 (1) ...	433	s. 3	666
(2) ...	426, 432	s. 14	473
s. 32	440	s. 31	474
s. 33	434	s. 59	346
s. 34 (1) ...	455	s. 64 ...	116, 195, 473
(2) ...	424, 433, 455	s. 123	6
s. 35 ...	413, 465	s. 165	409
s. 36 ...	428, 455	s. 239...117,	188
s. 37	425	s. 240...115,	117
s. 38	859	s. 242	117
s. 39 (1) ...	859, 861	s. 254...115,	117
(2) ...	859	s. 256	117
s. 41 ...	414, 416, 859	s. 310	117
s. 42	859	s. 339	115
s. 43	860	s. 358	992
s. 44	861	s. 419	665
s. 45	862	s. 458	665
(7) ...	862, 865	s. 483	409
s. 46	862	s. 502	362
s. 47 ...	827, 861, 862, 866	s. 503...362,	363, 666
s. 48	862	s. 508	666
(3) (4) ...	428, 430	s. 509	362
s. 49	429	s. 691	179
s. 50 (1) ...	423	s. 694...117,	120
(2) ...	424	s. 695 ...	89, 117, 195
(3) ...	424, 425	s. 719	117
s. 51 (1) ...	430	s. 720	117
(2) (3) ...	434	Part VII.	860
s. 52	437	c. lx.	796, 797
s. 53 (1) ...	376, 428, 456	c. ccxiii.	812
(2) (3) ...	378	s. 90	249
(4) ...	378	s. 91	249
s. 58 ...	413, 420	s. 101	699
(3) (4) ...	429, 548	58 & 59 Vict. c. 9	95
		c. 25	388
		c. 39	1021
		s. 5	453
		59 & 60 Vict. c. 25, s. 100	89
		60 & 61 Vict. c. 30, s. 1	837

	PAGE		PAGE
60 & 61 Vict. c. 37	340, 688	6 Edw. 7, c. 40	917
c. 46, s. 1	554	c. 41, s. 4 (2) (b)	549
c. 65 (Land Trans-		s. 53 (2)	856, 858
fer Act, 1897)	1004	c. 45 (Trade Disputes	
s. 1	908, 919,	Act, 1906),	
	924, 1001,	s. 1	788
	1013	s. 3	768, 787
(4)	921,	s. 4 (1)	769
	924	s. 5 (3)	788
(5)	924	c. 47	556
s. 2	924, 1001,	c. 48, s. 69	362
	1012, 1013	s. 71	363, 666
s. 3	908, 919,	c. 56, s. 3	1036, 1040
	924	s. 9	1036, 1040
s. 8 (4)	873	c. 58 (Workmen's	
s. 12	941	Compensation	
s. 20	873	Act, 1906) ...	51
s. 24 (1)	873	s. 1 (2)	688
s. 25	924	(4)	688
61 & 62 Vict. c. 41, s. 10	993	s. 2 (1)	688
s. 11	139	s. 3 (1)	688
c. 46, s. 7 (1)	552	s. 5 (3)	1013, 1014
c. 58	194	s. 6	688
s. 4	912	s. 13	688
s. 6	912	7 Edw. 7, c. 13, s. 23 (1)	637
s. 7	113	c. 16	107
s. 11	113	c. 17, s. 1 (4)	836
62 & 63 Vict. c. 30, s. 10	88	c. 18, s. 2	1025
c. 33, s. 7	73	c. 23, s. 6	836
63 & 64 Vict. c. 26, s. 2	923, 1013	c. 24, s. 4 (3)	448
s. 3	923, 1013	s. 5	448
s. 5	923, 1013	s. 6	448
c. 32, s. 1	666	s. 16	89
s. 2	679	c. 29, s. 14	95
c. 51 (Money-		s. 36	758
lenders Act,		s. 64	95
1900)	553	s. 79	89
s. 1	512	c. 47	910, 919
s. 2	401	8 Edw. 7, c. 7	691
1 Edw. 7, c. 22, s. 101 (8)	625	c. 26	912
2 Edw. 7, c. 8, s. 7	112	c. 28 (Agric. Hold-	
c. 17, s. 1	401	ings Act, 1908)	266
s. 6	401	s. 1 (3)	271
s. 7	401	s. 10	271, 616
c. 28, s. 5 (2)	453, 1021	s. 11	271
3 Edw. 7, c. 31	73	s. 22	888, 891
c. 39, s. 12	265	s. 23	894
c. 42, s. 3	1009	s. 26	271, 616
5 Edw. 7, c. 11, s. 1	672	s. 28	770
c. 15, s. 50	89	s. 29	780, 781, 784
c. ccix., s. 20	625	s. 45	891
6 Edw. 7, c. 16, s. 1	999	s. 49	773
c. 17, s. 1	325, 329	s. 50	773
c. 25, s. 15	89	c. 36	267
c. 27, s. 1	375, 378	c. 39	408
s. 3	378	c. 48, s. 81 (1)	974
c. 32, s. 1 (1)	669	s. 82 (2)	974
(2)	669		
s. 7	670		

	PAGE		PAGE
8 Edw. 7, c. 53 (Law of Dis-		8 Edw. 7, c. 69, s. 111	958
tress Amendt.		s. 116	973
Act, 1908),		s. 117	974
s. 1 ... 780, 782, 948		s. 121	958
s. 2	780	s. 123	967, 969
s. 3	780, 948	s. 125	965, 969
s. 4 ... 780, 782, 783,		s. 151	974
784		s. 160	969
s. 5	780	s. 165	969
s. 6	780	s. 192	387
s. 8	782	s. 205	459
s. 9	610, 782	s. 211	784
c. 67 (Children Act,		s. 220	958
1908),		s. 243	88
s. 12	454, 455	(7)	958
s. 30	145	s. 286	987
s. 38 (2)	454	Table A, cl.	
s. 88	88	110-113	974
c. 69 (Cos. Consol.		9 Edw. 7, c. 39, s. 2	143
Act, 1908...952, 956		c. 44 (Housing, Town	
s. 1	957	Planning, &c.	
s. 2	958	Act, 1909),	
s. 3	970	s. 14	264, 265
s. 4	970	s. 15	265
s. 8	958, 967	s. 47	265
s. 9	958	c. 49, s. 21	88
s. 10	960	s. 36 (2)	337
s. 11	960	10 Edw. 7 & 1 Geo. 5, c. 24,	
s. 14	969	s. 53	89
(2)	965	c. 32	114
s. 16	958	1 & 2 Geo. 5, c. 37, s. 3 (10) ...	923
s. 17 (1)	958	s. 12 ... 898, 925	
s. 23	960	c. 55 (National	
s. 24	959, 962	Insce. Act,	
s. 25	959	1911), s. 68	878
s. 26	959	c. 57 (Maritime	
s. 27	959	Conventions	
s. 28	964	Act, 1911),	
s. 29	960	s. 1	260, 667
s. 33	959, 961	s. 2	667
s. 63	332, 970	s. 4 (1) ...	665
s. 71	958, 971	s. 8	666
s. 73 (1)	963	s. 9 (4) ...	363
s. 74	958, 971	2 Geo. 5, c. 3, s. 18	89
s. 76	970	2 & 3 Geo. 5, c. 31, s. 15 ... 363, 665	
s. 77	332, 970	3 & 4 Geo. 5, c. 34, s. 15	824
s. 78	970	4 & 5 Geo. 5, c. 14	594
s. 79	970	c. 17, s. 20	88
s. 81	726, 969	s. 21	88
s. 84	725, 726,	s. 22	88
1007		c. 47, s. 1 (1) ... 1063	
s. 87	972	(2) ... 1063	
s. 88	965	s. 2	1063
s. 89	962	s. 3	1063
s. 93	972, 1062	s. 5 (1) ... 1063	
s. 100	972	(2) ... 1063	
s. 105	972	s. 6	1063
s. 109	958	s. 7	1063
s. 110	958		

Table of Statutes Cited.

	PAGE		PAGE
4 & 5 Geo. 5, c. 47, s. 8	1063	4 & 5 Geo. 5, c. 59, s. 142 ...	73, 100
s. 25 ...	89, 1063	5 & 6 Geo. 5, c. 40	915
c. 58, s. 28	89, 90,	c. 51, s. 4	73
97, 105		6 Geo. 5, c. 7	914
c. 59 (Bkcy. Act,		s. 1	114
1914),		6 & 7 Geo. 5, c. 21	915
s. 16 (16) 373		c. 50 (Larceny	
(20) 586		Act, 1916),	
s. 28 (4)... 586		s. 41	800
s. 30..1014, 1015		s. 45 ...	836, 838
s. 31	1015	c. 58, s. 16	89
s. 33	1013	c. 65, s. 6	73
s. 35 (1) ... 783,		7 & 8 Geo. 5, c. 28	959
784		c. 44, s. 4	73
s. 38	1014	c. 48	304
s. 41..1064, 1066,		8 Geo. 5, c. 2	914
1069, 1070		8 & 9 Geo. 5, c. 23	204
s. 54	1015	9 & 10 Geo. 5, c. 73 (County	
s. 118	84	Courts Act, 1919), s. 11	228
s. 132	73	c. 80, Sched. ...	758
s. 137	167	11 & 12 Geo. 5, c. 24	910
s. 139	88		

ADDENDA.

- Page, 58, line 11. *Add* : See also *La Roche v. Armstrong*, [1922] 1 K. B. 485.
- Page 185, line 29. *Add* : See also *In re Macartney*, 90 L. J. Ch. 314; [1921] 1 Ch. 522.
- Page 318, line 12 from bottom. *Nicholls v. Evans*, 83 L. J. K. B. 301; [1914] 1 K. B. 118, was overruled, and *Dey v. Mayo*, 89 L. J. K. B. 241; [1920] 2 K. B. 346, approved in *Sutters v. Briggs*, 91 L. J. K. B. 1; [1921] 1 A. C. 1.
- Page 374, last line of first paragraph. *Niblett v. Confectioners' Materials Co.*, 37 T. L. R. 103, was reversed in C. A., 90 L. J. K. B. 984; [1921] 3 K. B. 387.
- Page 375, line 18. *Add* : The expression "merchantable quality" does not include the quality of being legally saleable in the market for which the goods are intended: *Sumner, Permain & Co. v. Webb*, 91 L. J. K. B. 228; [1922] 1 K. B. 55.
- Page 401, third paragraph. See now Dentists Act, 1921 (11 & 12 Geo. 5, c. 21).
- Page 419, lines 17, 18. *Add* : The principle of *Ogle v. Vane*, 37 L. J. Q. B. 77; L. R. 3 Q. B. 272, and *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598, is unaffected by *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1, or *Hartley v. Hymans*, 90 L. J. K. B. 14; [1920] 3 K. B. 475; so held in *Levey v. Goldberg*, [1922] W. N. 96.
- Page 442, line 25. *Add* : Conversely, where the seller has sued the principal to judgment, he cannot, although he has not received satisfaction, afterwards sue the agent: *L. G. O. Co. v. Pope*, 38 T. L. R. 270.
- Page 487, line 19 from bottom. *Add* : For money on current account a demand by the customer is in general necessary before the bank can be sued: *Joachimson v. Swiss Bank*, 90 L. J. K. B. 973; [1921] 3 K. B. 110.
- Page 505, line 3 from bottom. *Add* : Section 2 of the Act of 1835 has not been impliedly repealed by the Gaming Acts, 1845 and 1892: *Cohen v. Hall*, 38 T. L. R. 429.
- Page 506, first paragraph. *Add* : *Dey v. Mayo*, 89 L. J. K. B. 241; [1920] 2 K. B. 346, approved in *Sutters v. Briggs*, 91 L. J. K. B. 1; [1922] 1 A. C. 1.
- Page 519, line 27. *Foster v. G. W. Ry.*, 73 L. J. K. B. 811; [1904] 2 K. B. 306, was overruled in *Neilson v. L. & N. W. Ry.*, 91 L. J. K. B. 266; [1922] 1 K. B. 192.
- Page 519, line 6 from bottom. *Smith v. G. W. Ry.*, 90 L. J. K. B. 644; [1921] 2 K. B. 237, was affirmed in H. L., [1922] 1 A. C. 178.
- Page 536, last line. *Add* : Cf. *Transoceanica Societa Italiana, &c. v. Shipton*, 38 T. L. R. 318.
- Page 538, line 23. *Add* : Cf. *Walls v. Centaur Co.*, 126 L. T. 242.
- Page 549, line 4. *Add* : See also *Alexander v. Webber*, 38 T. L. R. 42.
- Page 619, line 28. *Curling v. Matthey*, 37 T. L. R. 717, affirmed in H. L., [1922] W. N. 110.
- Page 653, lines 1, 2. *Add* : See *In re Polemis & Furness, Withy*, 90 L. J. K. B. 1353; [1921] 3 K. B. 560, and Sir F. Pollock's article thereon in *Law Quarterly Review* for April, 1922, p. 165.
- Page 663, line 21. *Cooke v. Midland G. W. Ry.*, 78 L. J. P. C. 76; [1909] A. C. 229, was applied in *Glasgow Cor. v. Taylor*, 91 L. J. P. C. 49; [1922] 1 A. C. 44 (death of child through eating poisonous berries in public botanic gardens).
- Page 888, line 42. *Add* : To determine a monthly tenancy reasonable notice is required, but a notice, if in other respects reasonable, is not rendered unreasonable and invalid merely because it expires on a day other than the last day of a month calculated from the commencement of the tenancy: *Simmons v. Crossley*, [1922] W. N. 129.

DIGEST OF THE LAW OF EVIDENCE AT NISI PRIUS.

PART I.

EVIDENCE IN GENERAL.

With regard to its nature, evidence may be considered under the following heads:—Primary evidence; secondary evidence; presumptive evidence; hearsay; admissions.

PRIMARY EVIDENCE.

It is a general rule, that the best evidence, or rather the highest kind of evidence, must be given of which the nature of the case admits; and evidence of a nature which supposes better proof to be withheld is only secondary evidence. So, in general, where a contract has been reduced into writing by the parties, the writing is the best evidence of its contents and must be produced. *Fenn v. Griffiths*, 8 L. J. (O. S.) C. P. 218; 6 Bing. 533. So where a person was engaged as secretary on the terms contained in a resolution entered in a certain book of the employer, in action for his salary the book must be produced. *Whitford v. Tutin*, 3 L. J. C. P. 106; 10 Bing. 395. In an action for infringement of a musical composition, the defendant cannot ask a witness whether he has not seen printed copies of it at a certain place and time, or heard it performed, in order to disprove the originality; such copies, if any, must be produced and proved, or inability to produce them shown. *Boosey v. Davidson*, 18 L. J. Q. B. 174; 13 Q. B. 257.

But it is not universally necessary, where the matter to be proved has been committed to writing, that the writing should be produced. If, for instance, the narrative of an extrinsic fact has been committed to writing, the fact may yet be proved by oral evidence. Thus, a receipt for money will not exclude oral evidence of the payment. *Rambert v. Cohen*, 4 Esp. 213. So where, in trover, the witness stated that he had orally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, *Ld. Ellenborough, C.J.*, ruled that it was not necessary that the writing should be produced. *Smith v. Young*, 1 Camp. 439. In the same manner, what a party says, admitting a debt, is evidence, although the promise to pay is reduced into writing. *Singleton v. Barrett*, 1 L. J. Ex. 134; 2 C. & J. 369. Parol evidence of the fact of tenancy is admissible, although the tenant hold under a written agreement. *R. v. Holy Trinity, Kingston-upon-Hull*, 6 L. J. (O. S.) M. C. 24; 7 B. & C. 611; 1 M. & Ry. 444. But the parties to the lease, the amount of rent, and the terms of the tenancy, can only be shown by the

writing. *S. C.*; *Strother v. Barr*, 6 L. J. (O. S.) C. P. 245; 5 Bing. 136; *R. v. Merthyr Tidvil*, 8 L. J. (O. S.) M. C. 114; 1 B. & Ad. 29. In an action *inter alios*, the landlord cannot be called to prove the rent due without producing the written lease if there be one. *Augustien v. Challis*, 17 L. J. Ex. 73; 1 Ex. 279. And the fact of a tenancy under a particular person cannot be so proved where there is a writing. *Doe v. Harvey*, 1 L. J. C. P. 9; 8 Bing. 239; *semb. contra, per Alderson, B.*, in *Augustien v. Challis, supra*. Although there exists a deed of partnership, yet the fact of partnership may be proved by the acts of the parties. *Alderson v. Clay*, 1 Stark. 405. The fact of the employment of an agent to sell may be proved by oral evidence, though the terms of his commission are contained in a letter. *Semb. Whitfield v. Brand*, 16 L. J. Ex. 103; 16 M. & W. 282. Where it is necessary to prove a marriage, the entry in the parish register is not the only evidence; but the fact may be proved by the testimony of persons who were present and witnessed the ceremony, or by general reputation. *Evans v. Morgan*, 2 C. & J. 453; *R. v. Wilson*, 3 F. & F. 119; *Campbell v. Campbell*, L. R. 1 H. L. (Sc.) 201, *per* Ld. Cranworth. And where evidence of reputation was given, proof of a fiat for a special licence, and of the affidavit on which it was founded, and of an entry in a parish register stating a private marriage in a house, purporting to be signed by the parties, was admitted to confirm the other evidence. *Doe d. Egremont (Earl) v. Grazebrook*, 12 L. J. Q. B. 221; 4 Q. B. 406. On an indictment for an unlawful assembly, the inscriptions and devices on banners displayed at a public meeting may be proved by oral evidence, and it is not necessary to produce the banners themselves. *R. v. Hunt*, 3 B. & A. 566. And the transactions and proceedings of such a meeting may be proved by oral evidence, as resolutions entered into; although it should appear that those resolutions were read from a paper. *Id.* 568. So an inscription on a fixed monument, or writing on a wall, may be proved by oral evidence. *Doe d. Coyle v. Cole*, 6 C. & P. 359; *Mortimer v. M'Callan*, 9 L. J. Ex. 73; 6 M. & W. 68, 72, *per Cur.*; *Sayer v. Glossop*, 17 L. J. Ex. 300; 2 Exch. 409; *Bartholomew v. Stephens*, 8 C. & P. 728. In an action for infringement of the copyright of a picture by a photograph, it is not necessary to produce the picture; a witness who has seen it can prove that the photograph is taken from an engraving which is the copy of the picture, the engraving and photograph being produced. *Lucas v. Williams*, (1892) 2 Q. B. 113; 61 L. J. Q. B. 595, C. A.

The admission of one of the parties to a suit is *primary* evidence as against him. *Slatterie v. Pooley*, 10 L. J. Ex. 8; 6 M. & W. 664, where it was decided that oral admissions are evidence against the party making them, although they relate to the contents of a written instrument. See also *Newhall v. Holt*, 9 L. J. Ex. 293; 6 M. & W. 662; and *Henman v. Lester*, 12 C. B. (N. S.) 776; 31 L. J. C. P. 366. So a copy of a document delivered by a party is primary evidence against him of that document. See *Stowe v. Querner*, L. R. 5 Ex. 155, 159; 39 L. J. Ex. 60.

The proper evidence of all judicial proceedings is the production of the proceedings themselves or of examined or office copies of them. *Thellusson v. Shedden*, 2 Bos. & P. N. R. 228. It has even been held that oral evidence was not admissible of the day on which a cause came on to be tried; as the proper proof is the *postea*. *Thomas v. Ansley*, 6 Esp. 80; *R. v. Page, Id.* 83. But as adjournments are not noticed on the record, it may well happen that oral evidence is the best and only evidence of the actual day of trial; *Roe d. Wrangham v. Hersey*, 3 Wils. 274; *Whittaker v. Wisbey*, 12 C. B. 52; 21 L. J. C. P. 116; though the record may be the only legal evidence of the proceeding at *Nisi Prius* recorded in it. Where the deposition of a witness in a case of misdemeanor was taken under 7 G. 4, c. 64, s. 3, and the plaintiff in an action against the witness offered oral evidence of an admission made by him in such deposition, the court held such evidence to have been rightly rejected. *Leach v. Simpson*, 5 M. & W. 309.

The counterpart of a deed is admissible as original or primary evidence

against the party executing it, and those claiming under him, though no notice to produce the other part has been given; *Burleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Houghton v. Kœnig*, 18 C. B. 235; 25 L. J. C. P. 218; so a duplicate original may be adduced in evidence without notice to produce the other original; *Colling v. Treweek*, 5 L. J. (O. S.) K. B. 132; 6 B. & C. 394, 398; and in the case of printed matter each copy of the same impression is an original. *R. v. Watson*, 2 Stark. 129.

Though a written contract must be produced in an action founded on it, yet a mere memorandum, not signed by the parties nor intended to be final, will not prevent the introduction of oral evidence of a contract. *Doe d. Bingham v. Cartwright*, 3 B. & A. 326; and see *Hawkins v. Warre*, 3 B. & C. 690, 698. So where an oral contract is made for the sale of goods, and is put into writing afterwards by the vendor's agent for the purpose of assisting his recollection, but is not signed by the vendee, the contract may be proved by oral evidence. *Dalison v. Stark*, 4 Esp. 162. A vendee may give evidence of warranty, although a note of the sale and receipt of the money, given by the vendor to the vendee after the conclusion of an oral contract, contained no notice of any warranty. *Allen v. Pink*, 7 L. J. Ex. 206; 4 M. & W. 140. So of the memorandum of the terms of a lease, not signed by the lessor, but only by the wife of the lessee. *R. v. St. Martin's, Leicester*, 4 L. J. M. C. 25; 2 Ad. & E. 210. See also *R. v. Wrangle*, 4 L. J. M. C. 31; 2 Ad. & E. 514. The case of *Whitford v. Tutin*, 3 L. J. C. P. 106; 10 Bing. 395, may seem hardly distinguishable in principle from some of the above. There it was held that a secretary, who accepted an engagement under a society on the terms contained in a resolution entered in the society's book, was held bound to produce the book in an action for his salary, though not a party to the resolution. The distinction seems to be that the hiring was expressly upon the written terms, though the writing was not in itself a contract. The general proposition established by the cases seems to be that a mere unaccepted proposal, executory memorandum, private minute or unauthorised entry of one of the parties, will not exclude oral proof. But where an oral contract expressly incorporates, or refers to, a written paper as part of its terms, that paper ought to be produced in order to prove those terms. See *Hill v. Nuttall*, 17 C. B. (N. S.) 262; 33 L. J. C. P. 303.

To render the production of a writing necessary, it must appear to relate to the matter in question. Thus where oral evidence is offered to prove a tenancy, it is not a valid objection that there is some written agreement relative to the holding, unless it also appear that the agreement was between the parties as landlord and tenant, and that it continues in force at the very time to which the oral evidence applies. *Doe d. Wood v. Morris*, 12 East, 237. Oral evidence of the terms of a demise is admissible, although the witness called to prove them states that the lessor read them from some paper held in his hand at the time, but which was not shown to, or signed by, the lessee. *Trewhitt v. Lambert*, 10 Ad. & E. 470.

If, in an action for work and labour, it appear that the claim is for extras on a written contract, the written contract must be produced. *Buxton v. Cornish*, 13 L. J. Ex. 91; 12 M. & W. 426. But if an entirely separate order be given for the extras, then production of the written contract is not necessary. *Reid v. Batte*, M. & M. 413.

If oral evidence of an agreement be given at a trial, the party desirous of excluding it may at once interpose and ask the witness whether it was not in writing; if the witness deny this, he may then give evidence on a collateral issue to show that the agreement was in writing; *Cox v. Couveless*, 2 F. & F. 139; or he may reserve the question for cross-examination, and may inquire as to the contents of the writing, so far as may be necessary, to show that oral evidence is inadmissible. *Curtis v. Greated*, 3 L. J. K. B. 126; 1 Ad. & E. 167. It is not enough to prove, by a witness, that the solicitor of the opposite party has admitted in conversation that there

was a written agreement on the subject, for a solicitor is not an agent of his client to make such admissions. *Watson v. King*, 3 C. B. 608.

Whether the existence of a writing is sufficiently proved to exclude oral evidence is a question for the judge.

SECONDARY EVIDENCE.

Secondary evidence is admitted in cases where the principle which excludes it, namely, the supposed existence of better evidence behind, which it is in the power of the party to produce, does not apply. Thus, it is admissible if a ground be laid for it by proving that better evidence cannot be obtained. *Rainy v. Bravo*, L. R. 4 P. C. 287. In the case of a lost deed, the loss or destruction must be proved; and if it appear that two or more parts have been executed, the loss of all the parts should, it is said, be proved, otherwise "perhaps" a copy will not be admitted. B. N. P. 254; and see *R. v. Castleton*, 6 T. R. 236; and *Munn v. Godbold*, 4 L. J. (O. S.) C. P. 54; 3 Bing. 292, 294, *per Best*, C.J. So where an instrument is in the possession of the opposite party, oral evidence of its contents may be given, on proof of the service of a notice to produce it. All the proper sources from which the primary evidence can be procured must be exhausted before secondary evidence can be admitted. Thus, the party who has the legal custody of an instrument must be applied to. *R. v. Stoke Golding*, 1 B. & A. 173. So where a letter, which had been in the possession of the defendant, was filed in the Court of Chancery pursuant to an order of that court, it was ruled that secondary evidence of it was not admissible, it being in the power of either party to produce it on application to the court. *Williams v. Munnings*, Ry. & M. 18. A document of record in a foreign country, the laws of which do not admit of its production, may be proved by secondary evidence. *Halket v. Dudley (Earl)*, 76 L. J. Ch. 330; [1907] 1 Ch. 590; but, *semble*, it must be shown that by the foreign law production of the original is not allowed; the refusal by a subordinate officer of the court, in whose actual custody the document was, to allow its production, was held in *Crispin v. Doglioni*, 32 L. J. P. 109, not to justify secondary evidence being given. The construction of a lost document, though proved by oral evidence, is for the judge, where the veracity of the witness as to its contents is not questioned. *Berwick v. Horsfall*, 4 C. B. (N. S.) 450; 27 L. J. C. P. 193.

The wrongful refusal of a third party to produce a document in his possession on *subpœnâ duces*, will not let in oral evidence of it. *Jesus College v. Gibbs*, 1 Y. & C. 156; *R. v. Llanfaethly*, 2 E. & B. 940; 23 L. J. M. C. 33. But where a document is in the hands of a person, which he is not obliged to produce under a *subpœnâ duces*, secondary evidence of its contents may be given. S. C.; *Hibberd v. Knight*, 17 L. J. Ex. 119; 2 Ex. 11; *R. v. Leatham*, 8 Cox, C. C. 498; 30 L. J. Q. B. 209, *per Hill, J.*; *Calcraft v. Guest*, 67 L. J. Q. B. 505; [1898] 1 Q. B. 759, C. A. But it is only if everything has been done to get the original that secondary evidence of its contents is admissible. *Hibberd v. Knight (supra)*. Where a private letter is in the hands of a person resident abroad, and out of the jurisdiction of the English courts, who refuses to part with it or produce it on the trial of a cause, the contents may be proved by secondary evidence, if all reasonable exertions have been made to procure the original. *Semb. Boyle v. Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160. In such a case the person requiring the production should disclose to the proprietor of the instrument the object of the application. See *Brown v. Thornton*, 6 L. J. K. B. 82; 6 Ad. & E. 185; *Quilter v. Jorss*, 14 C. B. (N. S.) 747.

The contents of documents of a public nature, required by law to be kept, may be proved by examined (and in some cases by office or certified) copies without accounting for the non-production of the original document; and the same rule applies to public registers and documents kept abroad.

In some cases secondary evidence of oral testimony is admitted, as where

the testimony of a witness on a former trial is admitted on another trial without producing him in person.

Proof of loss of document.] Where secondary evidence is offered in consequence of the loss of the primary evidence, diligent search must be shown to have been made in those quarters in which the primary evidence was likely to be procured. Where the publisher of a newspaper, in which a libel had appeared, stated that he believed the original was either destroyed or lost, having been thrown aside as useless, this was held sufficient to let in secondary evidence. *R. v. Johnson*, 7 East, 66. So where a licence to trade had been returned to the secretary of the governor who had granted it, and the secretary swore that it was his custom to destroy or put aside such licences as waste paper, and that he had disposed of the licence in question in the same manner as other licences, that he had searched for it, but had not found it, the court held the loss sufficiently proved. *Kensington v. Inglis*, 8 East, 278; see also, as to extent of search, *Brewster v. Sewell*, 3 B. & A. 296. As a general rule, to admit secondary evidence of a deed of apprenticeship, proof should be given that a search has been made for the original instrument among the papers both of the master and apprentice. *R. v. Hinchley*, 3 B. & S. 885; 32 L. J. M. C. 158; *R. v. Morton*, 4 M. & S. 48; *R. v. Piddlehinton*, 1 L. J. M. C. 43; 3 B. & Ad. 460. But where the only evidence of loss consisted of the declarations of the deceased pauper, who stated that the indenture had been given back to him and worn out, parol evidence was held inadmissible. *R. v. Rawden*, 2 Ad. & E. 156.

When the party, in whose possession the instrument was, is alive, it has in some cases been held that he ought to be called, and his declarations are not admissible. *R. v. Denio*, 7 B. & C. 620; *sub nom. R. v. Rhodegeidio*, 6 L. J. (O. S.) M. C. 10. But, generally, the declarations of the persons applied to are received in evidence to show that due inquiry and search has been made, and the judge determines whether the search is sufficient. *R. v. Braintree*, 1 E. & E. 51; 28 L. J. M. C. 1. *R. v. Saffron Hill*, 1 E. & B. 93; 22 L. J. M. C. 22, seems to show that it is not in every case necessary to call the person applied to as a witness; it is a question for the court.

Where the loss or destruction of the paper is probable, very slight evidence of its loss or destruction will be required, and a useless paper will be presumed to have been destroyed. *Brewster v. Sewell*, 3 B. & A. 296, *per* Abbott, C.J. Thus, where depositions had been delivered to the clerk of the peace or his deputy, it appearing to be the practice to throw them away as useless, slight evidence of a search for them was held sufficient, and the deputy need not be called, it being his duty to deliver them to his principal. *Freeman v. Arkell*, 2 L. J. (O. S.) K. B. 64; 2 B. & C. 494. A constable, who levied under a warrant issued by the defendant, and was entitled to the custody of it, said that he had deposited it in his office, but was unable, upon search, to find it: held, that secondary evidence of it was admissible against the defendant, though no notice to produce was served on him. *Fernley v. Worthington*, 1 M. & Gr. 491. The degree of diligence to be used in searching for a deed must depend on the importance of the deed and the particular circumstances of the case. *Gully v. Exeter (Bishop)*, 4 Bing. 290. If not found in its proper place of deposit, further search may generally be dispensed with. A fruitless search in the parish chest for indentures, given up to the parish officers long ago, is sufficient to let in parol evidence of them. *R. v. Stourbridge*, 6 L. J. (O. S.) M. C. 65; 8 B. & C. 96; 2 M. & Ry. 43.

A cheque drawn on account of a parish was delivered to the defendant, who was then paying clerk of the parish; it was shown that the bankers of the parish, on the same day, paid the cheque, and that their custom was to return the paid cheques to the paying clerk, who deposited them in an apartment in the workhouse; the defendant was no longer in office as paying clerk, and his successor was not called; a witness stated that he had made

application to him for an inspection of the cheques, and that he had handed him several bundles, which the witness looked through without finding the cheque in question; it was held that secondary evidence of the contents of the cheque was admissible. *M'Gahey v. Alston*, 6 L. J. Ex. 29; 2 M. & W. 206. In *Pardoe v. Price*, 14 L. J. Ex. 212; 13 M. & W. 267, a fruitless search for a security given to one K. in an attorney's office, where the papers of K. and of his executrix were deposited, was held to be sufficient to let in secondary evidence.

All places of probable deposit should be searched. Where a conveyance of freehold and leasehold in trust was alleged to be lost, and one of the trustees and the heir of another, deceased, negatived possession of it, it was held insufficient unless the executor of the deceased trustee was also questioned, who had taken possession of his papers. *Doe d. Richards v. Lewis*, 11 C. B. 1035; 20 L. J. C. P. 177. Where duplicate instruments were executed, a search for both seems necessary.

Though proof of the destruction of the original lets in secondary proof, yet if the destruction is alleged to have been by, or while in the possession of, the opposite party a notice to produce is required. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46.

The objection that secondary evidence of a document is offered without proof of due search for the original must be distinctly made at the trial; otherwise the court will not entertain it on a motion for a new trial. *Williams v. Wilcox*, 8 Ad. & E. 314.

Notice to produce when necessary.] In general, when any written instrument is in the possession or power of the opposite party, secondary evidence of its contents is inadmissible without previous proof of a notice to produce the original. *R. v. Elworthy*, L. R. 1 C. C. 103; 37 L. J. M. C. 3. The object of the notice is to give the party an opportunity to produce it if he please. *Dwyer v. Collins*, 21 L. J. Ex. 225; 7 Ex. 639. Where, however, from the nature of the proceedings, the party in possession of the instrument necessarily has notice that he is to be charged with the possession of it, as in the case of trover for a bond, a notice to produce is unnecessary. *How v. Hall*, 14 East, 274; *Scott v. Jones*, 4 Taunt. 865. In *Martin v. White*, 79 L. J. K. B. 553; [1910] 1 K. B. 665, secondary evidence of the particulars contained in a licence to drive a motor car was held admissible, although no notice to produce the licence had been given. The plaintiff may prove the nature and description of the document, for which trover is brought, by secondary evidence, though the defendant offers to produce it; for that is part of the defendant's evidence. *Whitehead v. Scott*, 1 M. & Rob. 2. A notice is not required where the party has procured the possession of the instrument by fraud, after the action commenced, from a witness called for the purpose of producing it under a *subpœnâ duces tecum*. *Leeds v. Cook*, 4 Esp. 256. A counterpart executed by the defendant may be read by the plaintiff without a notice to produce the original. *Burleigh v. Stibbs*, 5 T. R. 465. In trover against a sheriff for executing a *fi. fa.* plaintiff may give evidence of the warrant and its loss, without notice to produce it. *Minshall v. Lloyd*, 6 L. J. Ex. 115; 2 M. & W. 450. In an action by a seaman, secondary evidence of the contents of any agreement with the crew or otherwise to support his case is admissible under 57 & 58 V. c. 60, s. 123, without notice to produce it. See *Bowman v. Manzelman*, 2 Camp. 315, decided under an earlier statute. But where defendant pleaded to an action by the drawer of a bill that he accepted in part payment of a debt due from defendant to plaintiff, in order to induce him to prove his debt under a fiat then pending against the defendant, to which plaintiff replied by denying acceptance in part payment of such debt: held that plaintiff was not bound to produce the bill without notice to produce; *Goodered v. Armour*, 12 L. J. Q. B. 56; 3 Q. B. 956; and the same point was ruled where the defendant pleaded that his acceptance was obtained by fraud, and issue was joined thereon. *Lawrence v. Clark*, 15 L. J. Ex. 40; 14 M. & W. 250.

In ejectment the defendant relied upon a will; on the cross-examination of one of his witnesses he stated that, about a fortnight after the execution of the will, a second will was prepared, which had come into the possession of the defendant; the plaintiff's counsel was not allowed to ask whether the latter paper was duly signed by three witnesses, and whether the testator had declared it to be his last will, no notice to produce it having been given. *Doe d. Phillips v. Morris*, 3 Ad. & E. 46.

Notice to produce a notice to produce is, for obvious reasons, not necessary; and, generally, a notice to produce any notice on which the action is founded is also unnecessary. It is usual in business to make two copies of a notice, and to serve one and retain the other, indorsing on the one retained the time and mode of service. There can be no doubt that in this case the notice served is, strictly speaking, the only *primary* evidence. But a custom, and not an unreasonable one, of admitting the copy, which is almost a duplicate original, has obtained. There is some little doubt as to what are the notices to which the rule extends. It clearly extends to a notice to produce documents; it has also been held to extend to a notice to quit; *Doe d. Fleming v. Somerton*, 14 L. J. Q. B. 210; 7 Q. B. 58; to a notice of dishonour; *Swain v. Lewis*, 4 L. J. Ex. 249; 2 C. M. & R. 261; *Kine v. Beaumont*, 3 B. & B. 288; and to a notice of demand of a copy of the warrant pursuant to the 24 G. 2, c. 44, s. 6; *Jory v. Orchard*, 2 B. & P. 39. But the rule does not extend to notice of dishonour of bills other than the bill sued on. *Lanauze v. Palmer*, M. & M. 31.

In order to prove the delivery of a solicitor's signed bill of costs, it is not necessary to give notice to produce the bill delivered, which is itself a notice. *Colling v. Treweek*, 5 L. J. (O. S.) K. B. 132; 6 B. & C. 394. See also the 6 & 7 V. c. 73, s. 37.

By Rules, 1883, O. xxxii. r. 8, "an affidavit of the solicitor or his clerk of the service of any notice to produce and of the time when it was served, with a copy of the notice to produce, shall in all cases be sufficient evidence of the service of the notice, and of the time when it was served." *Semble*, "sufficient evidence" in this rule means *prima facie* evidence only; see *Barraclough v. Greenhough*, L. R. 2 Q. B. 612; 36 L. J. Q. B. 251.

Where a party has the document in court at the trial, a requisition to produce it, given at the trial, will be sufficient to let in secondary evidence of it, if production be refused; and the solicitor of one party may be asked in court whether he has the document in court, and is bound to answer the question, though he may be justified in refusing to produce it on the ground of confidence. *Dwyer v. Collins*, 7 Ex. 639; 21 L. J. Ex. 225.

Although the contents of a document may be proved by an admission of the opposite party out of court, yet it seems that the party cannot himself be cross-examined (when produced as a witness) respecting its contents, unless he has had notice to produce it. *Darby v. Ouseley*, 25 L. J. Ex. 227; 1 H. & N. 1. In that case it did not appear that the party interrogated had the document in his power or possession, and the language of the court almost goes to the extent of showing that a party cannot be called on to say whether he *admits* the contents of any document, though his admission *out of court* would have been evidence according to *Slatterie v. Pooley*, 10 L. J. Ex. 8; 6 M. & W. 664. The court considered that there was a difference between proving an admission and calling upon the party in court to make one. See also *Whyman v. Garth*, 8 Exch. 803; 22 L. J. Ex. 316.

An admission in the usual form, under a notice to admit, as now required, of the accuracy of a copy, will not dispense with a notice to produce the original, if in the opposite party's possession, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 9 L. J. Q. B. 185; 11 Ad. & E. 805.

Notice to produce; proof of possession of original.] To render a notice to produce available, it must be proved that the original instrument is in

the hands of the opposite party, or of some person in privity with him. The nature of this evidence must vary according to the nature of the instrument. Where it belongs exclusively to the party, slight evidence is sufficient to raise a presumption that it is in his possession. Thus, where a solicitor proved that he had been employed by the defendant to solicit his certificate, and that looking at his entry of charges he had no doubt the certificate was allowed, this was held to be presumptive proof of the certificate having come to the defendant's hands. *Henry v. Leigh*, 3 Camp. 502. Where the instrument has been delivered to a third person, between whom and the party to the suit there exists a privity, notice to the latter is sufficient; as in an action against the owner of a vessel for goods supplied to the use of the vessel, a notice to the defendant to produce the order for the goods, which had been delivered to the master by the defendant, is sufficient. *Baldney v. Ritchie*, 1 Stark. 338. So in an action against the sheriff, a notice to his solicitor to produce a warrant, which has been returned to the under-sheriff while the defendant was in office, is sufficient, whether the defendant be in or out of office at the time of notice. *Taplin v. Atty.*, 3 L. J. (O. S.) C. P. 218; 3 Bing. 164; *Suter v. Burrell*, 2 H. & N. 867; 27 L. J. Ex. 193. So also notice to a defendant to produce a cheque drawn by him, and paid by his banker, is sufficient to entitle the plaintiff to give secondary evidence of its contents, although the cheque remains in the banker's hands. *Partridge v. Coates*, Ry. & M. 156. So notice to a party to the action to produce a document in the possession of his solicitor in another action is sufficient. *Irwin v. Lever*, 2 F. & F. 296. If the instrument were in possession of the party at the time of the service of notice, he cannot afterwards voluntarily part with it so as to get rid of the effect of the notice. Dallas, C.J., in *Knight v. Martin*, Gow, 104; and Best, C.J., in *Sinclair v. Stevenson*, 1 C. & P. 585. But where the plaintiff was nonsuited in a cause in which he had given defendant notice to produce a lease, and afterwards defendant assigned the lease, and on a second trial plaintiff again gave defendant's attorney notice to produce it, and was then told by him of the assignment, it was held that secondary evidence was inadmissible and a *subpœna* necessary. *Knight v. Martin*, Gow, 103. Where a paper had been delivered to a third person, under whom the defendant justified in an action of trespass, and by whose directions he acted, a notice to produce, served upon the defendant, was held not sufficient to authorise the admission of secondary evidence. *Evans v. Sweet*, Ry. & M. 83. It is said, however, in B. N. P. 254, that "if it were proved that the deed came into the hands of the defendant's brother, under whom the defendant claims, a copy ought to be read, even though the defendant have sworn in an answer in Chancery that he has not got the original." But the statement is rather loose. When a document is in the hands of a person who holds it as stakeholder between the defendant and a third party, the notice to produce is not sufficient to let in secondary evidence; *Parry v. May*, 1 M. & Rob. 279; for though it need not be shown that the document is in the actual possession of the party, it must be in the hands of some one who is bound to give up possession to him. S. C. See also *Wright v. Bunyard*, 2 F. & F. 193.

The question whether there is sufficient proof of possession in the opposite party is in general solely for the judge; and, where the notice to produce is given by the plaintiff, the defendant may interpose with evidence to disprove possession; and such evidence (being, in fact, for the information of the judge) gives the plaintiff no reply to the jury. *Harvey v. Mitchell*, 2 M. & Rob. 366. Notice to produce a book containing the terms of an agreement was served on defendant; at the trial defendant produced such a book, but plaintiff denied that it was the right one, though defendant denied possession of any other; the question of the existence of another was held to be for the judge, but he might, by consent, take the opinion of the jury on it as an interlocutory issue. *Froude v. Hobbs*, 1 F. & F. 612. "Where the objection to the reading of a copy concedes that there was primary evidence of some

sort in existence, but defective in some collateral matter, as, for instance, where the objection is a pure stamp objection, the judge must, before he admits the copy, hear and determine whether the objection is well founded. But where the objection goes to show that the very substratum and foundation of the cause of action is wanting, the judge must not decide upon the matter, but receive the copy, and leave the main question to the jury." *Stowe v. Querner*, L. R. 5 Ex. 155, 158, 159, *per* Bramwell, B.; 39 L. J. Ex. 60, 61, 62. This was an action on a policy of insurance, in which the existence of the policy was in issue; the defendant did not produce the policy at the trial pursuant to notice, and thereupon the plaintiff put in a copy received from defendant's broker; the defendant objected, and offered evidence to show that there never was an original policy, but the judge admitted the copy. The evidence was subsequently given, and the judge left it to the jury to say whether the defendant had executed a stamped policy. The jury found in the affirmative. It was held that the question was rightly left to them, inasmuch as if the judge himself had decided it he would have decided the main issue between the parties.

Notice to produce; form of.] O. xxxii. r. 8, specifies the form of a notice to produce, and O. lxvi. r. 1, provides that "all notices required by these rules shall be in writing, unless expressly authorised by the court or a judge to be given orally." It is usual to give some particular description of the documents required, but it is better to give a general description than to risk giving an erroneous one. A notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action" (*Jacob v. Lee*, 2 M. & Rob. 33, Patteson, J.), or "all letters written to, and received by, plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, &c., relating to the subject-matter of this cause" (*Morris v. Hauser*, *Id.* 392, Ld. Denman, C.J.), has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. So in *Rogers v. Custance*, *Id.* 179, Ld. Denman, C.J., held a notice to produce "all accounts, papers, and writings in any way relating to the matters in question in this case" sufficiently to particularise a written account of the work done by the plaintiff, delivered to the defendant, and admitted by him to be correct; affirmed by Q. B. *Id.* 181. And in the case of *Conybeare v. Farries*, L. R. 5 Ex. 16, a notice to produce "all letters relating to your tenancy of a room, &c.," was held sufficient to include a letter which, with the plaintiff's reply, constituted the tenancy. The notice must not, however, be too general, as "all letters." *Gardner v. Wright*, 15 L. T. 325, Blackburn, J. See also *Jones v. Edwards*, M'Cl. & Y. 139. If the title of the cause be misdescribed in the notice, it has been held bad; *Harvey v. Morgan*, 2 Stark. 19; but *semb.* no title at all was necessary, and there were other grounds of decision in this case; nor was there in that case any ground for supposing that the misdescription could mislead. In a later case, where the notice was entitled in a wrong court, it was considered sufficient. *Lawrence v. Clark*, 14 M. & W. 250; 15 L. J. Ex. 40. Notice to produce a letter purporting to enclose an account is sufficient notice to produce the account. *Engall v. Druce*, 9 W. R. 536.

Notice to produce; service of, on whom.] In general it is sufficient, and indeed is proper, to serve the notice to produce on the solicitor or agent of the party. *Cates v. Winter*, 3 T. R. 306; *Houseman v. Roberts*, 5 C. & P. 394. But notice served on the party is sufficient. *Hughes v. Budd*, 8 Dowl. 315. A notice to produce papers not necessarily connected with the cause, served on the solicitor so late as to prevent the party (*i.e.*, his client) from receiving it in time before the trial, is not good. *Vice v. Anson*, M. & M. 96. Where the solicitor has been changed, a notice to produce served on the first solicitor before the change will entitle the party to call for production of the paper. *Doe d. Martin v. Martin*, 1 M. & Rob.

242. It is sufficient to leave the notice with the servant of the party at his dwelling-house. *Evans v. Sweet*, Ry. & M. 83, 84, per Best, C.J.

Notice to produce; time and place of service.] The notice must be such as to satisfy the judge that the party called upon to produce the document might, by using reasonable diligence, have done so. Service of the notice, upon the wife of the defendant's attorney in a town cause, late in the evening before the trial, was held insufficient. *Doe d. Wartney v. Grey*, 1 Stark. 283. So service in the attorney's office letter-box late over-night. *Lawrence v. Clark*, 14 M. & W. 250; 15 L. J. Ex. 40. But notice to produce a letter, served on the attorney of the party on the evening next but one before the trial, was ruled to be sufficient, though the party was out of England, the presumption being that, on going abroad, the party had left with his attorney the papers necessary for the conduct of the trial. *Bryan v. Wagstaff*, Ry. & M. 327. See also *Aflalo v. Fourdrinier*, M. & M. 335, n. A notice served on April 10, the trial being on the 14th, was ruled to be sufficient to let in secondary evidence of letters written eighteen years back, and addressed to the defendant, a foreigner, at his residence abroad. *Drabble v. Donner*, Ry. & M. 47. A notice to produce certain deeds was served on an attorney in Essex on Saturday, Monday being the commission day; he fetched them from London; on Monday evening notice was given to produce another deed; the attorney said it was in London, but should be fetched if the party would pay the expense of the journey; no offer to pay was made, and the trial came on on Thursday: the second notice was held insufficient. *Doe d. Curtis v. Spitty*, 3 B. & Ad. 182; 1 L. J. K. B. 84. Notice served on the attorney at his office on the evening before the trial, at 7 h. 30 m. p.m., was held insufficient to let in secondary evidence of a letter in his client's possession. *Byrne v. Harvey*, 2 M. & Rob. 89. And now, by Rules, 1883, O. lxiv. r. 11, service of notices shall be made before 6 p.m., on every day but Saturday, when it must be before 2 p.m., otherwise it will be deemed service on the next following day, or on Monday, respectively. This rule includes notices to produce, at least when served on solicitors. *Sed quare*, if it apply to such notices as the above given at assizes or sittings at Nisi Prius? In a town case, both party and attorney living there, service at 7 p.m. over-night was held sufficient by Alderson, B. *Leap v. Butt*, Car. & M. 451; *Meyrick v. Woods*, *Id.* 452.

Notice to produce must in general be served before the commission day, when parties are living away from the assize town; *Twist v. Johnson*, 1 M. & Rob. 259; *accord. R. v. Ellicombe*, *Id.* 260; but there seems to be no inflexible rule as to time; for where both attorney and client lived in the assize town, a notice served two days before trial, though after the commission day, has been held sufficient; *Firkin v. Edwards*, 9 C. & P. 478; and where a paper might be expected to be in the solicitor's hands, a notice on him at his office a day before the trial of a town cause may be good. *Gibbons v. Powell*, *Id.* 634. A three days' notice was held sufficient in the case of letters written by defendant to a person in New South Wales, where long litigation on the subject of them made it presumable that they had been remitted to him in this country. *Sturge v. Buchanan*, 10 Ad. & E. 598; 8 L. J. Q. B. 272. But in one case a notice served on a defendant shortly before the assizes to produce a letter written to his firm at Bombay, where their only place of business was, was held insufficient. *Ehrensperger v. Anderson*, 3 Ex. 148; 18 L. J. Ex. 132. Service of a notice on Sunday is probably bad, or, at all events, will only operate as service on the next day. *Hughes v. Budd*, 8 Dowl. 315, 317. The notice may be served even after the trial has commenced, if there be time to produce before the adjournment day. *Sturm v. Jeffree*, 2 Car. & K. 442.

All the decisions prior to *Dwyer v. Collins*, 7 Ex. 639; 21 L. J. Ex. 225, ought now to be considered with reference to that case. It was there held that the object of the notice to produce was merely to give the party holding the document an opportunity to produce it, if he wished, and, in default

of his doing so, to enable the party giving the notice to give secondary evidence of its contents. On this ground the court held that the attorney of one of the parties present in court, and having the document with him, could be called upon, then and there, to produce it, and if he did not do so, that secondary evidence was admissible.

After a new trial is ordered it is not necessary to serve fresh notices to produce, those served on the former trial being available. *Hope v. Beadon*, 17 Q. B. 209; 21 L. J. Q. B. 25.

Notice to produce; effect of.] If the party refuse to produce the papers required, such a circumstance is not of itself evidence against him; it merely entitles the other party to give secondary evidence. *Cooper v. Gibbons*, 3 Camp. 363; *Lawson v. Sherwood*, 1 Stark. 315. The refusal to produce them is, however, matter for observation to the jury. *Semb. Id. Lyndhurst, C.B., Bate v. Kinsey*, 1 C. M. & R. 41; 3 L. J. Ex. 304. But see *Doe d. Bridger v. Whitehead*, 8 Ad. & E. 571; 7 L. J. Q. B. 250. If the party giving the notice decline to use the papers when produced, this, though matter of observation, will not make them evidence for the adverse party; *Sayer v. Kitchen*, 1 Esp. 210; though it is otherwise if the papers are used or inspected by the party calling for them, and are material to the issues. *Wilson v. Bowie*, 1 C. & P. 10; *Calvert v. Flower*, 7 C. & P. 386; and see *Wharam v. Routledge*, 5 Esp. 235. Notice to produce papers will not entitle the party who gives it to cross-examine a witness as to their contents; *Graham v. Dyster*, 2 Stark. 23; except after refusal to produce. If the party refuse, he cannot afterwards use the original either to contradict the secondary proof; *Doe d. Thomson v. Hodgson*, 12 Ad. & E. 135; 9 L. J. Q. B. 327; or to show that there are attesting witnesses who ought to be called; *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 134; or to refresh the memory of a witness; *Till v. Ainsworth*, Bristol, 1874, Wilde, C.J., MS.; or it seems for any purpose, *Collins v. Garbon*, 2 F. & F. 47, Byles, J. He is, in effect, bound by any legal and *satisfactory* evidence produced on the other side.

This principle has been extended by Rules, 1883, O. xxxi. r. 15, which provides that, "Every party to a cause or matter shall be entitled at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter unless he shall satisfy the court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the court or judge shall deem sufficient for not complying with such notice; in which case the court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the court or judge shall think fit." Rules 16-18 regulate the procedure under this rule. See hereon *Quilter v. Heatly*, 23 Ch. D. 42, C. A., and *Roberts v. Oppenheim*, 53 L. J. Ch. 1148; 26 Ch. D. 724, C. A. "Pleadings" include particulars, *Cass v. Fitzgerald*, (1884) W. N. 18, Mathew, J.; for these "are really supplemental to the pleadings," *Milbank v. Milbank*, 69 L. J. Ch. 287; [1900] 1 Ch. 376, 385, *per* Vaughan Williams, L.J. And "affidavits" include answers to interrogatories, *Moore v. Peachey*, [1891] 2 Q. B. 707.

General nature of secondary evidence.] There are no degrees of secondary evidence; or, in other words, if the production of the original document is dispensed with, its contents may be proved by the same evidence as any other fact is capable of being proved, and no other restriction is laid upon the party producing the evidence, as to the kind of evidence which he shall produce for this purpose, except that which arises from the risk of having it

treated as unsatisfactory by the jury. This is what a jury would very probably do, and might possibly by a judge be advised to do, if it were patent that more satisfactory evidence was available to the party than that which he had thought fit to produce. *Doe d. Gilbert v. Ross*, 7 M. & W. 102; 10 L. J. Ex. 201.

The only exception is where, as in the case of certain public documents, a special kind of secondary evidence is substituted for the original. But even in this case, if good reason can be shown why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. 1 Taylor, Evid., § 552; *Thurston v. Slatford*, 1 Salk. 285; *Macdougall v. Young*, Ry. & M. 392; *Anon.*, 1 Vent. 257.

Proof of documents by copies.] Business men usually keep copies of all the more important documents relating to the matters in which they are engaged. A well-authenticated copy is by far the most satisfactory substitute for the original document. But no copy whatever is admissible in evidence unless its accuracy be sworn to, or there be some presumption attached to it from which its accuracy may be inferred. *Fisher v. Samuda*, 1 Camp. 190. It is not necessary to call the very person who wrote the copy; any person who can testify on oath to the accuracy of it is sufficient. *Everingham v. Roundell*, 2 M. & Rob. 138.

A copy of a letter taken by a copying machine, though still only a copy, will be presumed to be a correct copy. *Nodin v. Murray*, 3 Camp. 228; *Simpson v. Thoreton*, 2 M. & Rob. 433. Such copy may be used as an admission. *Nathan v. Jacob*, 1 F. & F. 452. Where the plaintiff gave the defendant notice to produce certain letters written by the defendant to a third party, and a letter book containing copies thereof, and the defendant consented to admit the copies and produce the book: held, that the copies when produced must be presumed to be correct. *Sturge v. Buchanan*, 10 Ad. & E. 598; 8 L. J. Q. B. 272. An entry by the plaintiff's deceased clerk in a letter book, purporting to be a copy of a letter from the plaintiff to the defendant, is presumed to be correct, proof being given that, according to the course of business, business letters written by the plaintiff were copied by this clerk. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *Id.* 377.

Among instances in which copies, though not verified by oath, are admissible, are the following:—a very old instrument purporting to be a copy or abstract of a conveyance, and which for many years had gone along with the possession of the land, was admitted in evidence without proving it to be a true copy. B. N. P. 254. A copy of an old decree in Chancery, establishing certain customs as against the lord of the manor, found among the muniments of his successor, was held to be admissible and presumed to be correct, against the successor, on account of its place of deposit. *Price v. Woodhouse*, 3 Ex. 616; 18 L. J. Ex. 271. See further *Lauderdale Peerage*, 10 App. Cas. 722 *et seq.* An old ledger or cartulary of an abbey, containing an account of the several endowments, and found in the possession of the person who had succeeded to part of the abbey estates, was admitted as secondary evidence of the endowments, search having been made for the original endowment. *Bullen v. Michel*, 2 Price, 399; 4 Dow, 297. So also in *Williams v. Wilcox*, 8 Ad. & E. 314, a copy of a grant in an old cartulary seems to have been held admissible as secondary evidence. It is not clear whether the admission of old monastic cartularies stands on the same footing as that of Episcopal Registers, or of old copies and abstracts already referred to. In either case the antiquity of the document, and the inevitable exposure to destruction and loss of very old originals, gave them a title to reception, which recent unexamined copies cannot claim; and the known usage of preserving verbatim enrolments and registers of the title deeds of religious houses imparts to such collections, in some sort, an official character. Such copies, however, have never been admitted unless traced to

the custody of some grantee of the corporate lands, and tendered as evidence in support of ancient possession, or preserved among the crown records as muniments of its title. If they come from custody unconnected with the lands, and even from a public national library, they are inadmissible. *Swinerton v. Stafford (Marquis)*, 3 Taunt. 91; *Potts v. Durant*, 3 Anst. 789. See further *Doe d. Padwick v. Wittcomb*, 6 Ex. 601; 20 L. J. Ex. 297; 4 H. L. C. 425. "Although in certain circumstances copies produced from proper custody may after the lapse of time be treated as good evidence, yet this cannot be the case where an original is in actual existence and a copy is capable of being obtained and properly proved." *Permanent Trustee Co. of N. S. Wales v. Fels*, 87 L. J. P. C. 172; [1918] A. C. 879.

Where a will was lost the register or ledger book of the Ecclesiastical Court, or a copy of it, has been admitted as secondary evidence of a will of lands. *B. N. P.* 246. It is presumed that in this last case the will was of personal as well as real estate. Where the assignment under a commission of bankrupt was lost before it was enrolled pursuant to the old Act, 6 G. 4, c. 16, s. 96, the counterpart of it was admitted as secondary evidence. *Giles v. Smith*, 1 C. M. & R. 462; 4 L. J. Ex. 17.

As to the admissibility of secondary evidence where the original document has been attested, *vide Proof of Documents—Proof of attested deed by secondary evidence, post*, p. 125.

The fact that two copies of a document made at different dates are literally identical is no evidence that they were made from a common source which was faithfully transcribed. *Permanent Trustee Co. of N. S. Wales v. Fels (supra)*, where also it was said that "no signature, however trustworthy, nor authentication by the most unimpeachable official, can take the place of the evidence required at common law to prove that a certain document is the copy of an original that is not produced." At common law it is necessary to prove that the alleged copy is a copy in fact, either by calling the person who made it or some person who has compared it with the original. *Ib.*

In numerous instances copies of public books and registers are good evidence of documents which are in existence without imposing any obligation to produce, or even to account for the non-production of, the originals. This sort of evidence is no doubt secondary in its nature, but is allowed by common law or statute on the ground of public convenience; *vide Proof of Documents, post*, p. 86.

ORAL EVIDENCE TO EXPLAIN OR ADD TO DOCUMENTS.

The rule of law is clear that, where a contract is reduced into writing, it is presumed that the writing contains all the terms of it, and evidence will not be admitted of any previous or contemporaneous oral agreement which would have the effect of adding to or varying it in any way. This is a rule of evidence at common law. The Statute of Frauds, and the Sale of Goods Act, 1893, s. 4, also require that certain contracts should be in writing, and therefore, by implication, evidence relating to such contracts which is not in writing is excluded. In other cases it is the duty of certain officers to record, in a manner more or less solemn, what is said or done; as in the case of records of courts of law, or depositions taken before magistrates on a criminal charge. How far such authentic memorials are conclusive is not clearly settled, but they are certainly so in some cases. It is obvious that evidence might frequently be objected to as infringing more than one of these rules, and, where several objections might be good, it is not always easy to see which of the two in a particular case forms the *ratio decidendi*. The cases which we are about to consider are those where the decisions have been founded, or seem likely to have been founded, on the common law rule now under consideration.

Although the principles upon which the admissibility of evidence in

these cases depends would appear to be general as regards all written instruments, they have not been applied in a precisely similar manner to all classes of cases. But perhaps this may be partly explained thus. Inasmuch as the question is whether the written memorandum *by its terms* excludes oral evidence, the admissibility of the latter is, in all cases, to a certain extent, and in some exclusively so, a question of *interpretation* of the written document. And inasmuch as, in analogy to the use of technical terms, language, by being constantly used for the same purpose, almost always acquires a conventional meaning, such corresponding groups of cases as have been mentioned naturally arise. In fact, there are two questions of interpretation to be solved, whenever oral evidence is objected to on the ground that it contradicts a written instrument: first, the interpretation of the written contract as it stands; secondly, the interpretation of the clause which it is proposed to insert by way of addition or explanation, for that is really what is done; and hence the same question as that which is raised upon the admissibility of evidence may be sometimes raised on the record by an objection in point of law.

The following decisions will illustrate what is said above. Thus where it was agreed in writing that A., for certain considerations, should have the produce of Boreham meadow, it was held that he could not prove that it was at the same time agreed orally that he should have both Milcroft and Boreham meadow. *Meres v. Ansell*, 3 Wils. 275; *Angell v. Duke*, 32 L. T. 320; and see *Hope v. Atkins*, 1 Price, 143. Oral evidence is inadmissible to show that a note, made payable on a day certain, was to be payable on a contingency only. *Rauson v. Walker*, 1 Stark. 361; *Foster v. Jolly*, 1 C. M. & R. 703; 4 L. J. Ex. 65. So where a promissory note is expressed to be made payable on demand, oral evidence of a contemporary agreement that it should not be paid until a given event happened is inadmissible. *Moseley v. Hanford*, 10 B. & C. 729; 8 L. J. (O. S.) K. B. 261; *Hitchings, &c. v. Northern Leather Co., &c.*, 83 L. J. K. B. 1819; [1914] 3 K. B. 907; see also *Besant v. Cross*, 10 C. B. 895; 20 L. J. C. P. 173; *Adams v. Wordley*, 1 M. & W. 374; 5 L. J. Ex. 158. In an action on a covenant by a lessee to "pay" the rent in advance, evidence of an antecedent parol agreement that he would give bills for the rent in advance was held inadmissible as being inconsistent with the covenant. *Henderson v. Arthur*, 76 L. J. K. B. 22; [1907] 1 K. B. 10. The terms of a bill of lading cannot be varied by oral evidence. *Leduc v. Ward*, 57 L. J. Q. B. 379; 20 Q. B. D. 475. But defendant may show that the agreement, though not under seal, was in the nature of an escrow, and signed on the express condition that a third party approved. *Pym v. Campbell*, 6 E. & B. 370; 25 L. J. Q. B. 277; *Davis v. Jones*, 17 C. B. 625; 25 L. J. C. P. 91; *Wallis v. Littell*, 11 C. B. (N. S.) 364; 31 L. J. C. P. 100; *Rogers v. Hadley*, 32 L. J. Ex. 241; *Lindley v. Lacey*, 17 C. B. (N. S.) 578; 34 L. J. C. P. 7. Where the conditions of sale described the number and kind of timber trees to be sold by lot, but not the weight of the timber, it was held, in an action for the purchase-money, that oral evidence could not be given by the defendant that the auctioneer had, at the sale, warranted the timber of a certain weight. *Powell v. Edmunds*, 12 East, 6; *Shelton v. Livius*, 2 C. & J. 411; 1 L. J. Ex. 139. So oral evidence is inadmissible to alter the legal effect and construction of a written agreement. Thus, where an agreement for the sale of goods was silent as to the time of delivery, in which case the law implies a contract to deliver in a reasonable time, it was held that oral evidence of an agreement to take them away immediately was inadmissible. *Greaves v. Ashlin*, 3 Camp. 426; *Halliley v. Nicholson*, 1 Price, 404. So where a contract of sale, which, being silent as to time of payment, implies payment on delivery, proof of intended credit is inadmissible. *Ford v. Yates*, 2 M. & Gr. 549; 10 L. J. C. P. 117. Where the defendant, the day after a sale by him of flour to the plaintiff, sent a memorandum of the sale, "Sold White's X. S.," and delivered "White's X. S." accordingly, it was held that the plaintiff could not show that the contract was for

“White’s X. X. S.” *Hamor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53. It is observable, however, that the four last cases were for non-performance of executory contracts within the Statute of Frauds, which ought to contain all the terms of agreement. So where the written agreement was to take goods on board a ship “forthwith,” oral evidence to show that they were to be received on board in two days was not allowed. *Simpson v. Henderson*, M. & M. 300. An absolute sale of a reversion was held not to be qualified by proof of an oral agreement to apportion the accruing rent. *Flinn v. Calow*, 1 M. & Gr. 589. Nor is a release, by proof of an oral agreement to reserve rights against a co-surety. *Mercantile Bank of Sydney v. Taylor*, [1893] A. C. 317. Parol evidence is not in general admissible to vary the terms fixed for payments to be made under a mortgage deed. *Williams v. Stern*, 49 L. J. Q. B. 663; 5 Q. B. D. 409, disapproving *Albert v. Grosvenor Investment Co.*, 37 L. J. Q. B. 24; L. R. 3 Q. B. 123. As to rectification of a deed or writing on the ground of common mistake, see *Johnson v. Bragge*, 70 L. J. Ch. 41; [1901] 1 Ch. 28.

But in order to exclude oral proof of a contract, the writing must purport to be a complete contract. Therefore where a written order for goods was sent without mentioning a time of payment, and they were delivered with an invoice accordingly, it was ruled in an action for goods sold that an oral agreement for six months’ credit might be proved; for the order *per se* was no contract, but only evidence of some of the terms of one. *Lockett v. Nicklin*, 2 Ex. 93; 19 L. J. Ex. 403. So where a written proposal was not accepted, oral evidence of the terms of the contract is admissible. *Scones v. Doules*, 29 L. J. Ex. 122. See also *Eden v. Blake*, 13 M. & W. 614; 14 L. J. Ex. 194. And it would seem that when a writing is not *ex necessitate legis* (as under the Stat. of Frauds, s. 4, or Sale of Goods Act, 1893, s. 4), the apparent deficiencies of a written agreement as to some particulars of price, time of delivery, &c., may be supplied by oral evidence, although the jury would be directed to presume a reasonable price, or reasonable time, &c., in the absence of such evidence; for such evidence does not contradict or vary the written document as far as it goes; and it may be that the parties themselves did not intend to commit to paper the whole of the contract. See *Valpy v. Gibson*, 4 C. B. 837. So evidence of what took place prior to the sale of goods is admissible to raise a warranty under the Sale of Goods Act, 1893, s. 14, although the contract was in writing. *Gillespie v. Cheney*, 65 L. J. Q. B. 552; [1896] 2 Q. B. 59. Where the Statute of Frauds, &c., apply, oral evidence to supply the intention of the parties would not be admissible, as we have seen above.

If a party sign an agreement in his own name, he cannot afterwards defeat an action on it by proving that he signed only as agent for another. *Magee v. Atkinson*, 2 M. & W. 440; 6 L. J. Ex. 115; *Jones v. Littledale*, 6 Ad. & E. 486; 6 L. J. K. B. 169; *Higgins v. Senior*, 8 M. & W. 834; 11 L. J. Ex. 199. Where A. signed a charterparty as “owner,” and was so designated in it, A.’s principal could not sue on it, and prove that he was owner, and not A. *Humble v. Hunter*, 12 Q. B. 310; 17 L. J. Q. B. 350. But evidence is admissible to show that a person described in the contract as “charterer” was acting on behalf of an undisclosed principal, who was therefore entitled to sue. *Rederi Aktienbolaget Transatlantic v. Drughorn*, 88 L. J. K. B. 233; [1919] A. C. 203. If a sold note is in the form “sold to our principals,” oral evidence is admissible to show who those principals are. *Cropper v. Cook*, L. R. 3 C. P. 194. Where an instrument professed to be made between plaintiff and A., and signed by B. as agent for A., it was held that B. was not liable on the contract, if it turned out that he had no authority to bind A. *Jenkins v. Hutchinson*, 13 Q. B. 744. In an action on a written contract between plaintiff and B., oral evidence is admissible, on behalf of the plaintiff, to show that the contract was in fact, though not in form, made by B. as agent of the defendant; for the evidence tends not to discharge B., but to charge the dormant principal; *Wilson v. Hart*, 7 Taunt. 295; and it is admissible, although B. named his principal

at the time he entered into the contract. *Calder v. Dobell*, 40 L. J. C. P. 224; L. R. 6 C. P. 486. Where a deed between A. and Y., which contained a clause, "it is further understood between the parties that S. guarantees payment to Y. of all moneys due to them under this contract," was executed by S. on behalf of A. under a power of attorney, thus, "P.P.A.—A.—S.," oral evidence was held admissible to show that S. signed on behalf of himself as well as for A., as this was doubtful on the face of the agreement. *Young v. Schuler*, 11 Q. B. D. 651. And see further 2 Smith's L. C., *Thompson v. Davenport*, *in notis*.

A patent ambiguity is to be explained by the judge, and not left to the jury. Thus, although "months" denote at law "lunar months" the context may show "calendar months" to have been intended, this is a question for the judge; but extrinsic evidence is admissible that a word is used in a sense peculiar to some trade, business, place, or local usage, in which case it is for the jury to find the meaning. *Simpson v. Margitson*, 11 Q. B. 23; 17 L. J. Q. B. 81; *Bruner v. Moore*, 73 L. J. Ch. 377; [1904] 1 Ch. 305; *Smith v. Thompson*, 8 C. B. 44; 18 L. J. C. P. 314. See *Hills v. London Gas Co.*, 27 L. J. Ex. 60, where it seems to have been considered that the judge must construe the contract, though its terms be technical or scientific, and that expert evidence on the point would be for the information of the judge, and not of the jury. In that case a patent for the use of *hydrate* of iron was contested, by showing that the use of *carbonate* of iron was not new, and that, in commerce, the scientific distinction between those two substances was not preserved, and Pollock, C.B., thereupon directed a nonsuit. But if their commercial identity had been disputed at the trial, there would have been a question for the jury, and on this ground, *ut semble*, a new trial was granted.

There are cases in which an oral agreement may exist between the parties to a written agreement on a matter collateral and superadded to it, so that both may well subsist together. In such cases oral evidence of the collateral matter is admissible, for the original contract is unaffected by it. Thus, where the parties to an indenture of charterparty afterwards agreed orally for the use of a ship at a period before the charterparty attached, oral evidence of this was held admissible in an action on this latter agreement. *White v. Parkin*, 12 East, 578. Where there was an oral agreement by the landlord to pay £20 towards repairs in consideration that plaintiff would become tenant, and plaintiff accepted a lease, and did the repairs, which defendant, the landlord, then promised to repay; held, that plaintiff could recover on an account stated, although the lease itself contained no such agreement. *Seago v. Deane*, 4 Bing. 459. So where a tenant executed a lease, which reserved the right of shooting to the lessor, on an oral promise by the latter that he would keep down the game: held, that the tenant could sue the lessor for breach of this promise. *Morgan v. Griffith*, 40 L. J. Ex. 46; L. R. 6 Ex. 70; *Erskine v. Adeane*, 42 L. J. Ch. 835; L. R. 8 Ch. 756. The decision in *Mann v. Nunn*, 43 L. J. C. P. 241, is to the like effect; it was, however, doubted by Blackburn, J., in *Angell v. Duke*, 32 L. T. 320. So evidence may be given of a contract made by a lessor with the lessee on the occasion of a lease of a house, as to the user of the adjacent houses of the lessor. *Martin v. Spicer*, 34 Ch. D. 1; affirmed on other grounds, 14 App. Cas. 12. On the sale of land by auction, evidence was admitted of an oral statement by the auctioneer that there was a certain right of way to the land. *Brett v. Clouser*, 5 C. P. D. 376. Where A. orally agreed with a railway company that they should carry his cattle to K. station, and at the same time signed, without noticing its contents, a consignment note for the carriage of the cattle to an intermediate station, E., it was held that the oral agreement was admissible as not contradicting, but being supplemental to, the written contract. *Malpas v. L. & S. W. Ry.*, 35 L. J. C. P. 166; L. R. 1 C. P. 336. Where the plaintiff agreed in writing to purchase certain furniture of the defendant, and by that agreement the defendant was *authorised* to settle an action of *C. v. L.*, it was

held that, in an action for not settling the action of *C. v. L.*, evidence was admissible of a distinct oral agreement to settle that action, made immediately before the written agreement. *Lindley v. Lacey*, 17 C. B. (N. S.) 578; 34 L. J. C. P. 7. These cases are plainly not exceptions to the general rule. Nor is it an exception to this general rule that it does not extend to the exclusion of all the *legal incidents* which by the general law merchant, or common law, attach to certain instruments. Thus, the days of grace allowed to the parties to bills; the necessity of notice of dishonour, &c., are not specified on the bill; so of implied warranties on policies, &c. In such cases the court will take notice of all legal incidents. It is otherwise in regard to particular usages or local customs, which will be mentioned hereinafter.

Oral evidence to prove a consideration, or to vary the date, or description, &c.] The cases as to proof of consideration stand somewhat apart. It is constantly the practice to show that no consideration has been given for a bill or note, although the instrument bears on its face the words "value received," which clearly import a consideration for the promise contained in the instrument. Upon a contract under seal it is not, as in a contract not under seal, generally necessary to prove that there was any consideration, or the nature of it. But if the consideration come in question at all, it seems generally to have been permitted to inquire into it, notwithstanding any averment in the deed. Thus where the considerations mentioned in a deed were £10,000, and natural love and affection, an issue was directed to inquire whether natural love and affection formed any part of the consideration. *Filmer v. Gott*, 4 Bro. P. C. 230. A deed operating under the Statute of Uses, and reciting no consideration, may be supported by showing that a pecuniary one in fact passed. *Mildmay's Case*, 1 Rep. 176. A deed which recites only a pecuniary consideration, may be shown to have been also founded on the consideration of marriage. *Id.*; *Villers v. Beamont*, Dyer, 146 a; *Tull v. Parlett*, M. & M. 472; and *Clifford v. Turrill*, 1 Y. & C. C. C. 138; 14 L. J. Ch. 390; S. C., on appeal, *Id.* 396. Proof of a larger consideration than that stated does not contradict the instrument. *Frith v. Frith*, 75 L. J. P. C. 50; [1906] A. C. 254. So evidence is admissible to show that the consideration stated in a bill of sale is not the true consideration, and that it is, therefore, as against trustees in bankruptcy and execution creditors, void under the Bills of Sale Act, 1878, s. 8. *Ex pte. Carter*, 12 Ch. D. 908. The same principle applies to the Bills of Sale Act, 1882, s. 9 and schedule; see *Cochrane v. Moore*, 59 L. J. Q. B. 377; 25 Q. B. D. 57, 73. A guarantee purported to be "in consideration of your having advanced this day," &c.; oral evidence was admitted to show that the advance was contemporaneous with the guarantee, and was therefore a good consideration. *Goldshede v. Swan*, 1 Ex. 154; 16 L. J. Ex. 284. In the following cases in which words of guarantee, founded on a consideration ambiguously expressed, so as to import either a past or future credit, were explained by extrinsic evidence that the credit was *in fact* a future or continuing credit; or that the consideration and guarantee were simultaneous. *Edwards v. Jevons*, 8 C. B. 436; 19 L. J. C. P. 50; *Colbourn v. Dawson*, 10 C. B. 765; 20 L. J. C. P. 154; *Bainbridge v. Wade*, 16 Q. B. 89; 20 L. J. Q. B. 7; *Heffield v. Meadows*, L. R. 4 C. P. 595; *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622. See *Morrell v. Cowan*, 47 L. J. Ch. 73; 7 Ch. D. 151.

Save in exceptional circumstances, the Court may consider the real date of the execution of an instrument, when that date is different from the date appearing by the instrument itself. *In re Maher and Nugent's Contract*, [1910] 1 I. R. 167. A deed takes effect from the delivery, and not from the date; therefore oral evidence was allowed to show that a lease dated on Lady Day, 1783, and purporting to commence on *Lady Day last past*, was in fact executed after the date, and that the term therefore commenced on Lady Day, 1783, and not 1782. *Steele v. Mart*, 4 B. & C. 272. In such

case there is no real contradiction. The same consideration will also explain the ground on which oral proof was permitted to be given by the defendant that the plaintiff had made certain admissions on his examination before commissioners of bankrupt, although the written examination produced contained no such admissions. *Rowland v. Ashby*, Ry. & M. 231. So, although the written information taken by a magistrate on a criminal charge is the best evidence of such information, yet any additional statements made by the informant, and not reduced to writing, may be proved by oral evidence. *Venafra v. Johnson*, 1 M. & Rob. 316.

Although no oral evidence can be used to add to or detract from the description in a deed, or to alter it in any respect, yet such evidence is always admissible to show the condition of every part of the property, and all other circumstances necessary to place the court, when it construes an instrument, in the position of the parties to it, so as to enable it to judge of the meaning of the instrument. *Baird v. Fortune*, 4 Macq. 127, 149; *Magee v. Lavell*, 43 L. J. C. P. 131; L. R. 9 C. P. 107, 112; *Devonshire (Duke) v. Pattinson*, 57 L. J. Q. B. 189; 20 Q. B. D. 263; *Roe v. Siddons*, 22 Q. B. D. 224. "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the court to ascertain the nature and qualities of the subject-matter of the instrument, in other words to identify the persons and things to which the instrument refers, must of necessity be received." 2 Taylor, Evid., 10th ed. § 1194, cited in *Krell v. Henry*, 72 L. J. K. B. 794; (1903) 2 K. B. 740, 753. See also *Inglis v. Buttery*, 3 App. Cas. 552; *Great Western Ry. v. Bristol Corporation*, 87 L. J. Ch. 414, where it was said that evidence is not admissible to put a particular meaning upon plain and unambiguous words. The same rule applies in the case of a will; and see *Way v. Hearn*, 13 C. B. (N. S.) 292; 32 L. J. C. P. 34; *Newell v. Radford*, 37 L. J. C. P. 1; L. R. 3 C. P. 52; and *Lewis v. Gt. W. Ry.*, 47 L. J. Q. B. 131; 3 Q. B. D. 195, C. A. See, however, *Stanton v. Richardson*, 41 L. J. C. P. 180, 185; L. R. 7 C. P. 428, 434, *per Brett, J.*

Mere words of description in a conveyance, not operating by way of estoppel, may be contradicted by oral evidence; thus the lessee of land, described as "meadow," may prove it to have been arable in an action by the lessor for ploughing it up; *Skipwith v. Green*, Stra. 610; or he may show that land described as containing 500 acres does not in fact contain so many; S. C. as reported Bac. Ab. Pleas I. 11; or contains many more. *Jack v. M'Intyre*, 12 Cl. & F. 151; *Manning v. Fitzgerald*, 29 L. J. Ex. 24.

Where a conveyance stated the consideration of the purchase to be £28, oral evidence was admitted to show that the consideration was in fact £30; *R. v. Scammonden*, 3 T. R. 474; *Frith v. Frith*, 75 L. J. P. C. 50; (1906) A. C. 254; and that money, stated in a deed of apprenticeship to have been paid by J. M., was in fact parish money. *R. v. Llangunnor*, 2 B. & Ad. 616. A parish may show a settlement by renting a tenement in parish B., though the lease describes it as in parish A. *R. v. Wickham*, 2 Ad. & E. 517; 4 L. J. M. C. 45.

[*Oral evidence to prove fraud, illegality, or error.*] Where fraud is imputed, any consideration or fact, however contrary to the averment of a deed, may be proved to show the fraudulent nature of the transaction; B. N. P. 173; *Paxton v. Popham*, 9 East, 421; for fraud is a matter extrinsic and collateral, which vitiates all transactions, even the most solemn. Thus, in order to set aside a will, oral evidence may be given of what passed at the signing, and what the testator said, to show that his signature was obtained by fraud. *Doe d. Small v. Allen*, 8 T. R. 147. And, in general, matter which in law avoids an instrument, whether it be fraud, forgery, duress, illegality, &c., may be proved orally, however contradictory to its tenor. See *Doe d. Chandler v. Ford*, 3 Ad. & E. 649; 3 L. J. (O. S.) K. B. 268; and 1 Smith's L. Cases, *Collins v. Blantern, in notis*.

Evidence is sometimes admissible to show a mistake in a writing; thus

a contract, usurious on the face of it, might have been explained by showing it was made so by a clerical error. *Anon.*, *Freem.* 253; *Booth v. Cooke*, *Id.* 264. A house, misdescribed in a lease as No. 38, may be shown to be really No. 35. *Hutchins v. Scott*, 2 M. & W. 809; 6 L. J. Ex. 186; *Cowen v. Truefitt*, 68 L. J. Ch. 563; [1899] 2 Ch. 309. See also *Hitchin v. Groom*, 5 C. B. 515; 17 L. J. C. P. 145. But where a verdict and judgment were given in evidence to prove a public way, the court will not admit proof that the verdict was entered erroneously by the mistake of the officer. *Reed v. Jackson*, 1 East, 355. The record in the first action should have been amended by leave of the court. But where a N. P. record was put in evidence to prove damages in a suit against the plaintiff, and the *postea* did not show on which of two different counts the damages were in fact given, oral evidence was admitted to prove that they were recovered, substantially, on one of the counts only, this being no contradiction of the record, the verdict and damages having been entered generally. *Preston v. Peeke*, E. B. & E. 336; 27 L. J. Q. B. 424. Proof of a material and substantial error in the frame of a subsisting contract cannot in general be set up in an action upon it; *Perez v. Oleaga*, 11 Ex. 506; 25 L. J. Ex. 65; *Solvency Mutual Guarantee Co. v. Freeman*, 7 H. & N. 17; 31 L. J. Ex. 197; except by way of a claim for rectification under the J. Act, 1873, s. 24 (1-3), on the ground of common mistake. But there is no occasion to reform the contract where an agent is wrongly described as principal; *Wake v. Harrop*, 6 H. & N. 768; 30 L. J. Ex. 273; 1 H. & C. 202; 31 L. J. Ex. 451; or where it has been completely executed according to the intention of the parties; *Steele v. Haddock*, 10 Ex. 643; 24 L. J. Ex. 78; *Luce v. Izod*, 1 H. & N. 245; 25 L. J. Ex. 307; *Vorley v. Barrett*, 1 C. B. (N. S.) 225; 26 L. J. C. P. 1; or where the full performance has become impracticable by reason of the default of the plaintiff. *Borrowman v. Rossel*, 16 C. B. (N. S.) 58; 33 L. J. C. P. 111. In such cases the mistake will afford a defence without rectification.

[... *Oral evidence to explain mercantile contracts and words of art.*] Where the parties have contracted in writing, in many instances oral evidence is admitted to prove a usage affecting the contract, on the ground that, where such usage exists, the parties must be taken to have made their contract subject to its operation. Such evidence is sometimes admitted as explanatory of the language of the writing, and sometimes as superadding a tacitly implied incident. Thus, oral evidence is always admitted to show the sense in which, according to the custom of merchants, a mercantile contract is to be understood. See 1 Smith's L. Cases, *Wigglesworth v. Dallison*, *in notis*. In such a case it is unobjectionable to ask a witness whether there is any generally understood meaning of certain words among persons engaged in the particular trade or commerce under investigation. *Robertson v. Jackson*, 2 C. B. 412; 15 L. J. C. P. 28. That question must be put to the witness before he is asked what he understands by the written contract to which it is meant to apply the usage. *Curtis v. Peek*, 13 W. R. 230. The usage may be excluded by the terms of the contract. *Brenda Steamship Co. v. Green*, 69 L. J. Q. B. 445; [1900] 1 Q. B. 518.

Where a ship was warranted to depart with convoy, evidence of usage was admitted to show that this meant convoy from the usual place of rendezvous. *Lethulier's Case*, 2 Salk. 443. So, to explain the meaning of "days" in a bill of lading; *Cochran v. Retberg*, 3 Esp. 121; to show that the Gulf of Finland is considered by mariners to be within the Baltic; *Uhde v. Walters*, 3 Camp. 16; or the Mauritius to be an East Indian island. *Robertson v. Money*, Ry. & M. 75. So evidence was admitted to explain the term "privilege" in a contract between shipowner and captain; *Birch v. Depeyster*, 4 Camp. 385; and to show the received meaning of "mess pork of S. & Co." *Powell v. Horton*, 2 Bing. N. C. 668; 5 L. J. C. P. 204. Where the captain of a ship agreed to convey a boat of certain dimensions for the plaintiff, evidence was admitted on behalf of the captain that the

practice was to remove the deck of such boats when put on board. *Haynes v. Holliday*, 7 Bing. 587; 9 L. J. (O. S.) C. P. 179. Apparent variances in bought and sold notes may be reconciled by the evidence of brokers. *Bold v. Rayner*, 1 M. & W. 343; 5 L. J. Ex. 172; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191. Where it was represented to an insurer that the ship would sail from St. Domingo in October, he was permitted to show in his defence that this was understood among merchants to mean between the 25th and the end of October; whereas the ship sailed on the 11th. *Chaurand v. Angerstein*, Peake, 43. Oral evidence may be given to explain the meaning of "level" in a mining lease; *Clayton v. Gregson*, 5 Ad. & E. 302; and of "across the country" in a wager on a race. *Evans v. Pratt*, 3 M. & Gr. 759; 11 L. J. C. P. 87. Where a person covenants to get a commercial document, e.g., a policy of insurance, evidence is admissible as to the course of business in reference to such a document and as to the kind of document the person will get from a third party who is under no obligation to grant it. *Upjohn v. Hitchins*, 87 L. J. K. B. 1205, 1213; [1918] 2 K. B. 48, 59, *per* Scrutton, L.J. In a contract for the purchase of "1,170 bales of gambier," it was held that it might be shown that by the usage of that trade a "bale" meant a compressed package, weighing about two cwt. *Gorriessen v. Perrin*, 2 C. B. (N. S.) 681; 27 L. J. C. P. 29. See also *Taylor v. Briggs*, 2 C. & P. 525. So where instructions were given by a principal residing out of England to his factor to sell corn, a custom in the London corn market to sell in the factor's own name is admissible to explain the instructions. *Johnston v. Usborne*, 11 Ad. & E. 549. On a sale of goods by a manufacturer who is not a dealer, evidence is admissible of a custom in the particular trade to deliver goods of another manufacturer. *Johnson v. Raylton*, 50 L. J. Q. B. 753; 7 Q. B. D. 438. A sale of tobacco may be explained to be a sale by sample, by the general usage of the trade, although the bought and sold notes are silent as to sample. *Syers v. Jonas*, 2 Ex. 111. As to the variation, by usage, of a right or liability under the Sale of Goods Act, 1893, s. 15, see *In re Walkers and Shaw & Co.*, 73 L. J. K. B. 325; [1904] 2 K. B. 152. An engagement by a public singer for three years, may be explained to mean three theatrical seasons. *Grant v. Maddox*, 15 M. & W. 737; 16 L. J. Ex. 227. Where a charterparty is signed by a shipbroker S. in the form "by telegraphic authority" of the charterer "as agent," this may be explained by usage to warrant only that S. had received a telegram which, if correct, authorised him to enter into such a charter. *Lilly v. Smales*, [1892] 1 Q. B. 456. In an action by a shipowner on a contract to pay freight at a certain rate per lb., defendant was allowed to show a custom of the trade at a particular port to allow three months' discount on freights on goods coming from certain ports. *Brown v. Byrne*, 3 E. & B. 703; 23 L. J. Q. B. 313. "After arrival" at a named island may be explained to mean after arrival at a place at sea some miles off the usual port, if it be a place of ordinary anchorage. *Lindsay v. Janson*, 4 H. & N. 699; 28 L. J. Ex. 315. Where by a charterparty the shipowner agreed to consign the ship to A. B., at Calcutta, "on the usual and customary terms," a custom may be proved for consignee to procure the homeward freight on commission; *Robertson v. Watt*, 8 Ex. 299; 22 L. J. Ex. 209; but where the charter provides that the consignment is to be "free of commission," and says nothing of usual terms, the charterer cannot set up such custom by oral evidence, in an action against the shipowner for not allowing the consignee to procure the homeward freight. *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J. Ex. 233. "A full and complete cargo of sugar" may be explained to mean full and complete according to the customary mode of packing and loading sugar at the port where it is loaded. *Cuthbert v. Cumming*, 11 Ex. 405; 24 L. J. Ex. 310, Ex. Ch. So "regular turns of loading," or "in turns to deliver," may be explained by local usage. *Leidemann v. Schultz*, 14 C. B. 318; 23 L. J. C. P. 17; *Robertson v. Jackson*, 2 C. B. 412; 15 L. J. C. P. 28; *Barque Quilpué v. Brown*, 73 L. J. K. B. 596; [1904] 2 K. B. 264. So the custom of the port as to when lay

days commence; *Norden Steam Co. v. Dempsey*, 45 L. J. C. P. 764; 1 C. P. D. 654; or as to how running days are to be calculated; *Nielsen v. Wait*, 55 L. J. Q. B. 87; 16 Q. B. D. 67; or as to the course of delivery, where "the steamer is to be discharged as fast as she can deliver." *The Jaederen*, 61 L. J. Adm. 89; (1892) P. 351. A custom that in discharging long lengths of timber, the shipowner is bound to put them into lighters brought alongside, is not inconsistent with the terms of the charterparty that the timber shall be taken from alongside at the merchant's expense. *Aktieselkab v. Ekman*, 66 L. J. Q. B. 538; [1897] 2 Q. B. 83. "Fifty tons best palm oil, with a fair allowance for inferior oil, if any," may be explained to be satisfied by the delivery of 50 tons, of which the greater part is inferior. *Lucas v. Bristow*, E. B. & E. 907; 27 L. J. Q. B. 364. A contract in writing to do stone and brickwork at the rate of "3s. per superficial yard of work 9 inches thick, and finding all materials, deducting all lights," was held not to exclude a custom in the trade to reduce all brickwork for the purpose of measurement to 9 inches in thickness. *Symonds v. Lloyd*, 6 C. B. (N. S.) 691. So a contract to do certain work and to deliver "a weekly account of work done" was held not inconsistent with a usage in the building trade, that this clause related not to all the work contracted to be done, but to that part only which was of a particular kind. *Myers v. Sarl*, 3 E. & E. 306; 30 L. J. Q. B. 9. Where there was a written contract for the sale of shares at a certain price, "for payment half in 2, half in 4 months," it was held, that evidence was admissible that the seller was by usage not bound to deliver the shares until the appointed time for payment, unless the buyer chose to pay for them earlier. *Field v. Lelean*, 6 H. & N. 627; 30 L. J. Ex. 168, where *Spartali v. Benecke*, 19 L. J. C. P. 293; 10 C. B. 212, was observed upon. The usage of a particular port, that the underwriters are not liable for general average in respect of the jettison of timber stowed on the deck, can be annexed to a policy making the underwriter liable for general average without restriction. *Miller v. Tetherington*, 6 H. & N. 278; 30 L. J. Ex. 217; 7 H. & N. 954; 31 L. J. Ex. 363. By a bill of lading of wool, freight was to be paid "at the rate of 80s. per ton of 20 cwt. gross weight, tallow and other goods, grain or seed, in proportion as per London Baltic printed rates"; evidence was admitted to show that by the usage of the trade this meant that 80s. per ton of 20 cwt. of tallow was to be taken as the standard by which the rate of freight on all other goods was to be measured. *Russian S. Navigation Trading Co. v. Silva*, 13 C. B. (N. S.) 610. The question whether a cargo "for shipment in June" was satisfied by a cargo which was loaded half in May and half in June, was held by Martin, B., and Lush, J. (*dub. Kelly, C.B., and Blackburn, J.*), to be a question for the jury. *Alexander v. Vanderzee*, L. R. 7 C. P. 530. See observations on this case in *Bowes v. Shand*, 2 App. Cas. 455. On a sale of goods to be paid for in from "6 to 8 weeks," the question of the length of credit thereby allowed was left to the jury, the words apart from usage being insensible. *Ashforth v. Redford*, 43 L. J. C. P. 57; L. R. 9 C. P. 20. A written agreement at a yearly salary and a bonus at the year's end in case of the employer's approval, may be qualified by proof of a trade custom to dismiss at a month's notice. *Parker v. Ibbetson*, 4 C. B. (N. S.) 346; 27 L. J. C. P. 236.

With reference to the evidence necessary to support an alleged usage, it was said in *Ghose v. Manickchand*, 7 Moo. Ind. App. 263, 282, that "there needs not either the antiquity, the uniformity, or the notoriety of custom, which in respect of all these becomes a local law. The usage may be still in course of growth; it may require evidence for its support in each case; but in the result it is enough, if it appear to be so well known and acquiesced in, that it may be reasonably presumed to have been an ingredient tacitly imported by the parties into their contract." The usage must be shown to be certain and reasonable, and so universally acquiesced in that everybody in the particular trade knows it, or might know it if he took

the pains to inquire. *Plaice v. Allcock*, 4 F. & F. 1074; *Foxall v. International Land Credit Co.*, 16 L. T. 637.

Where it is attempted to engraft on a contract some usage of a particular trade or local custom, the opposite party is at liberty to disprove the usage or custom by the like evidence, and for that purpose to show other previous transactions in like cases between the same parties wherein the supposed usage or custom was not acted on. *Bourne v. Gatcliffe*, 4 Bing. N. C. 314; 3 M. & Gr. 643; 11 Cl. & F. 45.

If the usage exists, and it is not inconsistent with the written contract, it is precisely the same as if it were written in words attached to the contract, and it cannot be got rid of by proof of an oral agreement to waive or vary it. *Fawkes v. Lamb*, 31 L. J. Q. B. 98. See also *Burges v. Wickham*, 3 B. & S. 669; 33 L. J. Q. B. 17; *Clapham v. Langton*, 5 B. & S. 729; 34 L. J. Q. B. 46.

"The words 'usage of trade' are to be understood as referring to a particular usage to be established by evidence, and perfectly distinct from that general custom of merchants, which is the universal established law of the land, which is to be collected from decisions, legal principles and analogies, not from evidence *in pais*, and the knowledge of which resides in the breasts of the judges." 1 Smith, L. C., 11th ed., p. 556. In *Suse v. Pompe*, 8 C. B. (N. S.) 538; 30 L. J. C. P. 75; *Meyer v. Dresser*, 16 C. B. (N. S.) 646; 33 L. J. C. P. 289, evidence of a general custom was not admitted to contradict the law merchant. That law has, however, been gradually developed by judicial decisions, ratifying the usages of merchants in the different departments of trade; *Goodwin v. Robarts*, 44 L. J. Ex. 157; L. R. 10 Ex. 337, 346; and "where a general usage has been judicially ascertained and established it becomes part of the law merchant which courts of justice are bound to know and recognise." *Id.* citing *Brandao v. Barnett*, 12 Cl. & F. 805. It is not easy to define the period at which a usage so becomes incorporated into the law merchant. See also *Kidston v. Empire Marine Insurance Co.*, 35 L. J. C. P. 250; 36 L. J. C. P. 156; L. R. 1 C. P. 535; L. R. 2 C. P. 357.

Proof of the usage of trade is not admissible to contradict the plain words of an instrument not used in a technical sense; as where a policy of insurance was "on the ship till moored at anchor 24 hours, and on the goods till discharged and safely landed," evidence of a usage that the risk on the goods, as well as the ship, expired in 24 hours, was held inadmissible to qualify the unequivocal words of the policy. *Parkinson v. Collier*, 2 Park. Ins. 8th ed. 653-4. Where a charterparty provides that the vessel is to deliver at H., "or so near thereto as she could safely get," a custom that the charterer should take delivery at H. only, is excluded. *Hayton v. Irwin*, 5 C. P. D. 130. See also *The Nifa*, 65 L. J. Adm. 12; [1892] P. 411; and *The Alhambra*, 50 L. J. Adm. 36; 6 P. D. 68. A contract for payment in money cannot be explained to mean payment in goods; but it may be shown that goods were in fact accepted as cash in the particular transaction. *Smith v. Battams*, 26 L. J. Ex. 232. So where goods are sold under a memorandum to be paid for by bill, oral evidence is inadmissible to show that bill means approved bill. *Hodgson v. Davies*, 2 Camp. 530. In an action on a warranty of "prime singed bacon," oral evidence was rejected of a practice in the bacon trade to receive bacon in some degree tainted as "prime singed bacon." *Yates v. Pym*, 6 Taunt. 446; 2 Marsh. 141. Oral evidence is not admissible to explain the meaning of the words "more or less" in a mercantile contract; *semble*, *Cross v. Eglin*, 2 B. & Ad. 106; 9 L. J. (O. S.) K. B. 145; or to show that "cargo" and "freight" apply to passengers as well as goods; *Lewis v. Marshall*, 7 M. & Gr. 729; 13 L. J. C. P. 193; or to show that boats on the outside of a ship, slung upon the quarter, are not protected by a marine policy in the usual form on the ship and furniture; *Blackett v. R. Exchange Assur. Co.*, 2 C. & J. 244; 1 L. J. Ex. 101; or to show a custom within the port of London that the insurers of jettisoned goods are only liable for the share of the loss cast upon the owner of

jettisoned goods in the general average statement; *Dickenson v. Jardine*, 37 L. J. C. P. 321; L. R. 3 C. P. 639; or to show that a contract to sell "ware potatoes" means a certain sort of "ware potatoes"; *Smith v. Jeffryes*, 15 M. & W. 561; 15 L. J. Ex. 325; or that on a contract to sell wool "to be paid for by cash in one month, less 5 per cent. discount," the vendor has a lien on it for payment by usage of the trade; *Spartali v. Benecke*, 10 C. B. 212; 19 L. J. C. P. 293; *Godts v. Rose*, 25 L. J. C. P. 61. *Spartali v. Benecke*, *supra*, was a good deal observed upon by the Ex. Ch. in *Field v. Lelean*, 6 H. & N. 627; 30 L. J. Ex. 170; but the difference of opinion is not as to the principle, but as to the meaning of the contract and the effect of the custom. See also *Phillipps v. Briard*, 1 H. & N. 21; 25 L. J. Ex. 233. Oral evidence of what the parties meant by a provision in the sale of a cargo, that "14 days are to be allowed for delivery," was not admitted; but if evidence of a *general usage* explaining those words had been offered, it would perhaps have been admissible. *Sotilichos v. Kemp*, 3 Ex. 105; 18 L. J. Ex. 36. In a contract for the sale of tallow by defendant in the name of a broker who was his known representative, the defendant was not allowed to show a custom of trade upon such a contract to look to the broker for its completion. *Trueman v. Loder*, 11 Ad. & E. 589; 9 L. J. Q. B. 165. But usage of trade is admissible to show that the broker is personally liable on a contract of sale on behalf of an undisclosed principal. *Humfrey v. Dale*, 7 E. & B. 266; 26 L. J. Q. B. 137; E. B. & E. 1004; 27 L. J. Q. B. 390. See also *Cropper v. Cook*, L. R. 3 C. P. 194, 199. Where a broker sold goods "for and on account of the owner," evidence was held admissible of a usage of trade that a broker who does not disclose the name of his principal at the time of making the contract is personally liable. *Pike v. Ongley*, 56 L. J. Q. B. 373; 18 Q. B. D. 708. See also *Hutchinson v. Tatham*, 42 L. J. C. P. 260; L. R. 8 C. P. 482. The evidence of such usages may be confirmed by evidence of a similar custom in a similar trade in the same place, e.g., in the colonial market, to corroborate the usage in the fruit market. *Fleet v. Murton*, 41 L. J. Q. B. 49; L. R. 7 Q. B. 126. So by evidence of a similar custom in the same trade at a neighbouring place. *Plaice v. Allcock*, 4 F. & F. 1074. The distinction between these latter cases and *Trueman v. Loder*, *supra*, is founded on the rule that oral evidence may be given to establish the right or liability of an undisclosed principal, but not for the purpose of excluding from liability a person liable on the face of a written contract, for the effect of evidence admitted for this latter purpose would be to contradict the written document. But a custom that an agent's authority to underwrite policies is limited to a particular sum, is good, though the insured is not aware of the limitation. *Baines v. Ewing*, 35 L. J. Ex. 194; L. R. 1 Ex. 220. A clause in a contract of sale for the final settlement of any difference under the contract by the selling brokers is inconsistent with their personal liability. *Barrow v. Dyster*, 13 Q. B. D. 635.

It has been doubted whether the practice of admitting oral evidence in these cases has not been carried to an inconvenient length. See *Anderson v. Pitcher*, 2 B. & P. 164, 168. "How far a mercantile contract reduced to writing and signed by the parties, which is silent on a particular point, may have that silence supplied by evidence of a general course and usage of the trade to which it relates, is a question which it would be difficult to answer with exactness and precision." *Per Tindal, C.J.*, in *Whittaker v. Mason*, 2 Bing. N. C. 369, 370; and in *Trueman v. Loder*, "The cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract."

The usages of a market are binding on principals ordering goods to be bought on a market by their agents; *Ireland v. Livingstone*, L. R. 2 Q. B. 90, 107; 36 L. J. Q. B. 50 (affirm. L. R. 5 H. L. 395; 41 L. J. Q. B. 201, on another ground); *Bayliffe v. Butterworth*, 1 Ex. 425; *Maxsted v. Paine*, L. R. 6 Ex. 132; 40 L. J. Ex. 57; *Nickalls v. Merry*, L. R. 7 H. L. 530; 45 L. J.

Ch. 575. It is immaterial whether the principal did or did not know of the usage, provided it be reasonable, *Grissell v. Bristowe*, L. R. 4 C. P. 49; 38 L. J. C. P. 10, but not otherwise; *Perry v. Barnett*, 15 Q. B. D. 388; 54 L. J. Q. B. 466; or if the usage not only regulate the mode of performing the contract, but also change its intrinsic character. *Robinson v. Mollett*, L. R. 7 H. L. 802, 836; 44 L. J. C. P. 362. A person employed to act as broker cannot, by the custom of the market, assume the character of principal, where his employer is ignorant of the custom. S. C. The customer of a bank is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. So are mercantile persons having dealings with bankers. *Misa v. Currie*, 1 App. Cas. 554; 45 L. J. Ex. 414.

Oral evidence to control or explain agricultural contracts.] A custom affecting the contract may be proved by oral evidence in other, as well as in mercantile, contracts, e.g., in agricultural contracts. Thus, it may be proved that a heriot is due by custom on the death of a tenant, though not expressed in the lease. *White v. Sayer*, Palm. 211. Or, that a lessee by deed or writing is entitled by custom to an away-going crop, though it be not mentioned in the deed. *Wigglesworth v. Dallison*, 1 Doug. 201; *Senior v. Armytage*, Holt, N. P. 197. But where a covenant excludes the customary right by an express provision on the subject-matter of the custom, evidence of such right is inadmissible. *Webb v. Plummer*, 2 B. & A. 746; *Roberts v. Barker*, 2 L. J. Ex. 268; 1 Cr. & M. 808; *Clarke v. Roystone*, 14 L. J. Ex. 143; 13 M. & W. 752. So where a brickfield was let at a yearly rent of 3s. per 1,000 bricks made, evidence of a custom that a lease of brickland on those terms should operate as a longer tenancy than a yearly one, was held inadmissible. *In re Stroud*, 8 C. B. 502; 19 L. J. C. P. 117. Yet the custom may still prevail, though the terms of the *holding* are inconsistent with it, if it only relate to the period of *quitting*. *Holding v. Pigott*, 9 L. J. (O. S.) C. P. 125; 7 Bing. 465. And even where there is an express stipulation respecting the *quitting*, it may not always be sufficient to exclude the custom. Where the custom was for the tenant to be paid for the last year's ploughing and sowing, and to leave the manure if the landlord would buy it; and the lease provided that the tenant should spend more manure than the custom required, leaving the rest to be paid for by the landlord at the end of the term; held that the tenant was still entitled to be paid for the last year's ploughing and sowing under the custom. *Hutton v. Warren*, 1 M. & W. 466; 5 L. J. Ex. 234. A custom to sell flints turned up in the ordinary course of good husbandry, for the tenant's benefit, is not inconsistent with a reservation of minerals to the landlord. *Tucker v. Linger*, 8 App. Cas. 508; 52 L. J. Ch. 941. See *Dashwood v. Magniac*, [1891] 3 Ch. 306; 60 L. J. Ch. 809 (the case of a devise). On the lease of a rabbit warren, oral evidence was admitted to show that by the custom of the county, the word "thousand" means 1,200 when applied to rabbits. *Smith v. Wilson*, (1832); 1 L. J. K. B. 194; 3 B. & Ad. 728. A contract for the sale of cider may be explained, by local usage, to mean apple juice before it has been made into cider in its usual form. *Studdy v. Sanders*, (1826); 4 L. J. (O. S.) K. B. 290; 5 B. & C. 628. A sale of hops at "100s." may be explained to mean £5 per cwt. *Spicer v. Cooper*, 10 L. J. Q. B. 241; 1 Q. B. 424. A contract of hiring may be qualified by proof of customary holidays. *R. v. Stoke-upon-Trent*, 5 Q. B. 303. As to such proof, see *Devonald v. Rosser*, [1906] 2 K. B. 728; 75 L. J. K. B. 688.

Oral evidence to explain words having a statutory meaning.] The general rule is that, where a statute has given a definite meaning to a word denoting quantity, evidence of custom is not admissible to show that it is used in a written contract in another sense. *Smith v. Wilson*, 1 L. J. K. B. 194; 3 B. & Ad. 728, 732, 733. See also *Wing v. Earle*, Cro. Eliz. 267; *Noble v. Durell*, 3 T. R. 271; *Hockin v. Cooke*, 4 T. R. 314; *S. Cross, Master of v. Ld. Howard de Walden*, 6 T. R. 338.

In *Furley d. Canterbury (Mayor) v. Wood*, 1 Esp. 198, Runnington on Eject., 2nd ed., 129, it was held by Ld. Kenyon that evidence was admissible to show that by the custom of the country the word "Michaelmas," in a notice to quit, meant "Old Michaelmas." It has been since assumed that this was a parol demise; but as the lands are stated to have been held by lease from a corporation, this was probably not so. In *Doe d. Spicer v. Lea*, 11 East, 312, however, it was held that evidence was rightly rejected when offered to show that "the feast of S. Michael," in a lease under seal, meant Old Michaelmas. A few days afterwards, M'Donald, C.B., held that a notice to quit at "Michaelmas" might be shown to mean "Old Michaelmas." *Doe d. Hinde v. Vince*, 2 Camp. 256; S. P. ruled by Ld. Ellenborough in *Doe v. Brookes*, at Hereford. *Id.* 257, n. It does not appear whether the leases in these last two cases were by deed or parol. In *Doe d. Hall v. Benson*, 4 B. & Ald. 588, the distinction between leases under seal and those not so, was taken by the court, and it was held that on a parol demise it might be shown that "Lady Day" meant "Old Lady Day." The cases of *Doe d. Peters v. Hopkinson*, 3 D. & Ry. 507; and *Rogers v. Hull Dock Co.*, 34 L. J. Ch. 165, are to the same effect. In pleading, it was held that "Martinmas" must mean "New Martinmas," even though followed by the words "to wit, the 23rd of November," which is the day on which Old Martinmas fell. *Smith v. Walton*, 8 Bing. 235. In many parts of the country the practice of letting lands, according to the old style, is still retained; and many text writers have expressed a general opinion that evidence of a custom of the country is always admissible to show that the feast day mentioned in the lease is referable to the old style, even though the lease be by deed. *Vide tamen*, 1 Smith's L. C., 11th ed., 569—571.

Oral evidence to explain ancient charters, grants, &c.] Long user may serve to explain an ambiguous Act of Parliament. *Stewart v. Lawton*, 1 Bing. 377. In the construction of ancient charters, expressed in obscure or general terms, oral evidence has always been admitted to prove the continual and immemorial usage under the instrument. 2 Inst. 282; *R. v. Varlo*, Cowp. 248; *Chad v. Tilsed*, (1821) 2 Br. & B. 406. Thus, in a Crown grant of "tithes," contemporaneous leases, proceedings in causes, and oral testimony, may be resorted to in order to show the species of tithes intended to be conveyed. *Lucton School Governors v. Scarlett*, 2 Y. & J. 330. An ancient Crown grant of a seigniori or lordship, or of "terra de Gower," may be shown by modern user to include the seashore between high and low water; *Beaufort (Duke) v. Swansea (Mayor)*, 3 Ex. 413; see also *Hastings Corporation v. Ivall*, L. R. 19 Eq. 558, and *Van Diemen's Land Co. v. Table Bay, &c., Board*, 75 L. J. P. C. 28; [1906] A. C. 92; although the grant from the Crown contains no appropriate words. *Calmady v. Rowe*, 6 C. B. 861. Where a private deed of 1656 gave the nomination of a curate to "inhabitants," it was held that the word was properly explained by past usage to mean all housekeepers. *A.-G. v. Parker*, 3 Atk. 576. So it was held that in an ancient charter, the word "inhabitants" might be explained by local usage. *R. v. Mashiter*, 6 L. J. K. B. 121; 6 Ad. & E. 153, and this decision was recognised in *R. v. Davey*, *Id.* 374, 386, where the same word, in a charter of Edward VI., was explained by usage to mean inhabitants paying church and poor-rates. So where an old charter granted and confirmed certain port-duties, it may be shown by user that the grantee is also entitled to other immemorial port-duties not named in the charter. *Bradley v. Newcastle (Pilots)*, 2 E. & B. 427; 23 L. J. Q. B. 35.

There seems to be no distinction in this respect between charters and private deeds. *Withnell v. Gartham*, 6 T. R. 398. The words "three acres of meadow," in a surrender and admittance, may be confined by long user to the *prima tonsura*; *Stammers v. Dixon*, 7 East, 200; and *pastura bosci* may be explained by usage and later admittances to mean the soil and wood itself. *Doe d. Kinglake v. Beviss*, 18 L. J. C. P. 128; 7 C. B. 456. Evidence of usage is admissible to show what is comprehended in parcels

described by words of a general nature or doubtful import. *Waterpark (Lord) v. Fennell*, 7 H. L. C. 650; *Hastings Corporation v. Ivall, supra*; or to explain a patent ambiguity, as where the description by boundaries conflicts with the description by acreage. *Watcham v. A.-G. for East Africa Protectorate*, 87 L. J. P. C. 150; [1919] A. C. 533. See also *Forbes v. Watt*, L. R. 2 H. L. Sc. 214.

But evidence of usage, however long, will not be admitted to overturn the clear words of a charter. *R. v. Varlo*, Cowp. 248. And in the case of modern deeds evidence of the acts of the parties is not admissible to show their construction of it where the language of the instrument to be construed is plain and unambiguous. *Clifton v. Walmesley*, 5 T. R. 565; *Iggulden v. May*, 9 Ves. 333; 2 B. & P. N. R. 449; *N. E. Ry. v. Hastings (Lord)*, [1900] A. C. 260; 69 L. J. Ch. 516. *Secus*, if there is a patent ambiguity. *Watcham v. A.-G. for East Africa Protectorate, supra*. Even the conditions of sale, and the admissions of the grantee, are insufficient and inadmissible to narrow the operation of a deed of conveyance; *Doe d. Norton v. Webster*, 9 L. J. Q. B. 373; 12 Ad. & E. 442; although, in the absence of the deed, such admissions might be evidence of its contents. Nor can the subsequent correspondence or conduct of the parties be submitted to a jury as evidence by which "alone" to explain the meaning of a contract. *Simpson v. Margitson*, 17 L. J. Q. B. 81; 11 Q. B. 23; *Doe d. Morgan v. Powell*, 14 L. J. C. P. 5; 7 M. & Gr. 980.

[Oral evidence to discharge written agreements.] A deed cannot be revoked or discharged by parol, *i.e.*, word of mouth, or writing not under seal; *Rutland's Case*, 5 Co. Rep. 26 a; *West v. Blakeway*, 10 L. J. C. P. 173; 2 M. & Gr. 729, 751 *et seq.* But an executory agreement in writing not under seal (other than a bill of exchange or promissory note) may, before breach, be discharged by a subsequent oral agreement. B. N. P. 152. After breach, it cannot be discharged except by release under seal, or accord and satisfaction, *Id.*; *Willoughby v. Backhouse*, 2 L. J. (O. S.) K. B. 174; 2 B. & C. 821. In an action for not accepting goods, where it appeared that the agreement in writing was to deliver at a fixed time, the plaintiff may show a subsequent extension of the time by oral agreement. *Cuff v. Penn*, 1 M. & S. 21. Where an auctioneer sold for £6 an article described as silver in a printed catalogue, but which he publicly stated at the sale to be only plated; held, that this was an oral sale of a plated article. *Eden v. Blake*, 14 L. J. Ex. 194; 13 M. & W. 614.

A distinction, however, is to be observed on this head between simple contracts in writing under the Stat. of Frauds or the Sale of Goods Act, 1893, s. 4, and contracts at common law. In the former case, an oral contract will not be admitted to show a subsequent variation in the written contract; *Vezey v. Rashleigh*, 73 L. J. Ch. 422; [1904] 1 Ch. 634; as where several lots of land were bought together, it cannot be shown that the purchaser has orally waived the contract as to one lot to which the vendor could not make title; *Goss v. Nugent (Lord)*, 2 L. J. K. B. 127; 5 B. & Ad. 58; or that the parties varied the day of completion. *Stowell v. Robinson*, 6 L. J. C. P. 326; 3 Bing. N. C. 928; *Marshall v. Lynn*, 9 L. J. Ex. 126; 6 M. & W. 109; *Stead v. Dawber*, 9 L. J. Q. B. 101; 10 Ad. & E. 57; *Noble v. Ward*, 36 L. J. Ex. 91; L. R. 2 Ex. 135; but parol evidence is admissible to prove a total abandonment or a rescission of a written contract. *Morris v. Baron & Co.*, 87 L. J. K. B. 145; [1918] A. C. 1, where *Noble v. Ward (supra)* was explained and distinguished. See also *Sanderson v. Graves*, L. R. 10 Ex. 234; 44 L. J. Ex. 210. But it would have been otherwise if the contract had not been subject to the control of a statute; for where such a contract has been reduced into writing, it is competent to the parties, at any time before the breach of it, by a new contract not in writing, either altogether to waive, dissolve or alter the former agreement, or to qualify the terms of it, and thus to make a new contract to be proved partly by the written agreement, and partly by the

subsequent oral terms engrafted upon it. *Goss v. Nugent* (Lord), 2 L. J. K. B. 127; 5 B. & Ad. 65.

By the Bills of Exchange Act, 1882, ss. 62, 89, the renunciation by the holder of a bill of exchange or promissory note of his rights against the acceptor must be in writing, unless the bill or note is delivered up to the acceptor.

Oral evidence to explain latent ambiguity.] Where an ambiguity, not apparent on the face of a written instrument, is raised by the introduction of oral evidence, the same description of evidence is admitted to explain it; for example, where a testator devises his estates of Blackacre, and has two estates called Blackacre, evidence may be admitted to show which of the Blackacres was meant; or if one devises to his son John Thomas, and he has two sons of the name of John Thomas, evidence may be admitted to show which the testator intended. *Per Gibbs, C.J., Doe v. Chichester*, 4 Dow, 93; *Doe d. Morgan v. Morgan*, 2 L. J. Ex. 88; 1 Cr. & M. 235. And where the description of the devisee, or thing devised, is true in part, but not true in every particular, oral evidence is admissible to show the person or thing intended, provided there be enough on the face of the will to justify the application of the evidence; *Miller v. Travers*, 8 Bing. 248—9; *Charter v. Charter*, L. R. 7 H. L. 364; 43 L. J. P. 73; *In re Waller*, 68 L. J. Ch. 526. Thus, an error in a christian or surname may be proved. *S. C.C.*, and *Careless v. Careless*, 1 Mer. 384. Where the grantor has no lands agreeing exactly with the description in the deed of grant, the lands intended may be shown by the contract of sale, or by letters written between the parties and their agents. *Beaumont v. Field*, 1 B. & Ald. 247. Where a farmer contracted in writing (as required by the Stat. of Frauds) to sell his "wool" at a certain price, evidence of a previous conversation between him and the buyer was held admissible to prove that his "wool" meant wool in his possession bought by him of other farmers, as well as wool of his own growth, but not admissible to prove that only a limited quantity of such wool was intended to be bought. *Macdonald v. Longbottom*, 1 E. & E. 977; 28 L. J. Q. B. 293; 1 E. & E. 987; 29 L. J. Q. B. 256. See also *Buxton v. Rust*, L. R. 7 Ex. 279, 281; 41 L. J. Ex. 173, *per Willes, J.*, and *Bank of New Zealand v. Simpson*, [1900] A. C. 182; 69 L. J. P. C. 22. So in construing a written contract of service under which A. was "to enter into the employ" of B., or A. was "to give the whole of his services to B.," oral evidence is admissible to show in what capacity A. was to serve B. *Mumford v. Gething*, 7 C. B. (N. S.) 305; 29 L. J. C. P. 105; *Price v. Mouat*, 11 C. B. (N. S.) 508; even although the Stat. of Frauds required a written contract. *S. C.* See also *Chadwick v. Burnley*, 12 W. R. 1077. So where there was a written contract to hire a flat for certain days, evidence was admitted that it had been previously announced that on those days processions would pass along a route visible from the flat, and that the taking place of those processions was the basis of the contract. *Krell v. Henry*, [1903] 2 K. B. 740; 72 L. J. K. B. 794. Where by a written agreement purporting to be between a company and the plaintiff three of the directors of the company, who signed the same, agreed, in consideration of the advance of £500 by the plaintiff to the company, to repay the same to the plaintiff, oral evidence was held admissible to prove that it was binding on the directors personally. *McCollin v. Gilpin*, 6 Q. B. D. 516. Where C. D. signed a voting paper, which had been filled up in the body of it with the name of A. B. as the person giving it, oral evidence was admitted to explain the mistake. *Summers v. Moorhouse*, 13 Q. B. D. 388; 53 L. J. Q. B. 564.

Where a devise was to S. H., second son of T. H., but in fact S. H. was the third son, evidence of the state of the testator's family, and of other circumstances, was admitted to show whether he had mistaken the name or the description. *Doe d. Le Chevalier v. Huthwaite*, 3 B. & Ald. 632. There are also other authorities for admitting evidence that the testator was

accustomed to misname a person, and thus to show who was meant by him, although there be a person in existence whose name corresponds with that in the will. *Blundell v. Gladstone*, 12 L. J. Ch. 225; 11 Sim. 467; *Lee v. Pain*, 4 Hare, 251. So by "my nephew, J. G.," testator's wife's nephew may be shown to be meant, though the testator also had a nephew J. G. *Grant v. Grant*, L. R. 2 P. & D. 8; 39 L. J. P. 17; *Id. v. Id.*, L. R. 5 C. P. 727; 39 L. J. C. P. 272; *Sherratt v. Mountford*, L. R. 8 Ch. 928; 42 L. J. Ch. 688. See *Wells v. Wells*, L. R. 18 Eq. 504; 43 L. J. Ch. 681, *cor.* Jessel, M.R., *contra*, and *In re Taylor*, 34 Ch. D. 255; 56 L. J. Ch. 171. See further *In re Ashton*, [1892] P. 83; 61 L. J. P. 85. Where the devise was to John A., grandson of T. A., with a charge in favour of "each of the brothers and sisters" of the said John A., and it appeared there were two grandsons of T. A., both named J. A.; held, that oral declarations of the testator were admissible to show which was meant, although it also appeared that only one of the grandsons had several brothers and sisters. *Doe d. Allen v. Allen*, 9 L. J. Q. B. 395; 12 Ad. & E. 451. In the case of a devise to testator's niece, remainder to her three daughters M., E., and A., the niece at the time of making the will had two legitimate daughters, M. and A., and one illegitimate, E.; held, that the claim of the latter might be rebutted by showing that the niece formerly had a legitimate daughter, E., and that the testator knew nothing of the death of the legitimate, or the birth of the illegitimate, E. *Doe d. Thomas v. Beynon*, 9 L. J. Q.-B. 359; 12 Ad. & E. 431. See also *Hill v. Crook*, L. R. 6 H. L. 265; 42 L. J. Ch. 702, and *In re Ashton*, *supra*.

Evidence of the testator's declaration of intention is only admissible where the language is clear and unambiguous, but the ambiguity arises from some of the circumstances admitted in proof, as to which of two or more persons the testator intended to express. *Doe d. Hiscocks v. Hiscocks*, 5 M. & W. 363, 369; *Charter v. Charter*, L. R. 7 H. L. 364; 43 L. J. P. 73; *In re Waller*, 68 L. J. Ch. 526; *In re Jeffery*, 83 L. J. Ch. 251; [1914] 1 Ch. 375; *In re Halston*, 81 L. J. Ch. 265; [1912] 1 Ch. 435. Where a devise was to John H., the eldest son of John H., and it appeared that John H., the father, had an eldest son named Simon, and a son by a second marriage named John; held, that the declarations of the testator were not admissible to show which was meant. *Doe d. Hiscocks v. Hiscocks*, *supra*. Where the devise was to the testator's "nephews," and evidence had been adduced to show that he had no nephews, but that his wife's nephews were meant, it was held that evidence that these could not have been intended by the testator was not admissible, without also showing some other class who were intended to take. *Sherratt v. Mountford*, 42 L. J. Ch. 688; L. R. 8 Ch. 928. See further *In re Mayo*, 70 L. J. Ch. 261; [1901] 1 Ch. 404.

A devise to "my dear wife, C.," cannot be defeated by showing that the deviser had a lawful wife, M., alive when he went through a form of marriage with C. *Doe d. Gains v. Rouse*, 5 C. B. 422. But where B. makes a devise to his wife A., the devise may be defeated by showing that A. fraudulently concealed from B. that she had a husband living when she went through a form of marriage with B. *Wilkinson v. Joughin*, 35 L. J. Ch. 684; L. R. 2 Eq. 319, following *Kennell v. Abbott*, 4 Ves. 802. *Secus*, if B. knew that A.'s husband was alive. *In re Wagstaff*, 77 L. J. Ch. 190; [1908] 1 Ch. 162. Where a fine was levied of 12 messuages in Chelsea, and it appeared that the cognisor had more than 12 messuages in Chelsea, oral evidence was admitted to show which messuages in particular the cognisor intended to pass. *Doe d. Bulkeley v. Wilford*, Ry. & M. 88; 8 D. & Ry. 549.

All facts relating to the subject of the devise, such as that it was not in the possession of the testator, the mode of acquiring it, the local situation, and the distribution of the property, are admissible to aid in ascertaining what is meant by the words used in a will. Parke, J., in *Doe d. Templeman v. Martin*, 3 B. & Ad. 785; *Webber v. Stanley*, 16 C. B. (N. S.) 698, 751, 752; 33 L. J. C. P. 217, 220; *McLeod v. McNab*, [1891] A. C. 471, 474;

60 L. J. P. C. 70; Wigram on Interp. Wills, 51. Even the value of the property and the charges upon it in the will may be shown in explanation of it. *Semb. Nightingall v. Smith*, 1 Ex. 879. See also *Allgood v. Blake*, L. R. 8 Ex. 160, 162, and *In re Glassington*, 75 L. J. Ch. 670; [1906] 2 Ch. 305. In construing a will the court should place itself as fully as possible in the situation of the testator, and guide its construction of his intention in some degree by the light of the knowledge thus acquired. *Hill v. Crook*, L. R. 6 H. L. 265, 277; 42 L. J. Ch. 702; *Charter v. Charter*, L. R. 7 H. L. 364; 43 L. J. P. 73, per Lds. Cairns, C., and Selborne; *In re Taylor*, 34 Ch. D. 255; 56 L. J. Ch. 171. As to the admissibility of evidence to show in what sense the testator used the word "securities," see *In re Rayner*, 73 L. J. Ch. 111; [1904] 1 Ch. 176.

Where a subject-matter exists which satisfies the terms of the will, and to which they are perfectly applicable, there is no latent ambiguity, and no evidence can be admitted for the purpose of applying the terms to a different object. Thus, where a testator devised his "estate at Ashton," it was held that oral evidence was inadmissible to show that he was accustomed to call all his maternal estate "his Ashton estate," there being an estate in the parish of Ashton which was sufficient to satisfy the devise. *Doe d. Chichester v. Oxenden*, 3 Taunt. 147; S. C., 4 Dow, 65; *Webber v. Stanley*, supra; *Pedley v. Dodds*, L. R. 2 Eq. 819. See also *Carruthers v. Sheddon*, 6 Taunt. 14. But a devise of lands "in parish D." will pass lands of which part only is in D., if it be shown by oral evidence that all was reputed to be in it. *Anstee v. Nelms*, 1 H. & N. 225; 26 L. J. Ex. 5; *Whitfield v. Langdale*, 45 L. J. Ch. 177; 1 Ch. D. 61. Where words have acquired a precise and technical meaning, no other meaning can be applied to them. Per Ld. Kenyon, *Lane v. Stanhopè (Earl)*, 6 T. R. 352. In the case of a legacy to the testator's "heir," it cannot be shown that a testator was in the habit of calling a person his heir who was not so. *Mounsey v. Blamire*, 4 Russ. 384. If a will name the devisee, and it be shown orally that there are several to whom the name applies, this is not enough to let in oral evidence of intention, where it can be collected from the will itself who was intended. *Doe d. Westlake v. Westlake*, 4 B. & A. 57; *Webber v. Corbett*, L. R. 16 Eq. 515.

Where a complete blank is left for the devisee's name in a will, oral evidence cannot be admitted to show whose name was intended to be inserted. *Baylis v. A.-G.*, 2 Atk. 239; *In re Hubback*, 74 L. J. P. 58; [1905] P. 129. Where the names of the devisees in a will of real property were all indicated only by single letters, a card kept by the testator separate from his will, containing "a key" to the letters, and showing the person meant by each, was held inadmissible to explain it, though referred to in the will. *Clayton v. Nugent (Lord)*, 13 M. & W. 200. But where a blank was left for the Christian name only, oral evidence was admitted to prove the individual intended. *Price v. Page*, 4 Ves. 680. In a devise to "Mrs. G.," the person intended may be shown, by proving that the testator invariably called a Mrs. Gregg by the name of "Mrs. G." *Abbott v. Massie*, 3 Ves. 148. Where a will mentioned George, the son of George Gord, and also George, the son of John Gord, a bequest to "George the son of Gord," was explained by proof of the declarations of the testator to mean George the son of George Gord. *Doe d. Gord v. Needs*, 2 M. & W. 129. See also *Henderson v. Henderson*, [1905] 1 Ir. R. 353, and *In re Ofner*, 78 L. J. Ch. 50; [1909] 1 Ch. 60. So where a will contained a bequest to "my granddaughter," on it appearing that the testator had several granddaughters, evidence was admitted as to which of them was meant. *In re Hubback*, 74 L. J. P. 58; [1905] P. 129. If an agreement, unambiguous on the face of it, is shown by extrinsic evidence to have a different meaning from that which it imports, and the extrinsic facts are undisputed, the construction of it is for the judge, who ought not to leave it to the jury as a question of the intention of the parties. *Semb. Hitchin v. Groom*, 5 C. B. 515; 17 L. J. C. P. 145. Where it is doubtful on the face of a document whether it is testamentary or not,

evidence of the intention of the deceased is admissible. *Robertson v. Smith*, L. R. 2 P. & D. 43; 39 L. J. P. 41; *In re Slinn*, 15 P. D. 156; 59 L. J. P. 82.

Where, in the entry of an appointment to a curacy in the bishop's register, a blank was left for the patron's name, it was held that this might be supplied by oral evidence. *Meath (Bishop) v. Belfield (Lord)*, 1 Wils. 215. A demise offered in evidence was a printed blank form filled up and altered for use; held, that the court might look at the parts struck out in order to ascertain the intent of the parties in what remained. *Strickland v. Maxwell*, 3 L. J. Ex. 161; 2 Cr. & M. 539.

Oral evidence on questions of parcel or no parcel.] Where the question is "parcel or no parcel," oral evidence is admissible to explain a writing. Thus, where a testator devised "all his farm called Trogues Farm," it was held that it might be shown of what parcels the farm consisted. *Goodtitle d. Radford v. Southern*, 1 M. & S. 299. But where a deed professes to convey a farm as described on a schedule and map annexed, a field not included in the map or schedule, though always treated as part of the farm, will not pass. *Barton v. Dawes*, 10 C. B. 261; 19 L. J. C. P. 302. Where the testator devised two cottages, one described as being in the occupation of A., and the other of B.; and it appeared that the testator had two cottages which had been internally divided, so that part only of one was occupied by A., and part of the other occupied by B.; it was held (*Erle, J., dissent.*) that only the portions of the cottages so occupied passed by the devise, and oral evidence was not admissible to show that he meant the entire cottages to pass. *Doe d. Hubbard v. Hubbard*, 15 Q. B. 227; 20 L. J. Q. B. 61. Where a lease professed to demise premises and a yard, extrinsic evidence was admitted to rebut the presumption that a cellar under the yard was also intended to pass. *Doe d. Freeland v. Burt*, 1 T. R. 701. So in case of a written agreement to convey "all those brick-works in the possession of A. B.," oral evidence of what passed on making the agreement was admitted to show what brick-works were intended to pass. *Paddock v. Fradley*, 1 C. & J. 90. Although the question of parcel or no parcel is for the jury, the judge must tell the jury what is the proper construction of any documents necessary to be considered in the decision of that question. *Lyle v. Richards*, L. R. 1 H. L. 222; 35 L. J. Q. B. 214. Conditions of sale, shown to a purchaser at the time of sale, are evidence against him of what was then reputed parcel of the premises conveyed to him by deed. *Murly v. M'Dermott*, 8 L. J. Q. B. 152; 8 Ad. & E. 138. But they will not narrow the language of the conveyance. *Doe d. Norton v. Webster*, 9 L. J. Q. B. 373; 12 Ad. & E. 442. See also *Glave v. Harding*, 27 L. J. Ex. 286.

PRESUMPTIVE EVIDENCE.

Presumptive evidence is usually so called in contradistinction to direct or positive proof, whether written or oral, though all moral proof is, in strictness, founded on probability and presumption. Thus, a fact attested by the direct evidence of an ocular witness can only be admitted to be true on the presumption that the witness neither deceives nor is deceived. Perhaps the principal distinction is that what is usually called a presumption may be rebutted without necessarily impugning the testimony upon which it rests; but direct testimony cannot be impeached without attacking its credibility. Presumptive evidence is not, in its nature, secondary to direct evidence. Thus, payment of rent may be proved by the positive evidence of a person who saw it paid; yet it may also be proved by the production of a receipt for later arrears, which affords a presumption that the earlier arrears are satisfied, without laying any ground for the introduction of such evidence by showing that positive evidence cannot be procured. See observations in *Doe d. Welsh v. Langfield*, 16 M. & W. 513.

Some presumptions are artificial, and legally admit of no contradiction by contrary evidence; of this kind was the presumed revocation of a will by a subsequent alteration of the property. *Goodtitle d. Holford v. Otway*, 2 H. Bl. 522. So *some* damage is conclusively presumed to result from an unlawful act done by the defendant and actionable *per se*.

Another class of presumptions includes those cases in which a jury will be directed by the court to presume a fact, of which no evidence has been given. Thus a bill of exchange is always presumed to be given for a good consideration. *Philliskirk v. Pluckwell*, 2 M. & S. 395. So the law presumes innocence. So the jury ought to be told to presume legitimacy; *Banbury Peerage Case*, 1 Sim. & St. 153; and marriage from cohabitation, except in prosecutions for bigamy, and formerly in actions for adultery; *Doe d. Fleming v. Fleming*, 4 Bing. 266; *Campbell v. Campbell*, L. R. 1 H. L. Sc. 182; *Neo v. Neo*, L. R. 6 P. C. 382, 386; *In re Thompson*, 91 L. T. 680; *In re Haynes*, 94 L. T. 431.

The law presumes in favour of possession, see *Lee v. Johnstone*, L. R. 1 H. L. Sc. 426; and, in the case of land, presumes the highest estate in it, viz., a seisin in fee. A good tenant to the præcipe is presumed in support of an old recovery. Gilb. Ev. 6th ed. 22. A deed 30 years old, and in unsuspected custody, is presumed to have been duly executed. Long possession is a presumption of the regular endowment of a vicarage. *Crimes v. Smith*, 12 Rep. 4. So the continuance of things *in statu quo* will be generally presumed; as where the plaintiff, being slandered in his official character, proves his appointment to the office just before the libel, his continuance in office at the time of the libel need not be proved, though averred, if such continuance be consistent with the nature of the office. *R. v. Budd*, 5 Esp. 230; *Steward v. Dunn*, 13 L. J. Ex. 324; 12 M. & W. 655. So proof of official character at a certain time may in some cases be evidence that the party had that character within a reasonable time before. *Doe d. Hopley v. Young*, 8 Q. B. 63. Every place is presumably within some parish. *R. v. S. Margaret's*, 7 Q. B. 569. But a place named generally is itself presumed to be a vill; at least such was the old law; for there may be extra-parochial places, but all places in England are either villis or within a vill. *Adeson v. Otway*, Freem. 228, 240. So the law presumes that a party intended that which is the immediate or probable consequence of his act. *R. v. Dixon*, 3 M. & S. 11, 15. In such cases, in the absence of contrary proof, the jury are, it should seem, as much bound to find agreeably to the legal presumption, as they are to find according to the law as explained by the judge.

A third class of presumptions is exclusively within the province of the jury, and they occur when direct proof of a fact is offered to the jury as probable evidence from which they may infer another fact. As where a witness says that he lent a certain printed book to A. B., who afterwards returned to him a book exactly like it, which he believes to be the same, but cannot swear to its identity, this is proof of identity; for it is more probable that it was the same than another. *Fryer v. Gathercole*, 18 L. J. Ex. 389; 4 Ex. 262.

There is a species of presumption not uncommonly urged in the addresses of a counsel to a jury, viz., the presumption that the testimony of a witness who might be, but is not, called, is unfavourable to the party who omits to call him. So it is sometimes treated as a legitimate inference that a document, tendered in evidence by A. and objected to by B., is unfavourable to the case of B. Thus, where a document was offered in evidence to confirm the statement of a witness, but was rejected by the judge, it was held to be no misdirection for the judge to tell the jury that the document might be assumed, against the objecting party, to be one which confirmed the testimony of the witness. *Sutton v. Davenport*, 27 L. J. C. P. 54. Such presumptions are of no value as evidence *per se*, and are not worth much except under special circumstances. If the witness, not called, be present at the trial, he may be called by the opposite party. If not present, his

absence may be owing to other causes than that of wilful suppression. Where the document is excluded by the ruling of the judge, it is because the law presumes that the ends of justice will not be advanced by the reading of it, and it seems a strong thing for the court to invite inferences against the objecting party, though counsel cannot be restrained from addressing any arguments, however fallacious, to the jury. But, generally, there is a fair presumption against a party who keeps back a document in his own possession. *A.-G. v. Windsor (Dean)*, 27 L. J. Ch. 320; 24 Beav. 679. We have seen that the refusal of a party to produce a document after notice to produce is not evidence *per se*; *Chaplin v. Reid*, 1 F. & F. 315; but it is matter of observation to the jury. S. C.

The following are a few of the most useful and usual cases of presumption:—

The existence of an immemorial custom may be presumed from an uncontradicted usage of 20 years, and it ought to be so presumed by the jury if there be nothing in evidence to negative such presumption. *R. v. Jolliffe*, 1 L. J. (O. S.) K. B. 232; 2 B. & C. 54; *Jenkins v. Harvey*, 5 L. J. Ex. 17; 1 C. M. & R. 877; *Brocklebank v. Thompson*, 72 L. J. Ch. 626; [1903] 2 Ch. 344. The flowing of the tide is presumptive evidence of a public navigable river; *Miles v. Rose*, 5 Taunt. 705; but the strength of this *prima facie* evidence depends upon the situation and nature of the channel; *R. v. Montague*, 4 L. J. (O. S.) K. B. 21; 4 B. & C. 602; and long obstruction of the right of navigation is presumptive evidence of its legal extinction by natural or legal means. S. C. Land lying between high and low water marks on the sea-shore, or the banks of a navigable river is, *prima facie*, extra-parochial. *R. v. Musson*, 8 E. & B. 900; 27 L. J. M. C. 100; *Bridgewater Trustees v. Bootle-cum-Linacre*, L. R. 2 Q. B. 4; 36 L. J. Q. B. 41. But for civil parochial purposes such land is now, by 31 & 32 V. c. 122, s. 27, no longer extra-parochial.

Cujus est solum ejus est usque ad cælum et ad inferos, is a maxim juries are directed to observe.

A letter is presumed, as against the writer, to have been written on the day on which it is dated. *Hunt v. Massey*, 5 B. & Ad. 902. And it may be evidence of the date as against a third person; thus, where indorsee sued the acceptor, who pleaded that plaintiff's indorser took the bill with notice that the defendant was not liable upon it, and indorsed it with like notice to plaintiff, it was held that defendant might prove that the indorser had such notice by producing letters written by him to defendant; and that the date on them was evidence that the letters had been written before the indorsement. *Potez v. Glossop*, 2 Ex. 191. The last decision was accompanied with some expression of doubt by the court; it was, however, followed in *Malpas v. Clements*, 19 L. J. Q. B. 435, where in an action by indorsee against acceptor, a paper signed by the drawer and purporting to be of even date with the bill, was received in evidence against the plaintiff to prove the terms on which the bill was drawn.

An act done with the knowledge of a person who would have a right to object to it may be presumed to be done by his licence. Thus, where an inclosure had been made from a waste 12 or 14 years, and seen by the steward of the lord from time to time, without objection, it was left to the jury to say whether the inclosure was made by the lord's licence. *Doe d. Foley v. Wilson*, 11 East, 56. An entry in a merchant's book, purporting to be a copy of a letter addressed by him to his partner abroad, is evidence, as against the writer, that it was also sent. *Sturge v. Buchanan*, 10 Ad. & E. 598. So indorsements on a promissory note admitting the receipt of interest are presumed (except for the purpose of rebutting the Statute of Limitations) to have been made at the time they bear date. *Smith v. Battens*, 1 M. & Rob. 341. And a bill is presumed to be made on the day of its date; *Owen v. Waters*, 6 L. J. Ex. 13; 2 M. & W. 91; *Laws v. Rand*, 3 C. B. (N. S.) 442; 27 L. J. C. P. 76; except when used to prove a petitioning creditor's debt at the date specified; *Anderson v. Weston*, 9 L. J. C. P. 194; 6 Bing.

N. C. 296, 301; but the soundness of this exception was questioned in *Potez v. Glossop*, 2 Ex. 191. When the *bonâ fides* of a sale to the plaintiff by a bankrupt was disputed by the assignees, the plaintiff was allowed to use a receipt and delivery order for the goods, dated at the time of the alleged sale, but not delivered to the witness who produced them till after the sale and bankruptcy, as confirmatory evidence of the date of the sale. *Morgan v. Whitmore*, 6 Ex. 716; 20 L. J. Ex. 289. On the ground of danger of collusion, it was considered necessary to give extrinsic evidence of the date of letters put in to show the terms on which husband and wife were living, in an action for adultery. *Trelawney v. Colman*, 2 Stark. 193.

In many cases, though the fact of actual knowledge cannot be proved, it will be presumed. Thus, where the rules of a club are contained in a book openly kept by the proper officer or servant of the club, every member of the club must be presumed to be acquainted with them. *Ragget v. Musgrave*, 2 C. & P. 556; *Alderson v. Clay*, 1 Stark. 405; *Wiltzie v. Adamson*, 1 Phill. & Arn. Ev. 339, 10th ed. A person dealing with a registered company is presumed to know the registered constitution of the company. *Balfour v. Ernest*, 5 C. B. (N. S.) 600; 28 L. J. C. P. 170.

It is not very easy to distinguish those presumptions which are obligatory on a jury from those which they are at liberty to disregard and to negative, even when not rebutted. Judges have entertained different opinions on this head as regards the effect of long user in proof of prescriptions and customs. On the one hand, the title to important rights can hardly be considered as secure, if no antiquity of enjoyment can prevent them from being exposed to the casualties of a verdict; on the other hand, it seems to be a contradiction in terms to leave to the jury presumptive evidence of a fact with no alternative but to find it. See the remarks in *Newcastle (Pilots) v. Bradley*, 23 L. J. Q. B. 35; 2 E. & B. 427, n.

It is not permitted to the parties to prove every fact which would lead to a presumption in some measure bearing on the question in issue. If there were no limits to this, it is obvious that a trial might be unduly lengthened; and it is clear that a judge may refuse to receive evidence which only leads to a very weak presumption.

Presumption of payment.] If a landlord give a receipt for the rent last due, it is presumable that all former rent has been paid. Gilb. Ev. 6th ed. 142. And payment from 1864 to 1877 by a tenant in common to his co-tenant of a moiety of the rent of the lands is said to be evidence of such payment prior to 1864. *Sanders v. Sanders*, 19 Ch. D. 373; 51 L. J. Ch. 279. Where a bill of exchange, negotiated after acceptance, is produced from the hands of the acceptor after it is due, the presumption is that the acceptor has paid it; *Gibbon v. Featherstonhaugh*, 1 Stark. 225; but not without proof of circulation after acceptance. *Pfiel v. Vanbatenberg*, 2 Camp. 439. Proof that the plaintiff and other workmen employed by the defendant came to him regularly every week to receive their wages from him, and that the plaintiff had not been heard to complain of non-payment, is presumptive evidence of payment of his past wages. *Lucas v. Novosilieski*, 1 Esp. 296; *Sellen v. Norman*, 4 C. & P. 80. So where the demand was for the proceeds of milk sold daily to customers by the defendant as agent to the plaintiff, and it appeared that the course of dealing was for the defendant to pay the plaintiff every day the money which she had received without any written voucher passing, it was ruled that it was to be presumed that the defendant had in fact accounted, and that the *onus* of proving the contrary lay on the plaintiff. *Evans v. Birch*, 3 Camp. 10. So where goods have been consigned to a factor to sell on commission, it may be presumed, after a reasonable time [e.g., 14 years], that he has accounted. *Topham v. Braddick*, 1 Taunt. 572. A debt, whether by simple contract or specialty, may be presumed to be satisfied from mere lapse of time. Thus, a simple loan 13 years ago may be presumed to be repaid, where no evidence to the contrary is offered. *Cooper v. Turner*, 2 Stark.

497. A similar presumption was held to arise in the case of a promissory note; *Duffield v. Creed*, 5 Esp. 52; see also *In re Rutherford*, 14 Ch. D. 687; 49 L. J. Ch. 654; this was, however, doubted by Abbott, C.J., in *Du Belloix v. Waterpark*, 1 D. & Ry. 16. The production of a cheque drawn by the defendant on his banker, and payable to the plaintiff, with proof that plaintiff indorsed his name upon it, and that it had been paid, affords *primâ facie* evidence of payment to him. *Egg v. Barnett*, 3 Esp. 196; *Boswell v. Smith*, 6 C. & P. 60. So the drawing of a cheque by A. in favour of B., and payment of it to B., was held proof of payment by A. to B., without showing that A. gave it to B. *Mountford v. Harper*, 16 L. J. Ex. 184; 16 M. & W. 825; correcting the decision in *Lloyd v. Sandilands*, Gow, 16. The strength of evidence such as that in the cases last cited must necessarily vary with the character of the debt, the mode in which it has been contracted, the position of the parties, and other similar circumstances. As if the party producing the instrument were fellow-lodger or clerk to the original holder, or his near relation, or in any position where he might easily possess himself of the document. Where S. proved that he lent B. a cheque on his bankers for £100, and produced the cheque crossed with the names of B.'s bankers, and showed that £100 had been paid to the account of B. the day after the cheque became due; but it appeared that the papers of B., after he became bankrupt, fell into the hands of S. it was held that there was no presumption that the amount of the cheque had been paid to B. *Bleasby v. Crossley*, (1826) 4 L. J. (O. S.) C. P. 136; 3 Bing. 430. In an action by indorsee against acceptor, to which defendant pleaded payment, the plaintiff produced the bill on which a receipt was indorsed; proof was given that an unknown person had, after dishonour by the defendant, paid the amount to a holder, and taken it away with the receipt indorsed: held, that this was no evidence of payment by the defendant. *Phillips v. Warren*, 14 L. J. Ex. 280; 14 M. & W. 379.

Although a limitation of actions on bonds, &c., is now provided for by stat. 3 & 4 W. 4, c. 42, yet a reference to the cases under the former law will still be occasionally necessary or convenient. Payment of a bond is presumed after 20 years without demand made: *Oswald v. Legh*, 1 T. R. 270; *Bostock v. Hume*, 7 Man. & G. 893; and even after the lapse of a less time, if other circumstances concur to fortify the presumption, as a settlement of accounts in the meantime. *S. C. Colsell v. Budd*, 1 Camp. 27. The presumption may be rebutted by circumstances, as by the defendant's admission of the debt, or by proof of payment of interest within 20 years. So by proof that the defendant has resided abroad during the whole of the time; *Newman v. Newman*, 1 Stark. 101; *Elliott v. Elliott*, 1 M. & Rob. 44; or was insolvent; *Fladong v. Winter*, 19 Ves. 196; see *Hull, Mayor of, v. Horner*, Cowp. 109, and 3 Man. & Ry. 118, n., where the origin of the doctrine of 20 years' presumption is discussed. But see *Willaume v. Gorges*, 1 Camp. 217, *contra*.

On the ground that they are against the obligee's interest, indorsements on a bond made by the deceased obligee, acknowledging the receipt of interest within 20 years, have been admitted to rebut the presumption of payment of principal, provided there be evidence that such indorsements existed before the presumption of payment arose. *Searle v. Barrington (Lord)*, 2 Stra. 826; *Rose v. Bryant*, 2 Camp. 322; *Gleadow v. Atkin*, 1 Cr. & M. 421. But where the indorsement was made after the lapse of 20 years it was not admissible in evidence; *Turner v. Crisp*, cited Stra. 827. Since *Ld. Tenterden's Act* (9 G. 4, c. 14), s. 3, indorsements of this kind are no longer sufficient to prevent the operation of the Statute of Limitations in the case of bills, notes, and other simple contracts within the provisions of that statute; but they may still be admissible for other purposes, as to rebut the presumption of payment of principal; and as the Act of 9 G. 4 seems to contemplate only "writings" within the old Statute of Limitations, and no similar provision is contained in the stat. 3 & 4 W. 4, c. 42, indorsements on bonds and specialities may still be available to exempt the debt from the

operation of the statute, by constituting evidence of part payment under sect. 5 of the last Act. If so, it may be a question whether, notwithstanding the decisions mentioned under the last head respecting the presumption in favour of the dates which instruments purport to bear, some extrinsic evidence ought not to be given that the indorsements were really made at the date thereof, or at least *before* the time of limitation had lapsed. See the observations in 1 Taylor, Evid., 10th ed., §§ 690—696A. The preponderance of authority is at present against the admission of such indorsements without extrinsic proof of the date. An indorsement, made within 20 years, of the payment of interest within 20 years, is sufficient to rebut the presumption, though the interest accrued beyond 20 years. *Sanders v. Meredith*, 3 M. & Ry. 116. An indorsement on a note, payable after demand, of the payment of interest, is evidence of the note having become payable by a demand having been made. *In re Rutherford*, 49 L. J. Ch. 654; 14 Ch. D. 687.

Presumption of property.] Proof of the possession of land, or of the receipt of rent from the person in possession, is *prima facie* evidence of seisin in fee. The owner of the fee simple is presumed to have a right to the minerals; but that presumption may be rebutted by non-enjoyment, and by the user of persons not the owners of the soil. *Rowe v. Grenfel*, Ry. & M. 396; *Rowe v. Brenton*, 5 L. J. Q. B. 137; 8 B. & C. 737. Payment of a small unvaried rent for a long series of years [*e.g.*, 38] to the lord of a manor, raises the presumption that the rent is a quit rent, and not rent service. *Doe d. Whittick v. Johnson*, Gow, 173. *Sed qu.* see *Hardon v. Heskeith*, 4 H. & N. 175; 28 L. J. Ex. 137. But long-continued payment by one lord of a manor to another lord is not presumptive evidence that one manor was originally part of the other. *Anglesey (Marquis) v. Hatherton (Lord)*, 12 L. J. Ex. 57; 10 M. & W. 218. In ejectment for a mine, a former recovery in trover for lead dug out of it does not *per se* afford evidence of the plaintiff's then possession of the mine. B. N. P. 102. The owners of contiguous houses have no presumed right of mutual support. It must be claimed by actual or implied grant or reservation. 2 Roll. Ab. 564, I. 50; *Partridge v. Scott*, 7 L. J. Ex. 101; 3 M. & W. 220; and see *Dalton v. Angus*, 6 App. Cas. 740; 50 L. J. Q. B. 689. But it is otherwise in the case of the ownership of adjoining land in its natural state. Roll. Ab. *supra*, and cases cited in *Humphries v. Brogden*, *infra*. So where the surface and the subsoil are vested in different owners, the presumption is that the owner of the surface has a right to the support of the subsoil. *Humphries v. Brogden*, 20 L. J. Q. B. 10; 15 Q. B. 739, and judgment, *Id.* In all these cases the presumption may be displaced or reversed by proof of express covenants between the parties, or by implied obligations arising out of the original circumstances under which the property became divided. See *Richards v. Rose*, 9 Ex. 218; 23 L. J. Ex. 3.

Presumption of grants, &c.] It is a rule of prescription that "'antiquity of time justifies all titles and supposeth the best beginning the law can give them.'" So that if evidence be given, after long enjoyment of property to the exclusion of others, of such a character as to establish that it was dealt with as of right as a distinct and separate property in a manner referable to a possible legal origin, it is presumed that the enjoyment in the manner long used was in pursuance of such an origin, which, in the absence of proof that it was modern, is deemed to have taken place beyond legal memory." *Johnson v. Barnes*, L. R. 7 C. P. 592, 604; 42 L. J. C. P. 259; L. R. 8 C. P. 527. Thus, independently of the statute 2 & 3 W. 4, c. 71, for shortening the time of prescription, evidence of the adverse enjoyment of an easement (as of lights or a way) for 20 years or upwards, unexplained, is held to afford a presumption of a grant or other lawful title to enjoy it. *Lewis v. Price*, 2 Wms. Saund. 175 a; *Campbell v. Wilson*, 3 East, 294; *Livett v. Wilson*, 3 L. J. (O. S.) C. P. 186; 2 Bing. 115. But the presump-

tion "only applies where the enjoyment cannot otherwise be reasonably accounted for." *Gardner v. Hodgson's Kingston Brewery Co.*, [1903] A. C. 229; 72 L. J. Ch. 558, per Ld. Lindley; *Lyell v. Hothfield (Lord)*, 84 L. J. K. B. 251; [1914] 3 K. B. 911. The uninterrupted possession of a pew for 36 years has been held to afford a presumption of title by faculty or otherwise. *Rogers v. Brooks*, cited 1 T. R. 431, n. See also *Halliday v. Phillips*, [1891] A. C. 228; 61 L. J. Q. B. 210. So the use for over 40 years of a sign board attached to an adjacent house is evidence of a grant of the easement to keep it there. *Moody v. Steggles*, 48 L. J. Ch. 639; 12 Ch. D. 261. Exclusive possession of a stream of water in any particular manner for 20 years is presumptive evidence of right in the party enjoying it, derived from a grant, or, if need be, an Act of Parliament. *Bealey v. Shaw*, 6 East, 215. See *Mason v. Hill*, 5 B. & Ad. 1; *Magor v. Chadwick*, 9 L. J. Q. B. 159; 11 Ad. & E. 571; *Ivimey v. Stocker*, L. R. 1 Ch. 396; 35 L. J. Ch. 467. So from 20 years' enjoyment the jury may presume a grant of the right of landing nets on another's ground to the owners of a fishery. *Gray v. Bond*, 2 Br. & B. 667. When rights of common and estovers have been enjoyed for many years by the freehold tenants of a manor, and also by the inhabitants, the latter will be presumed to claim through the former, so as to have acquired a legal origin for the right. *Warrick v. Queen's College, Oxford*, L. R. 6 Ch. 716; 40 L. J. Ch. 780. So where a borough corporation had by prescription a several oyster fishery in an estuary, and the free inhabitants of ancient tenements in the borough from time immemorial, without interruption and claiming as of right, exercised the privilege of dredging for oysters without stint during a portion of the year, it was held that the right of the corporation must be presumed to have been granted to them, subject to a trust or condition in favour of such inhabitants, in accordance with the usage. *Saltash Corporation v. Goodman*, 7 App. Cas. 633; *Haigh v. West*, 62 L. J. Q. B. 532; [1893] 2 Q. B. 19. See *Tilbury v. Silva*, 45 Ch. D. 98; *Harris v. Chesterfield (Earl)*, 80 L. J. Ch. 626; [1911] A. C. 623. In order, however, to establish the presumption of a grant of an easement, it must appear that the enjoyment was with the acquiescence of him who was seized of an estate of inheritance; for a tenant for life or years has no power to grant such right, except as against himself. *Barker v. Richardson*, 4 B. & A. 579; *Daniel v. North*, 11 East, 372. And in order to make the enjoyment evidence as against a reversioner, there must be evidence against him of acquiescence distinct from the mere enjoyment of the easement. S. C. But if the easement existed previously to the commencement of the tenancy, the fact of the premises having been for a long time in the possession of a tenant will not defeat the presumption of a grant. *Cross v. Lewis*, 2 L. J. (O. S.) K. B. 136; 2 B. & C. 686. As to presumption of a grant of support of land from subjacent strata, see *Clippens Oil Co. v. Edinburgh Water Trustees*, [1904] A. C. 64; 73 L. J. P. C. 32. As to that of lateral support for a building, see *Dalton v. Angus*, 50 L. J. Q. B. 689; 6 App. Cas. 740. So of access of air thereto, see *Bass v. Gregory*, 25 Q. B. D. 481; 59 L. J. Q. B. 574.

As a jury will be at liberty to negative a grant, unless some probable evidence of one is laid before them, the title by lost grant cannot always be relied on. See *Norfolk (Duke) v. Arbutnot*, 5 C. P. D. 390; 49 L. J. C. P. 782. Such grant cannot be presumed where it would have been in contravention of a statute. *Neaverson v. Peterborough Rural Council*, [1902] 1 Ch. 557; 71 L. J. Ch. 378. The stat. 2 & 3 W. 4, c. 71, while on the one hand it confers a new title by uninterrupted enjoyments, and so dispenses with the necessity of presuming grants, on the other hand enacts (sect. 6) that in the cases therein provided for (that is, cases of easements and profits à prendre) no presumption shall be made in support of a claim on proof of enjoyment for a less period than the number of years specified in the Act.

Charters and grants from the Crown may be presumed from length of

possession (as, for instance, 100 years), not merely in suits between private parties, but even against the Crown itself, if the Crown be capable of making the grant. *Hull (Mayor) v. Horner*, Cowp. 102; *Jenkins v. Harvey*, (1835) 5 L. J. Ex. 17; 1 C. M. & R. 877. Even where there is no person competent to make an indefeasible grant, an Act of Parliament may be presumed in favour of very long user. *Lopes v. Andrews*, 3 M. & Ry. 329; 5 L. J. (O. S.) K. B. 46. But "no judge would venture to direct a jury that they could affirm the passing of an Act of Parliament within the last 250 years, on an important subject of general interest, of which no vestige can be found on the Parliament Rolls or other records, or in the history of the country": and the court accordingly refused to presume any Act sanctioning a mode of nominating by the Crown to a deanery, which was shown to have begun in the sixteenth century, and to have continued, without interruption, for the last 250 years. *R. v. S. Peter's, Exeter*, 12 Ad. & E. 512; and see a like opinion expressed in *A.-G. v. Ewelme Hospital*, 17 Beav. 366; 22 L. J. Ch. 846. See also *Chilton v. London Corporation*, 7 Ch. D. 735; 47 L. J. Ch. 433; and *Neaverson v. Peterborough Rural Council*, *supra*. See also cases of presumption arising from long possession mentioned *arguendo* in *Tenny v. Jones*, 10 Bing. 78; *Doe d. Millett v. Millett*, 17 L. J. Q. B. 202; 11 Q. B. 1036; *Lyon v. Reed*, 13 L. J. Ex. 377; 13 M. & W. 285. The circumstances may negative the presumption of the grant, notwithstanding long user, *e.g.*, where the enjoyment has been under a void charter. *A.-G. v. Horner*, 14 Q. B. D. 245; 54 L. J. Q. B. 227. Where by an Act of Will. 3 certain corporation land was set apart for a burial ground, which was afterwards consecrated, it was held that a conveyance of the land from the corporation might be presumed. *Campbell v. Liverpool Corporation*, L. R. 9 Eq. 579. And where a grant is presumed from long enjoyment enrolment of the grant may, if necessary, also be presumed. *Haigh v. West*, 62 L. J. Q. B. 532; [1893] 2 Q. B. 19.

Where the origin of the possession is accounted for without the aid of a grant or conveyance, and it is consistent with the fact of there having been no conveyance, it requires stronger evidence than mere possession to warrant a jury in saying that any conveyance has been executed. *Doe d. Fenwick v. Reed*, 5 B. & Ald. 232. User of land is evidence of a grant thereof only where the user would otherwise be illegal; where the user is referable to an existing easement, there is no presumption of such grant. *Lee Conservancy Board v. Button*, 12 Ch. D. 383, 406, 409; 6 App. Cas. 685. Where there is no evidence of the right to an easement, except *mere user*, without any trace of the commencement of it, it is evidence of a title by prescription rather than by grant. *Blewett v. Tregonning*, 4 L. J. K. B. 223; 3 Ad. & E. 554. A Crown grant of a *profit à prendre* to the inhabitants of a parish, thereby incorporating them, will not be presumed if the presumption is inconsistent with the past and existing state of things, and there is no trace of such a corporation having existed. *Rivers (Lord) v. Adams*, 3 Ex. D. 361; *Saltash Corporation v. Goodman*, 7 App. Cas. 633, 637. And it seems that a jury ought not to be encouraged to presume a Crown grant from mere user in favour of a party, who might, if he pleased, have produced an authentic enrolment of it, which was shown by his own witnesses to be in existence at the Tower. *Brune v. Thompson*, 4 Q. B. 543. Where the plaintiff claimed, on an *indebitatus* count, a toll by prescription, and proved constant perception of a fixed amount, which the jury found to be unreasonable; held, that the plaintiff was not entitled to recover at all, although the jury found what amount would have been reasonable. S. C. As to presumption of fees, tolls, &c., being payable from long-continued payment of them, see the following cases—*Shephard v. Payne*, 12 C. B. (N. S.) 433; 31 L. J. C. P. 297; 16 C. B. (N. S.) 132; 33 L. J. C. P. 158; *Bryant v. Foot*, L. R. 3 Q. B. 497; 37 L. J. Q. B. 217; *Lawrence v. Hitch*, L. R. 3 Q. B. 521; 37 L. J. Q. B. 209; *Mills v. Colchester Corporation*, 36 L. J. C. P. 210; L. R. 2 C. P. 476; affirmed, L. R. 3 C. P. 575; *Gann v. Free Fishers of Whitstable*, 11 H. L. C. 192; 35 L. J. C. P. 29; *Free Fishers of*

Whitstable v. Foreman, L. R. 4 H. L. 266. User is evidence of extent of a market. *Gingell v. Stepney Borough Council*, [1906] 2 K. B. 468; 75 L. J. K. B. 777.

Mere possession of a lease by the lessor, with the seals cut off, affords no presumption of a surrender in writing under the Stat. of Frauds. *Doe d. Courtail v. Thomas*, 7 L. J. (O. S.) K. B. 214; 9 B. & C. 288.

There is no presumption in favour of the legal obligation of an immemorial burden. *Simpson v. A.-G.*, 74 L. J. Ch. 1; [1904] A. C. 476.

Presumption of the duration of life and survivorship.] The presumption of the duration of life of persons of whom no account can be given, generally ends at the expiration of seven years from the time when they were last known to be living. *Per* Ld. Ellenborough, C.J., *Doe d. George v. Jesson*, 6 East, 84; *Doe d. Lloyd v. Deakin*, 4 B. & A. 433. By stat. 19 C. 2, c. 11, s. 1, in action by lessor or reversioner for the recovery of lands granted or leased for lives, or for years determinable on lives, the *cestuis que vie* shall be accounted to be naturally dead if they shall remain beyond the seas, or elsewhere absent themselves within the realm, by the space of seven years together, and no sufficient or evident proof be made of the lives of such persons: sect. 4 provides for the recovery of the land and mesne profits where the *cestuis que vie* are afterwards shown to have been living. At common law proof by one of a family that many years before a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe d. Banning v. Griffin*, 15 East, 293. Where a person is shown to have been in existence a long time ago, as 100 years, and there is nothing to show whether he died with or without issue, there is no presumption either way. *Per* Cockburn, C.J., in *Greaves v. Greenwood*, 2 Ex. D. 289; 46 L. J. Ex. 252. In shorter periods (as 50 years) inquiry must be made in proper quarters, and from persons likely to know, whether the missing party, A., has been heard of. *Doe d. France v. Andrews*, 15 Q. B. 756; *In re Jackson*, 76 L. J. Ch. 553; [1907] 2 Ch. 354. If those persons say that they have heard of A., the *onus* of proof is shifted, but the party seeking to prove A.'s death may then give evidence to show that their only information is erroneous. *Edmonds v. Prudential Assurance Co.*, 2 App. Cas. 487, 511, 514. Proof that a person sailed in a ship bound for the West Indies two or three years ago, and that the ship has not since been heard of, is presumptive evidence that the person is dead; but the precise time of the death, if material, must depend upon the circumstances of the case. *Watson v. King*, 1 Stark. 121. See also *Doe d. Ashburnham (Lord) v. Michael*, 17 Q. B. 276; 20 L. J. Q. B. 480.

The fact of the party being alive or dead at any particular period within, or at the end of, the seven years, must be proved by the party asserting that fact. *Doe d. Knight v. Nepean*, 2 L. J. K. B. 150; 5 B. & Ad. 86; 2 M. & W. 894, Ex. Ch.; *In re Phene's Trusts*, 39 L. J. Ch. 316; L. R. 5 Ch. 139; *In re Aldersey*, 74 L. J. Ch. 548; [1905] 2 Ch. 181. In a case where a girl of 16 ran away from her father, a small farmer, and was never heard of after 1814, when she left England. Shadwell, V.-C., refused to presume, in 1844, that she had died in 1821; the mere fact of her not having been heard of since 1814 afforded no inference of her death, for the circumstances of her case made it probable that she would never be heard of by her relations. *Watson v. England*, 14 Sim. 28; *Dowley v. Winfield*, 14 Sim. 277; *Bowden v. Henderson*, 2 Sm. & G. 360. In *In re Beasley's Trusts*, 38 L. J. Ch. 159; L. R. 7 Eq. 498; and *In re Henderson's Trusts*, cited *Id.* 499, it was held that where a person had not applied for the payment of an annuity which he had previously received, and on which he was dependent for his support, there was evidence of his death before the payment became due. See also *Hickman v. Upsall*, L. R. 20 Eq. 136; 4 Ch. D. 144; 46 L. J. Ch. 245.

Presumptions as to the continuance of life are not *legal* presumptions, but presumptions of fact only, depending on the circumstances of each case. *Lapsley v. Grierson*, 1 H. L. C. 498; *R. v. Lumley*, L. R. 1 C. C. R. 196; 38 L. J. M. C. 86; *Reg. v. Willshire*, 6 Q. B. D. 366; 50 L. J. M. C. 57. Where N., born in 1829, went to America in 1853, and frequently wrote home till August, 1858, when he wrote from on board an American warship, but from that time nothing was heard about him except that he was entered in the books of the American navy as having deserted on June 16, 1860, while on leave, Giffard, L.J., refused to presume that N. was alive on January 6, 1861. *In re Phene's Trusts*, 39 L. J. Ch. 316; L. R. 5 Ch. 139; *In re Lewes' Trusts*, L. R. 6 Ch. 356; 40 L. J. Ch. 602. See also *In re Walker*, L. R. 7 Ch. 293; 41 L. J. Ch. 219; and *In re Benjamin*, 71 L. J. Ch. 319; [1902] 1 Ch. 723.

Where a husband and wife were carried off the deck of a vessel by the same waves, it was held that there was no inference of *law* as to survivorship from the different sex, age, and state of health of the husband and wife; that the question was, from beginning to end, one of fact; and the difference in strength, age, and in other respects was merely matter of evidence for the jury. *Underwood v. Wing*, 23 L. J. Ch. 982; 4 De G. M. & G. 633; 24 L. J. Ch. 293; affirmed in *Wing v. Angrave*, 8 H. L. C. 183; 30 L. J. Ch. 65; *Re Green's Settlement*, L. R. 1 Eq. 289.

A presumption which juries ought to make is that males under 14 are incapable of sexual intercourse. See *R. v. Waite*, [1892] 2 Q. B. 600; 61 L. J. M. C. 187. The period of gestation is also presumed to be about nine calendar months. The exact limits of variation of this period are not very clearly settled; so that if there were any circumstances from which an unusually short or long period of gestation might be inferred, or if it were necessary to ascertain the period with nicety, special medical testimony would be required. The subject was elaborately discussed in the *Gardiner Peerage Case*, which is reported separately by Le Marchant. See also *Bosvile v. Att.-Gen.*, 56 L. J. P. 97; 12 P. D. 177; and *Gaskill v. Gaskill*, 37 T. L. R. 977. In ordinary cases juries would be directed that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

As to presumption against child-bearing see *In re White*, 70 L. J. Ch. 300; [1901] 1 Ch. 570.

Presumption of regularity of acts, appointments, &c.] The legal maxim here applicable is *omnia præsumentur rite et solenniter esse acta*. Where a feoffment has been proved, livery of seisin may be presumed after 20 years, if possession has gone along with the feoffment; *Biden v. Loveday*, cited 1 Vern. 196; *Rees v. Lloyd*, Wightw. 123; but a less time than 20 years is not sufficient; *Doe d. Wilkins v. Cleveland*, 8 L. J. (O. S.) K. B. 74; 9 B. & C. 864; except as against one who claims under it. *Doe d. Rowlandson, v. Wainwright*, 5 Ad. & E. 520. As to a presumption of the regularity of acts done after a lapse of time without impeachment of them, see the observations in *Williams v. Eytton*, 2 H. & N. 771; 27 L. J. Ex. 176; 4 H. & N. 357; 28 L. J. Ex. 146. A person will not be presumed to have committed an unlawful act; therefore, when performances appeared to have taken place at a theatre, a licence was presumed in an action against a performer for not acting. *Rodwell v. Redge*, 1 C. & P. 220. But where the Act requiring the licence directs that a notice of it shall be painted on the outside of the house, and there is no such notice, it will be presumed, in an action for the penalty, that there is no licence. *Gregory v. Tuffs*, 3 L. J. Ex. 295; 6 C. & P. 271. Generally it may be laid down that illegality is not presumed. *Gleadow v. Atkin*, 2 L. J. Ex. 153; 1 Cr. & M. 418, *per* Bayley, B.; *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 389, *per* Bowen, L.J. Nor is crime. In an action on an accident policy where the evidence in favour of death by accident and by suicide was equally balanced, the presumption against crime determined the case in favour of accident. *Harvey*

v. *Ocean Accident, &c. Corporation*, [1905] 2 Ir. R. 1. A fact may be presumed from the regular course of a public office; thus, where it was proved that the custom-house would not permit an entry to be made, unless there had been indorsement on a licence, it was held (the licence being lost) that from this entry the indorsement might be presumed. *Butler v. Allnutt*, 1 Stark. 222. When a statute enjoins a public officer to make an entry of registration of a deed when brought to him with an affidavit of certain particulars, it must be presumed from such entry being made that the affidavit was left with the deed, as required by the statute; *Waddington v. Roberts*, L. R. 3 Q. B. 579; the deed in this case was a composition deed under the Bankruptcy Act, 1861, s. 192, and the court followed *Grindell v. Brendon*, 6 C. B. (N. S.) 698; 28 L. J. C. P. 333, where the deed was a bill of sale; *Gugen v. Sampson*, 4 F. & F. 974, 976, is to the like effect. In *Mason v. Wood*, 1 C. P. D. 63; 45 L. J. C. P. 76, the court declined to follow these cases, on the ground, apparently, that the statute did not direct the officer not to file the bill of sale without the affidavit. In the case of the post-office, there is a presumption that a letter properly directed and posted will be delivered in due course. See *British & American Telegraph Co. v. Colson*, L. R. 6 Ex. 108; 40 L. J. Ex. 97, per Bramwell, B.; and *Stocken v. Collin*, 7 M. & W. 515. This presumption is, it would seem, to be extended to postal telegrams.

The most common application of this presumption is in favour of the regular appointment of an officer in the execution of his duty. The fact of a person acting in an official capacity as a surrogate, is *prima facie* evidence that he is duly appointed, and has competent authority. *R. v. Verelst*, 3 Camp. 432. So of other public officers; though the appointment must be in writing; as in the case of justices of the peace, constables, &c. *Berryman v. Wise*, 4 T. R. 366; *Doe d. Davy v. Haddon*, 3 Dougl. 310; *Marshall v. Lamb*, 13 L. J. Q. B. 75; 5 Q. B. 115. Where a soldier is employed in recruiting, it will be presumed that he is a duly "attested soldier" within the Mutiny Act. *Wotton v. Gavin*, 16 Q. B. 48; 20 L. J. Q. B. 73. See also *R. v. Hawkins*, 10 East, 211. So in the case of a constable appointed by commissioners under a local Act. *Butler v. Ford*, 2 L. J. Ex. 286; 1 Cr. & M. 662. And the fact is evidence even in his own favour. *S. C.* So, where it is necessary to prove the swearing of an affidavit before a commissioner of one of the superior courts, evidence of his acting as such is sufficient. *R. v. Howard*, 1 M. & Rob. 187. Similar proof of a party's appointment as vestry clerk, *M'Gahey v. Alston*, 2 M. & W. 206; as solicitor, *Berryman v. Wise*, *supra*; as overseer, *Cannell v. Curtis*, 5 L. J. C. P. 43; 2 Bing. N. C. 228; *Doe d. Bowley v. Baines*, 15 L. J. Q. B. 293; 8 Q. B. 1037; or as incumbent of a living, *Radford v. M'Intosh*, 3 T. R. 635—has been held sufficient. The regularity of the constitution of a commission issued by a Bishop under stats. 1 & 2 V. c. 106, s. 77, and 48 & 49 V. c. 54, s. 3, will be presumed. *Barratt v. Kearns*, [1905] 1 K. B. 504; 74 L. J. K. B. 318. But in all these cases the evidence is only presumptive, and may be rebutted, when the regularity of the appointment is a pertinent inquiry.

HEARSAY.

It is a general rule of evidence that declarations of persons not made upon oath are inadmissible evidence of the fact declared; *Spargo v. Brown*, 8 L. J. (O. S.) K. B. 67; 9 B. & C. 935; unless it be by way of admission by a party to the suit. Therefore, hearsay evidence, which is the mere repetition of such declarations upon the oath of a witness who heard them, is excluded. There are, however, certain classes of cases in which hearsay is on various grounds admissible. See *Sturla v. Freccia*, 5 App. Cas. 623; 52 L. J. Ch. 86, per *Ld. Blackburn*.

In questions of pedigree.] In questions of pedigree, oral or written declarations of deceased members of the family are admissible to prove a

pedigree. This exception is founded on the obvious difficulty of tracing descent and the relationship of deceased members of families by any other evidence. Thus, declarations of deceased parents are admissible to prove the legitimacy of their children. So, hearsay is good evidence to prove who is a person's grandfather; when he married; what children he had; or the death of a relation beyond sea, &c. B. N. P. 294-5; *Bridger v. Huett*, 2 F. & F. 35. The declarations of a deceased parent and another relation were admitted to show which of several children born at a birth was the eldest. *Per Reynolds, C.B.*, 12 Vin. Abr. 247; cited 4 Camp. 410. Declarations in a family, descriptions in wills, inscriptions upon monuments, in Bibles or other books, and in registry books, are all admitted, upon the principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion where the mind stands in an even position, without any temptation to exceed or fall short of it. *Whitelocke v. Baker*, 13 Ves. 514; *Higham v. Ridgway*, 10 East, 109; *Berkeley Peerage Case*, 4 Camp. 418. And see the *Slane Peerage Case*, 5 Cl. & F. 23; and the *Vaux Peerage*, *ib.* 526. Entries in a family Bible are admissible in evidence, on the ground that, being in that place, they are to be taken as assented to by those having the custody of the book; proof of the handwriting of the entries is therefore immaterial. *Hubbard v. Lees*, L. R. 1 Ex. 255; 35 L. J. Ex. 169. See also *Berkeley Peerage Case*, 4 Camp. 421; *per Lds. Ellenborough and Redesdale*. It seems, however, that in the case of any other book the entries must be proved to have been made by a member of the family; *Tracy Peerage*, Hubback, *Evid. of Succession*, 673; or that they have been treated by a relative as a correct family memorial. *Hood v. Beauchamp*, 8 Sim. 26. A pedigree which has long hung up in a family mansion is good evidence in such cases; *Goodright d. Stevens v. Moss*, 2 Cowp. 594; or a marriage certificate kept by the family. *Doe d. Jenkins v. Davies*, 16 L. J. Q. B. 218; 10 Q. B. 314. A minute-book of a visitation, signed by the heads of the family, has been admitted, though produced from a private library. *Pitton v. Walter*, 1 Stra. 162. A signed pedigree delivered to the Herald's College by virtue of a commission under which the college was authorised to receive and enrol such pedigrees, was admitted. *Shrewsbury Peerage Case*, 7 H. L. C. 19. So a paper in the handwriting of a deceased member of the family, purporting to give a genealogical account of the family, was held admissible, though never made public by the writer, erroneous in many particulars, and professing to be founded partly on hearsay. *Monkton v. Att.-Gen.*, 2 Russ. & M. 147. So a ring, worn publicly, stating the date of the person's death whose name is engraved upon it. S. C., *Id.* 162. So a description of a party as "daughter and heir" in a deed signed by the party so described. *Doe d. Jenkins v. Davies*, 16 L. J. Q. B. 218; 10 Q. B. 314; *Smith v. Tebbitt*, L. R. P. & D. 354; 36 L. J. C. P. 35. But an old pedigree, professing on the face of it to be compiled from "registers, wills, monumental inscriptions, family records, and history," and going back to a fabulous date, is evidence only so far as it relates to persons presumably known to members of the family, or respecting whom they may have obtained information from other members of the family; whether the mere recognition of a pedigree by a deceased ancestor will make it legitimate evidence (except against claimants under him) is doubtful. *Davies v. Lowndes*, 5 Bing. N. C. 161; 6 M. & Gr. 471, 512, 525. The inscription on a tombstone, or a tablet in a church, is admitted because it is presumed to have been put there by a member of the family cognizant of the facts, and whose declaration would be evidence. *Id.* 512, *per Parke, B.*

The memoranda of a parent have been held good evidence to prove the time of the birth of a child. *Herbert v. Tuckal*, T. Raym. 84, cited by Ld. Ellenborough in *Roe d. Brune v. Rawlings*, 7 East, 290. So the statement of a parent, though written long after the time of birth. *In re Turner, Glenister v. Harding*, 29 Ch. D. 985. But only in a case of pedigree. *Haines v. Guthrie*, 13 Q. B. D. 818; 53 L. J. Q. B. 521. The declaration of a father as to the place of birth of a son was considered inadmissible,

as being a mere question of locality, and not of pedigree, in *R. v. Erith*, 8 East, 542. So, in *Shields v. Boucher*, 1 De G. & Sm. 40, Wilde, C.J., rejected declarations of a relation as to the part of England from which he had originally come; but on moving for a new trial, Knight-Bruce, V.-C., expressed a strong opinion in favour of their admissibility in a case of mere genealogy, and with a view to identify ancestors, and distinguished *R. v. Erith*, *supra*. *Accord. per* Kindersley, V.-C., in *Bauer v. Mitford*, 7 W. R. 570; and declarations of a party, showing that he has or had relations living at A., have been admitted to identify persons whose existence is proved *aliunde*. *Rishton v. Nesbitt*, 2 M. & Rob. 554; *Hood v. Beauchamp*, Hubback, *Evid. of Succession*, 468, cited 1 Taylor, *Evid.*, 10th ed., § 647. The declarations of a party as to *his own* illegitimacy, or place of birth, seem inadmissible except against himself, or those claiming under him by title posterior to the declaration. *R. v. Rishworth*, 2 Q. B. 476; 11 L. J. M. C. 34. Statements by a deceased that he was the father of a posthumous illegitimate child were held admissible in *Lloyd v. Powell Duffryn Steam Coal Co.*, 83 L. J. K. B. 1054; [1914] A. C. 733.

Where statements contained in monumental inscriptions, and declarations made by a deceased relation, were offered in evidence upon the trial of an issue to prove the *ages* of the parties referred to, Tindal, C.J., rejected the evidence; but Ld. Brougham, C., after argument, expressed a very strong opinion in favour of it; and afterwards stated that he had the concurring opinions of Littledale, J., and Parke, J., but, the suit being compromised, no further opinion was delivered. *Kidney v. Cockburn*, 2 Russ. & Myl. 167. An inscription on a tombstone, stating the death of a party at the age of 90, was admitted as evidence of the age. *Rider v. Malbone*, *cor.* Littledale, J., cited *Id.* pp. 169, 170. For other cases in which inscriptions on monuments have been admitted in proof of pedigree, see 1 Taylor, *Ev.*, 9th ed., § 652, and *Shrewsbury Peerage*, 7 H. L. C. 1. An old tracing from an effaced monument has been admitted. *Slaney v. Wade*, 7 Sim. 595. A bill in Chancery by a father, stating his pedigree, was admitted in *Taylor v. Cole*, 7 T. R. 3, n.; but this is contrary to the resolution of the judges in the *Banbury Peerage Case*, 2 Selw. N. P., 2nd ed., 773, and to *Boileau v. Rutlin*, 2 Ex. 665. An *answer* in Chancery, sworn *ante litem motam*, seems unexceptionable as evidence of pedigree incidentally set forth in it; but in the *Wharton Peerage Case*, 12 Cl. & F. 295, an answer, sworn but not filed, was rejected as evidence of pedigree. Proceedings in the sheriff court in Scotland are admissible, when the pedigree is incidentally stated. *Lyell v. Kennedy*, 14 App. Cas. 437. The recital in a family conveyance by a trustee is evidence of parentage. *Slaney v. Wade*, *supra*. An old and cancelled will has been allowed as evidence of the existence and relative ages of certain deceased members of the family from whom both parties derived title. *Doe d. Johnson v. Pembroke (Earl)*, 11 East, 504. The probate of a will is not *primary* evidence for this purpose. *Doe d. Wild v. Ormerod*, 1 M. & Rob. 466; *Dike v. Polhill*, 1 Ld. Raym. 744. The will itself and signature of the testator must be proved, unless the age of the document or other circumstance dispense with such proof: it is said, however, that the "ledger book" or "original rolls" of the Ecclesiastical Court, containing an enrolment of the will, are admissible evidence to prove relationship. B. N. P. 246.

The declarations need not necessarily be contemporaneous with the facts declared. A person's declaration that his grandmother's maiden name was A. B. is admissible. *Per* Ld. Brougham, C., *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 158. Nor is it necessary that the fact declared should be in the personal knowledge of the declarant; thus, the declaration of A. as to what he heard from B. is admissible, if both be relations. S. C. *Id.* 165.

Declarations of the kind above described are strictly admissible only in inquiries relating to descent or relationship, or in tracing the devolution of property. In proving recent events, such as the place of birth, age, death, &c., of a person, where that fact is directly in issue, stricter proof

is required. Thus the declaration of a parent as to the time of a child's birth is not admissible to prove a defence of infancy. *Haines v. Guthrie*, 13 Q. B. D. 818; 53 L. J. Q. B. 521. In peerage cases, also, unusually strict evidence is exacted.

General reputation is good evidence in pedigree cases, e.g., of heirship; *Bridger v. Huett*, 2 F. & F. 35; of marriage, *Evans v. Morgan*, 2 C. & J. 453; *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J. Mat. 217; *Campbell v. Campbell*, L. R. 1 H. L. (Sc.) 201, per Ld. Cranworth; but if it appear on cross-examination or otherwise that the witness is speaking of evidence given him by some individual, even as to the general reputation, the evidence ceases to be admissible. *Shedden v. Patrick*, *supra*.

Whose statements admissible in questions of pedigree.] The hearsay must be from persons having such a connection by blood or marriage with the party to whom it relates, that it is natural and likely, from their domestic habits and connections, that they are speaking the truth and are not mistaken. *Whitelocke v. Baker*, 13 Ves. 514. Declarations by a deceased person as to her own legitimacy are evidence. *Procurator-General v. Williams*, 31 L. J. P. 157. So by a deceased husband as to the legitimacy of his wife, and as to the pedigree of her family, are evidence. *Vowles v. Young*, 13 Ves. 148; *Doe d. Northey v. Harvey*, Ry. & M. 297. So the declaration of a wife as to her husband's family. *Shrewsbury Peerage*, 7 H. L. C. 1. But not the declaration of her father. S. C. Nor the declarations of illegitimate relations. *Doe d. Bamford v. Barton*, 2 M. & Rob. 28; *Crispin v. Doglioni*, 3 Sw. & Tr. 44; 42 L. J. P. 109. The declarations of servants and intimate acquaintance are not admissible. *Johnson v. Lawson*, 2 L. J. (O. S.) C. P. 136; 2 Bing. 86; 9 Moore, 183. The declarations of a deceased person, as to the fact of his own marriage, are evidence. B. N. P. 112; *R. v. Bramley*, 6 T. R. 330. The declarations of a deceased mother as to the non-access of her husband, are not evidence, on grounds of policy. *R. v. Luffe*, 8 East, 193; *Goodright d. Stevens v. Moss*, Cowp. 594. Nor are her declarations, or those of her husband, that her son is the son of another man. *Cope v. Cope*, 1 M. & Rob. 269. But where the non-access is admitted or established, the mother's declarations may be proof of paternity. *Legge v. Edmonds*, 25 L. J. Ch. 125. And her declarations that her child is a bastard, are admissible as evidence of her conduct; *Aylesford Peerage*, 11 App. Cas. 1; and so are those of the putative father; *Burnaby v. Baillie*, 42 Ch. D. 282; although the declarants are alive. Although parents' declarations are not admissible to bastardize a child born after marriage, they are admissible to prove that the child was born before marriage. *Goodright d. Stevens v. Moss*, Cowp. 591; *Murray v. Milner*, 12 Ch. D. 845; 48 L. J. Ch. 775. Before any such declaration can be admitted in evidence the relationship of the declarant by blood or marriage must be established by some proof independent of the declaration itself; it is the duty of the judge to decide whether this relationship is proved; slight evidence will, however, be sufficient. *Plant v. Taylor*, 7 H. & N. 237; 31 L. J. Ex. 289; *Smith v. Tebbitt*, L. R. 1 P. & D. 354; 36 L. J. C. P. 35.

Old depositions in a suit, purporting on the face of them to be made by relations, but not proved *aliunde* to have been so made, were not held evidence in the *Banbury Peerage Case*, 2 Selw. N. P., 2nd ed., 773; *Accord. Davies v. Morgan*, 1 C. & J. 591; but see *Freeman v. Phillipps*, 4 M. & S. 486, where the antiquity of the depositions was held to dispense with such extrinsic proof. Although it is necessary to give evidence *dehors* to connect the persons making them with the family, yet where the question is whether A. be related to C., the declarations of B., who is proved to have been related to A., are evidence to prove C. related to A., without evidence *dehors* to show B. related to C. *Monkton v. Att.-Gen.*, 2 Ruse. & Myl. 156. When the judge has decided that the evidence is sufficient, he may receive the declaration, although the fact of relationship is the very point in issue in the cause; *Doe d. Jenkins v. Davies*, 16 L. J. Q. B. 218; 10 Q. B. 314;

and he is not bound to hear evidence on the *voir dire* to rebut the evidence of relationship. *Hitchens v. Eardley*, L. R. 2 P. 241; 40 L. J. Mat. 70. It is no objection that the person who made the declaration stood *in pari casu* with the person tendering it in evidence. *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 159. In a claim of peerage a widow was admitted to prove declarations of her deceased husband in support of her son's title, though the husband, if living, would have had the right which the declarations went to establish. Cited by Abbott, C.J., in *Doe d. Tilman v. Tarver*, Ry. & M. 141. So declarations are admissible, though they tend to show the declarant's own title at the time, provided there was no *lis mota*; S. C.; *Doe d. Jenkins v. Davies*, *supra*; but in *Plant v. Taylor*, *supra*, it was doubted whether a declaration by a person obviously in his own interest ought to be received. A deposition of a deceased relative taken on a commission of inquiry as to the next-of-kin of a lunatic, is admissible to establish the title of the lunatic's heir-at-law. *Gee v. Ward*, 7 E. & B. 509.

The relative, whose declarations are offered, must be proved to be dead, before they can be admitted in evidence. *Butler v. Mountgarret*, 7 H. L. C. 633. Unless, indeed, from the circumstances, his death may be presumed.

In questions of pedigree post litem motam.] If the declarations were made after a controversy has arisen with regard to the point in question, they are inadmissible. *Berkeley Peerage*, 4 Camp. 401. It is not necessary, in order to exclude the evidence, to show that the controversy was known to the person making the declaration. *Id.* 417; *Reilly v. Fitzgerald*, 6 Ir. Eq. Rep. 348; *Shedden v. Patrick*, 2 Sw. & Tr. 170; 30 L. J. P. 217. The declaration may be admissible though made from interested motives, and in order to prevent future controversy. *Berkeley Peerage*, 4 Camp. 418. The term *controversy* must not be understood as necessarily signifying an existing suit. *Monkton v. Att.-Gen.*, 2 Russ. & Myl. 161; *Butler v. Mountgarret*, 7 H. L. C. 633; *Frederick v. Att.-Gen.*, L. R. 3 P. 270; 44 L. J. Mat. 1. Nor a suit for the same purpose as the suit or proceeding in which the evidence is offered. *Berkeley Peerage*, 4 Camp. 418; *Sussex Peerage*, 11 Cl. & F. 85; see *Shrewsbury Peerage*, 7 H. L. C. 1; and *Davies v. Lowndes*, 6 M. & Gr. 471.

To prove public rights.] Hearsay evidence is admissible where the question relates to matters of public or general interest. The term "interest" here means pecuniary interest, or some interests by which the legal rights or liabilities of a class of the community are affected; and the grounds of admissibility are,—because the origin of such rights is generally ancient and obscure, and consequently incapable of direct proof;—because in local matters all persons living in the neighbourhood, and interested in them, are likely to be conversant with them;—because common rights are naturally the subject of common and public conversation, in the course of which, statements are made, which, uncontradicted, are likely to be true; and thus a trustworthy reputation may arise from the concurrence of many unconnected with each other, and interested in investigating the truth. *Per* Ld. Campbell, in *R. v. Bedfordshire*, 4 E. & B. 541-2; 24 L. J. Q. B. 81. It will be seen from the following illustrations of the rule that all the grounds above enumerated need not exist in order to justify the reception of hearsay; and that, in some instances, other grounds may be adduced in favour of it.

Common reputation is admissible to prove not only public or general rights (*Berkeley Peerage*, 4 Camp. 415; *Weeks v. Sparke*, 1 M. & S. 686; *Morewood v. Wood*, 14 East, 329), but also rights affecting a number of persons, and therefore in the nature of public rights, as a manorial custom; *Denn d. Goodwin v. Spray*, 1 T. R. 466; or the extent of a manor; *Doe d. Padwick v. Skinner*, 3 Ex. 84; or a reputed manor which once existed; *Doe d. Molesworth v. Sleeman*, 15 L. J. Q. B. 338; 9 Q. B. 298; or common by cause of vicinage; *Pritchard v. Powell*, 15 L. J. Q. B. 166; 10 Q. B. 589; or otherwise; *Evans v. Merthyr Tydfil Urban Council*, [1899] 1 Ch. 241; 68

L. J. Ch. 175; or a custom in a borough to exclude foreigners; *semb. Davies v. Morgan*, 1 C. & J. 587; or the boundaries between parishes or manors; *Nicholls v. Parker*, 14 East, 331, n.; a parish modus; *Weeks v. Sparke*, 1 M. & S. 691; *White v. Lisle*, 4 Madd. 215; or parochial chapelry; *Carr v. Mostyn*, 19 L. J. Ex. 249; 5 Ex. 69; a toll traverse; *Brett v. Beales*, M. & M. 416; a ferry; *Pim v. Curell*, 6 M. & W. 234; a county bridge; *R. v. Bedfordshire*, 4 E. & B. 535; 24 L. J. Q. B. 81; a several fishery; *Neill v. Devonshire (Duke)*, 8 App. Cas. 135; or a right of freewarren by prescription over an entire manor, including demesne and tenemental lands; *Carnarvon (Earl) v. Villebois*, 14 L. J. Ex. 233; 13 M. & W. 313. Therefore the declaration of deceased copyholders; or a saving of the right in a private Act for inclosure, *inter alia*, of copyholders' common rights; or a verdict and judgment against a copyholder, are all evidence of such a right of freewarren. S. C., *Id.* A deed between the lord and certain copyholders, ratifying customs claimed by the latter in consideration of a payment to the lord, is evidence as against other copyholders where they set up a general custom negated by the deed. *Semb. Anglesey (Marquess) v. Atherton (Lord)*, 12 L. J. Ex. 57; 10 M. & W. 218. A customary heriot payable by a freeholder of a manor, may be proved by presentments and payments of heriots by other freeholders of the manor. *Damerell v. Protheroe*, 16 L. J. Q. B. 170; 10 Q. B. 20. Reputation is admissible to prove the prescriptive liability of certain landowners to repair a county bridge; for it is a matter of public interest, though private interests are also involved. *R. v. Bedfordshire*, *supra*; overruling *R. v. Wavertree*, 2 M. & Rob. 353.

But to prove a prescriptive right, strictly private, such evidence is not admissible; *Morewood v. Wood*, 14 East, 327; *Richards v. Bassett*, 8 L. J. (O. S.) K. B. 289; 10 B. & C. 657; and *Weeks v. Sparke*, 1 M. & S. 687, where it was allowed in support of a claim of a prescriptive right for the plaintiff, owner of a certain estate, to abridge by tillage the rights of common appurtenant claimed by the defendant and many others is overruled by *Dunraven (Earl) v. Llewellyn*, 15 Q. B. 791; 19 L. J. Q. B. 388, Ex. Ch. (this last case is explained in *Warrick v. Queen's College, Oxford*, 40 L. J. Ch. 780; L. R. 6 Ch. 716, 729). So, reputation as to the exemption of the sheriff of a county from the performance of a public duty, *viz.*, the execution of criminals, was rejected in *Rex v. Antrobus*, 4 L. J. K. B. 91; 2 Ad. & E. 798. Where the boundary of a tenement and a hamlet are proved to coincide, evidence of reputation as to the bounds of the latter is legitimate evidence of the former. *Thomas v. Jenkins*, 6 L. J. K. B. 163; 6 Ad. & E. 525.

On a question whether a certain road was a highway, a copperplate map was produced, in which it was so described; it purported to have been taken by the direction of the churchwardens, and proof was offered that it was generally received in the parish as an authentic map; but Ld. Kenyon rejected the evidence. *Pollard v. Scott, Peake*, 18. So the production of an old printed map of a county from the custody of a county magistrate, who had it some years in his possession, does not make it admissible to prove the bounds of the county. *Hammond v. Bradstreet*, 10 Ex. 390; 23 L. J. Ex. 332. If, however, such a map had been supported by proof of its compilation by persons having particular means of knowledge of the bounds, or had been in some way sanctioned publicly as authentic, it might have been admissible as reputation; otherwise there is no reason for attaching more value to an engraved map than to a printed book as evidence of its contents; nor does the current use of it by those who reside in the district delineated in it imply an assent to all its details. The tithe commission maps are not, under 6 & 7 W. 4, c. 71, s. 64, evidence as to the boundary of land in the case of disputed title. *Wilberforce v. Hearfield*, 5 Ch. D. 709; 46 L. J. Ch. 584. But they are admissible upon an issue raising a question of public or general right. *Smith v. Lister*, 64 L. J. Q. B. 154; and as to the existence of a public road across the land. *Att.-Gen. v. Antrobus*, 74 L. J. Ch. 599; [1905] 2 Ch. 188; so are deposited plans for a light railway across it; *Id.*, 194. But not as to the extent of the public right of way. *Copestake v. West*

Sussex C. C., 80 L. J. Ch. 673; [1911] 2 Ch. 331. The maps of the Ordnance survey are evidence of the existence of a visible track across the land. *Att.-Gen. v. Antrobus*, *supra*; *Att.-Gen. v. Meyrick*, 79 J. P. 515. An old map commonly used at a manor court to define the limits of copyholds, is not evidence of a highway, though ways may be indicated upon it; especially if it does not purport to describe them as public ways. *Pipe v. Fulcher*, 1 E. & E. 111; 28 L. J. Q. B. 12; *Att.-Gen. v. Horner* (No. 2), 82 L. J. Ch. 339; [1913] 2 Ch. 140.

A public meeting called for the purpose of considering about repairing a way, at which several present signed a paper stating that it was not a public way, is evidence, though slight, against the right. *Barracrough v. Johnson*, 7 L. J. Q. B. 172; 8 Ad. & E. 99. Even where general reputation is evidence, yet the tradition of a particular fact is not; as that a house once stood in a particular spot. *Ireland v. Powell*, Peake, Evid. 15; *Mercer v. Denne*, 74 L. J. Ch. 723; [1905] 2 Ch. 538. Nor is reputation admissible evidence of a farm modus. *Pritchett v. Honeyborne*, 1 Y. & J. 135. Where a question of public way was in issue, the declarations of a deceased occupier of land made whilst planting a tree, that he planted it to show the boundary of the road, are not evidence of the public right, for it is not a statement of general reputation but of a particular fact. *R. v. Bliss*, 7 L. J. Q. B. 4; 7 Ad. & E. 550; *R. v. Berger*, 63 L. J. Q. B. 529; [1894] 1 Q. B. 823. The declarations of a deceased lord of the manor as to the extent of the waste are not evidence in extension of it. *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919. Where the question was whether a place was within the limits of a hundred, ancient entries of orders of justices in sessions stating the place to be within such limits, were held to be evidence of reputation, though the justices were not proved to have been resident within the hundred or county. *Newcastle (Duke) v. Broxtowe*, 2 L. J. M. C. 47; 4 B. & Ad. 273. The question being whether certain land is in the parish of A. or B., ancient leases, in which they are described as lying in parish B., are evidence that the land is in that parish. *Plaxton v. Dare*, 8 L. J. (O. S.) K. B. 98; 10 B. & C. 17. In *assumpsit* for tolls by a lessee of the corporation of Cambridge, an old deed of composition between it and the University, recognising the right, was admitted in behalf of the plaintiff, though not proved to have been acted upon. *Brett v. Beales*, M. & M. 416. *Aliter* of a mere award, not proved to have been acquiesced in. S. C. So an award *inter alios* is not evidence, as reputation, of the boundary of a parish and county. *Evans v. Rees*, 9 L. J. M. C. 83; 10 Ad. & E. 151; *Wenman v. Mackenzie*, 25 L. J. Q. B. 44; 5 E. & B. 447. The finding of a jury to ascertain the bounds of adjoining manors, is evidence of such bounds. *Brisco v. Lomax*, 7 L. J. Q. B. 1482; 8 Ad. & E. 198. But an interlocutory order containing only a provisional arrangement between the parties, is not evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. Generally, a verdict, and judgment thereon, in a matter in which reputation is admissible evidence, is also admissible; so of a decree, or inquest of office lawfully authorised. Reputation alone is said to be evidence of the existence of a manor; *Steel v. Prickett*, 2 Stark. 463; but it seems that some foundation should be laid by proof of acts done, as holding courts, &c.; and the production of a deputation to kill game is not of itself sufficient proof even of a colourable title to a real manor; *Rushworth v. Craven*, M'Cl. & Y. 417; for the lord of a mere reputed manor may grant one.

In cases of rights or customs which are not, strictly speaking, public, but are of a general nature and concern a multitude of persons (as in questions with respect to boundaries and customs of particular districts), it seems that hearsay evidence is not admissible, unless it be derived from persons conversant with the neighbourhood. On the other hand, actual inhabitancy in the place, the boundaries of which are in dispute, is unnecessary. But where the right is strictly public (a claim of highway, for instance), in which all the king's subjects are interested, reputation from any one appears to be receivable, but almost worthless unless it came from persons who are shown

to have some means of knowledge, as by living in the neighbourhood, or frequently using the road in dispute. *Per Parke, B., in Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919; *Doe di. Molesworth v. Sleeman*, 15 L. J. Q. B. 338; 9 Q. B. 298. A document purporting to be a decree of certain persons, the Lord Treasurer and Chancellor of the Exchequer, &c., who had no authority as a court, was held inadmissible evidence as reputation on a question whether the city of Chester, before it was made a county itself, formed a part of the county palatinate, because those personages had from their situations no peculiar knowledge of the facts. *Rogers v. Wood*, 2 B. & Ad. 245. The answers of the tenants of a manor to an old commission of survey issued by the lord, finding the bounds of a manor and his right to wreck, are evidence of the former, but not of the latter, they having no peculiar means of knowledge, and the lord's title to such a franchise not being a matter of public concern. *Talbot v. Lewis*, 4 L. J. Ex. 9; 1 C. M. & R. 495. Such a claim of wreck is one affecting only the interests of the Crown, and not the tenants; and the case differs in that respect from a right of freewarren in *Carnarvon (Earl) v. Villebois*, 14 L. J. Ex. 233; 13 M. & W. 313.

Ancient answers of the customary tenants of a manor, stating the rights of the lord of the manor to all mines within it, are evidence even against the freeholders, for this claim affects all the tenants. *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919. Declarations of old persons concerning the boundaries of parishes and manors have been admitted in evidence, though they were parishioners and claimed right of common on the wastes which their declarations had a tendency to enlarge. *Nicholls v. Parker*, 14 East, 331; *Plaxton v. Dare*, 8 L. J. (O. S.) K. B. 98; 10 B. & C. 17. See also *R. v. Mytton*, 2 E. & E. 557; *S. C. sub nom. Mytton v. Thornbury*, 29 L. J. M. C. 109. Declarations on a question of parochial modus were received, though the deceased was a parishioner, and liable to pay tithe. *Harwood v. Sims*, Wightw. 112; *Deacle v. Hancock*, M'Cl. 85; *S. C.*, 13 Price, 226. So, a written declaration of a deceased corporator was considered to be evidence in support of a custom to exclude foreigners. *Davies v. Morgan*, 9 L. J. (O. S.) Ex. 153; 1 C. & J. 587.

For admission of evidence of reputation, it is not necessary that the fact of user should be shown; *Crease v. Barrett, supra*; although there are cases in which it has been so considered; see *Weeks v. Sparke*, 1 M. & S. 686; *Rushworth v. Craven*, M'Cl. & Y. 417; and it is obvious that such evidence without user will be of little weight.

Such declarations must not have been made *post litem motam*. *R. v. Cotton*, 3 Camp. 444. But where, in a suit as to the custom of a manor, depositions in a former suit relative to a custom of the same manor were offered in evidence, it was held no objection that the depositions taken in the former suit were *post litem motam*, if the two suits were not upon the same custom; and where the former suit was very ancient, it was held unnecessary to prove by intrinsic evidence that the witnesses who made the depositions were in the situation in which they professed to stand, or that they had the means of becoming acquainted with the customs of the manor. *Freeman v. Phillipps*, 4 M. & S. 486; but see *Banbury Peerage Case*, 2 Selw. N. P., 2nd ed. 773.

The declarations of old persons *still alive* cannot be admitted as proof of reputation. *Woolway v. Rowe*, 3 L. J. K. B. 121; 1 Ad. & E. 114.

When admissible as part of the transaction.] When hearsay is introduced, not as a medium of proof in order to establish a distinct fact, but as being in itself a part of the transaction in question, and explanatory of it, it is admissible. Words and declarations are admissible when they accompany some act, the nature, object, or motive of which are the subject of the inquiry. 1 Phill. & Arn. Ev., 10th ed. 152, cited by Blackburn, J., *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J. Q. B. 126; and see *Bennison v. Cartwright*, 5 B. & S. 1. In the case of an equivocal act, the accompanying

declarations are often absolutely necessary to show the animus of the actor. Thus, if a debtor leaves home, the intent to avoid his creditors may be shown by his declarations at the time. *Bateman v. Bailey*, 5 T. R. 512. So a payment by a debtor may be explained by an accompanying request to apply it to a certain debt. In a suit for a false representation of the solvency of A. B., whereby the plaintiffs trusted him with goods, their declarations at the time that they trusted him in consequence of the representation are admissible in evidence for them. *Fellowes v. Williamson*, M. & M. 306. So in an action against the drawer of a bill of exchange, what was said by the drawee, on the bill being presented, is evidence for the plaintiff as to want of assets, but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. A letter sent by plaintiff to his indorser with the promissory note on which the maker is sued may be read for the plaintiff to show why it was sent. *Bruce v. Hurly*, 1 Stark. 24; and see *Kent v. Lowen*, 1 Camp. 177. To prove good consideration for a conveyance, the verbal instructions of the alienor to his solicitor to prepare it are good evidence. *Tull v. Parlett*, M. & M. 472. In an action to recover money paid by a bankrupt in contemplation of a bankruptcy, his declarations as to the state of his affairs, made about the time of the transaction, are admissible for the plaintiffs. *Vacher v. Cocks*, M. & M. 353; *Herbert v. Wilcocks*, *Id.* 355, n. So in an action to recover fraudulent payments, answers to letters written by a bankrupt, requesting assistance, may be read to prove the refusal to give assistance, and his consequent knowledge of the state of his affairs. *Vacher v. Cocks*, *supra*. A trader, being in embarrassed circumstances, executed an assignment of all his "effects, stock, books, and book-debts," for the benefit of his creditors: in an action after his death against the assignee, as executor *de son tort*, it was held that a list of creditors, made out by the direction of the assignor about the time of the execution of the assignment, was evidence for defendant for the purpose of rebutting fraud. *Lewis v. Rogers*, 1 C. M. & R. 48. Where felling timber is offered as an assertion of ownership, the declarations of the party so employed, showing ownership in another, are evidence to rebut it. *Per Parke, B., Doe d. Stansbury v. Arkwright*, 5 C. & P. 575.

Declarations are admissible as evidence of feelings, or of suffering: thus, in an action of assault on plaintiff's wife, evidence of what she said immediately on receiving the hurt is admissible for him. *Thompson v. Trevanion*, Skin. 402. The declarations of a wife at the time of her elopement that she fled from terror of personal violence from her husband seem to be evidence against him. See *Aveson v. Kinnaird (Lord)*, 6 East, 193. And there are other cases on the like principle decided in actions for adultery. See *Willis v. Bernard*, 8 Bing. 376. See also *Aylesford Peerage*, 11 App. Cas. 1.

In the *Gardiner Peerage Case* medical men were examined as to their experience of cases of protracted gestation. The commencement of the period of gestation was known to them only through the answers by women to questions relating to their sexual intercourse, menstruation, quickening, and other similar facts. Those answers were held inadmissible. *Le Marchant's Rep.*, 174—6. See, however, *Bosville v. Att.-Gen.*, 12 P. D. 177; 56 L. J. P. 97, where medical men gave, without objection, evidence which was in effect the result of such enquiries. In *R. v. Johnson*, 2 Car. & K. 354, to ascertain the state of a woman's health a few days before her death, a witness (not medical) was allowed to state the answers of the deceased woman to enquiries made by him.

Statements by a deceased vendor, made at the time of the sale to indicate the land sold, are admissible to identify it. *Parrott v. Watts*, 47 L. J. C. P. 79.

The declarations of a plaintiff made in a conversation with the defendant, if part of the *res gestæ*, are admissible for the plaintiff as part of his evidence. *Hayslip v. Gymer*, 3 L. J. K. B. 149; 1 Ad. & E. 162. But an act done cannot, in general, be qualified by isolated declarations made afterwards,

alio intuitu. Thus the schedule of an insolvent, delivered four months after execution of a deed, was not admissible on behalf of the assignees to show that it was executed with intent to petition. *Peacock v. Harris*, 6 L. J. K. B. 14; 5 Ad. & E. 449. And a declaration by the obligee, as to the application of past payments made to him by the obligor, is not evidence as between the sureties. *Dunn v. Slee*, Holt, N. P. 401. Where general character is in issue, evidence of reputation is admitted. *Foulkes v. Sellway*, 3 Esp. 236.

But not every declaration is receivable in evidence, merely because it accompanies an act done by the speaker. The admissibility of the declaration depends not *merely* on its accompanying an act, but on the light which it throws upon an act which is, in itself, relevant and admissible evidence. See, generally, *R. v. Bliss*, 7 Ad. & E. 550; 7 L. J. Q. B. 4, and *Wright v. Doe d. Tatham*, 7 Ad. & E. 313. A declaration is sometimes receivable *per se as a claim*. Thus, where the plaintiff asserts a right to goods under a sale to him by C., and the defence is that the alleged sale was collusive, defendant's witness may be asked, "Whether he had not heard C. claim the goods after the sale?" Under such circumstances, a *claim* is as much an act done as if C. had taken the goods saying they were his. *Ford v. Elliott*, 4 Ex. 78; 18 L. J. Ex. 447. Where the object is merely to show that inquiries had been made for A. B. without success, the oral statement of his absence by a person at his residence is admissible evidence. *Crosby v. Percy*, 1 Taunt. 364; see, further, *Reg. v. Kenilworth*, 14 L. J. M. C. 160; 7 Q. B. 642. But if it be necessary to show that A. B. is actually out of the realm, such oral statement is not evidence of it. *Robinson v. Markis*, 2 M. & Rob. 375.

Many of the above cases are not strictly instances of hearsay evidence, though commonly so classed. The *res gesta* in each case is original evidence; and the accompanying declaration, being part of it, is also original.

Acts or assertions of ownership.] Under the head of hearsay are usually classed those cases in which expired leases, grants, or other documents of a similar kind actively asserting a right on the part of the maker, have been admitted as evidence of that right in favour of persons claiming under him; they are, in fact, *acts of ownership*, and, as such, evidence of property. Thus, old leases of fishing places by the lord of an adjacent manor are evidence of a right to the bed of the river in favour of those who claim under him. Hale, *De Jure Maris*, p. 35; *Neill v. Devonshire (Duke)*, 8 App. Cas. 135. Where the question was whether certain lands within a manor were subject to a right of common, counterparts of old leases, produced from among the muniments of the lord of the manor, from which it might be inferred that the land was demised by the lord free from such charge, were allowed to be evidence for the plaintiff claiming under him, though possession under the lease was not shown. *Clarkson v. Woodhouse*, 3 Doug. 189; 5 T. R. 412, n.; *Bristow v. Cormican*, 3 App. Cas. 641; *Johnstone v. O'Neill*, 81 L. J. P. C. 17; [1911] A. C. 552. Such counterparts are evidence of seisin, though only executed by the lessees. *Doe d. Egremont (Earl) v. Pulman*, 3 Q. B. 622; *Magdalen Hospital v. Knotts*, 8 Ch. D. 709; 47 L. J. Ch. 726. Old entries of licences on the court rolls of a manor, stating that the lords of the manor had the several fishery in a navigable river, and for certain rents had granted liberty of fishing, were held admissible to prove a prescriptive right in the lords of the manor without proof of payment under the licences; but such evidence is not entitled to much weight unless it be shown that in later times payments have been made under similar licences, or that the lords of the manor have exercised other more recent acts of ownership. *Rogers v. Allen*, 1 Camp. 309; see *Musgrave v. Inclosure Commissioners*, 43 L. J. Q. B. 80; L. R. 9 Q. B. 162; *Att.-Gen. v. Emerson*, [1891] A. C. 649, 658—9. So an old table of tolls, kept by the town clerk of a corporation, by which the lessees of the tolls had always been guided in their collection, is admissible in

favour of the claim of toll by the corporation. *Brett v. Beales*, M. & M. 419; *R. v. Carpenter*, 2 Show. 48. An ancient corporation book containing entries, showing what rents were due to the corporation, was held admissible as showing the exercise of acts of ownership. *Malcolmson v. O'Dea*, 10 H. L. C. 593. See also *Blandy-Jenkins v. Dunraven (Earl)*, [1899] 2 Ch. 121; 68 L. J. Ch. 589. Mere entries in the corporation books of *orders to grant leases*, appointments of commissioners to manage them, &c., have been rejected as evidence. *Brett v. Beales*, M. & M. 429, and S. C., 5 M. & Ry. 433, 436. An old entry of a resolution in the books of an eleemosynary corporation, being lay impropiators of tithes, that the tithe should, on default of payment of the accustomed payment in lieu of tithe, be taken in kind, is not evidence for them against a claim of modus, without proof that tithe in kind had in fact been taken in pursuance of such order. *Att.-Gen. v. Cleeve*, Somerset Sum. Ass. 1841, *per Rolfe*, B. Generally, what any one writes or says in his own favour cannot be evidence for himself or his representative. *Glyn v. Bank of England*, 2 Ves. Sen. 43; *R. v. Debenham*, 2 B. & A. 185. Therefore, entries made by a deceased person, under whom the defendant claims, acknowledging the receipt of his rent for the premises in question, are not admissible for the defendant in proof of his title to them. *Outram v. Morewood*, 5 T. R. 121. On a question whether the appointment of a curate belongs to the vicar or to a corporation, entries in old books belonging to the corporation are not evidence for them. *Att.-Gen. v. Warwick Cor.*, 4 Russ. 222. A survey of a manor, made by the owner, is not evidence against a stranger in favour of a succeeding owner. *Anon.*, Stra. 95. But where A., seised of the manors of B. and C., causes a survey to be taken of the manor of B., which is afterwards conveyed away, and, after a time, there are disputes between the lords of the manors of B. and C. about their boundaries, this old survey may be given in evidence between them. *Bridgman v. Jennings*, 1 Ld. Raym. 734. Property may be identified by the books of the deceased steward of a person from whom both plaintiff and defendant derive title. *Doe d. Strode v. Seaton*, 4 L. J. K. B. 13; 2 Ad. & E. 171.

Mere declarations of right, coupled with no other act, or actual exercise of it proved or presumable, are inadmissible as evidence in favour of the right asserted, except as against those who claim under the declarant.

Declarations of persons having no interest to misrepresent.] On this ground entries by a deceased rector, or vicar, as to the receipt of ecclesiastical dues are admissible for his successor. *Legross v. Levemoor*, 2 Gwill. 529; *Armstrong v. Hewitt*, 4 Price, 218; *Young v. Clare Hall (Master)*, 21 L. J. Q. B. 12; 17 Q. B. 529. Even where the entries have been made by deceased impropriate rectors, they have been admitted as evidence for their successors, though objected to as coming from the owners of the inheritance. *Anon.*, Bunb. 46; *Illingworth v. Leigh*, 4 Gwill. 1618. They are admissible, though the impropriator be a corporation aggregate; therefore, old receipts of tithe by the college of vicars-choral, Exeter, were admitted as evidence for them against a claim of modus. *Short v. Lee*, 2 J. & W. 478. Declarations of a deceased rector are admissible as evidence of the custom of appointing churchwardens in his parish. *Bremner v. Hull*, L. R. 1 C. P. 748; 35 L. J. C. P. 332. The reception of this evidence has given rise to much observation, and is to be regarded as an exceptional case. And it is certain that, as a general rule, the mere *absence of interest* will not make the declarations of a deceased party evidence; *Sussex Peerage*, 11 Cl. & F. 85, 103, 112, 113; *Berkeley Peerage Case*, Id. 109, n., in which cases the declarations made by deceased clergymen were rejected as evidence of marriage, and the ruling of Ld. Kenyon, in *Standen v. Standen*, Peake, 45, was denied.

On a somewhat similar principle the declarations of a testator, before the execution of his will, as to his intentions are admissible to support his will.

Declarations against interest.] In a variety of cases the declarations of

deceased persons (not parties) made against their own interest have been admitted. See the cases collected, *Barker v. Ray*, 2 Russ. 67, n. They are admissible as evidence of all the facts therein stated, though some of them may not have been within the party's own knowledge, for the whole declaration must be taken together. *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919; *Percival v. Nanson*, 7 Ex. 1; 21 L. J. Ex. 1; and see *R. v. Birmingham*, 1 B. & S. 763; 31 L. J. M. C. 63. Thus the time of a child's birth was proved by production of the book of the deceased man-midwife referring to the ledger, in which ledger his charge for attendance was marked as paid, there being also evidence adduced that the work was done. *Higham v. Ridgway*, 10 East, 109; 2 Smith's L. C. 12th ed. 301. It seems that such an entry was admissible, though the party, if living, could not have been examined as being an interested party; *Gleadow v. Atkin*, 1 Cr. & M. 424. *Accord. Short v. Lee*, 2 J. & W. 489. So the book of a deceased mason, containing charges for repair of a bridge, marked as paid, was admitted to prove repairs, and so to fix a parish with an obligation. *R. v. Lower Heyford*, 2 Smith's L. C., 12th ed. 313. An entry by a deceased person, J., "J. W. paid me 3 months' interest," followed by other entries indicating a loan to J. W., is *prima facie* against J.'s interest, and admissible in evidence. *Taylor v. Witham*, 3 Ch. D. 605; 45 L. J. Ch. 798; *The Swiftsure*, 82 L. T. 389.

The statement must be against the interest of the person making it, at the time he makes it. *Ex pte. Edwards*, 14 Q. B. D. 415. An admission by a bankrupt in his statement of affairs, made after the commencement of the bankruptcy, is not after his death evidence against his creditors. S. C.

A letter from a deceased manager of the plaintiff's business, stating that the defendant had sent three cases to the office, and giving details of the transaction under which they were sent, is not admissible, the possibility of pecuniary loss to the manager, in the event of the loss of the cases, being too remote. *Smith v. Blakey*, L. R. 2 Q. B. 326; 36 L. J. Q. B. 156. The day-book and ledger of a deceased broker, debiting himself with the price of shares bought, is not evidence of the purchase, as an entry made against interest, for it might have been to the advantage of the deceased. *Massey v. Allen*, 13 Ch. D. 558; 49 L. J. Ch. 76. The books of a firm cannot be made evidence upon the principle of *Higham v. Ridgway*, *supra*, merely because one member of the firm is dead, unless perhaps it be shown that the entries were made by him or by his personal direction. *In re Fountaine*, 78 L. J. Ch. 648; [1909] 2 Ch. 382.

The admissibility of the book in *Higham v. Ridgway*, *supra*, depended on the pecuniary interest of the deceased, and it is settled that an interest arising from the liability of the party to a prosecution, if his statement were true, is not such an interest as will make his declarations evidence; and for this reason the statement of a clergyman that he had celebrated an irregular marriage was held not to be evidence of the marriage. *Sussex Peerage*, 11 Cl. & F. 85, 107. Nor is the declaration of a party admissible merely because he would, if alive, have been excused from answering questions on the subject. S. C., *Id.* 110. To support the admissibility it must be shown that the statement was to the knowledge of the deceased contrary to his pecuniary or proprietary interest. *Tucker v. Oldbury Urban Council*, 81 L. J. K. B. 668; [1912] 2 K. B. 317, *per* Fletcher Moulton, L.J.

In cases under the Workmen's Compensation Act, 1906, statements by a deceased workman as to his bodily or mental feelings are admissible, but not statements as to the occasion and cause of the injury from which he suffered. *Gilbey v. G. W. Railway*, 102 L. T. 202; *Amys v. Barton*, 81 L. J. K. B. 65; [1912] 1 K. B. 40; *Tucker v. Oldbury Urban Council*, 81 L. J. K. B. 668; [1912] 2 K. B. 317; *Beare v. Garrod*, 85 L. J. K. B. 717.

Entries by a deceased bailiff or steward, charging himself to the amount of money received by him from different persons for the rent of fixed nets on

the foreshore, are admissible to prove that the foreshore was in his master. *Att.-Gen. v. Emerson*, [1891] A. C. 657—8. Similar entries made by him of money received by him from different persons in satisfaction of trespasses committed on the waste are admissible to prove that the right to the soil of the waste was in his master. *Barry v. Bebbington*, 4 T. R. 514. And if the entries be old and the document come from the proper custody, the handwriting need not be proved. *Wynne v. Tyrwhitt*, 4 B. & A. 376. A receiver's entry of a receipt of separate rents from A., due from himself and two others, B. and C., is a proof of payment not only by A., but also by B. and C., although the rents of B. and C. do not appear to have been paid directly to the receiver; *Percival v. Nanson*, 7 Ex. 1; 21 L. J. Ex. 1; and it is enough if a steward's account be signed by a third person for the real steward, where the authority to sign for him appears, on the books containing the arrears, to have been recognised, and the person so signing debits himself with the balance. *Doe d. Ashburnham v. Michael*, 17 Q. B. 276; 20 L. J. Q. B. 480. A bill of lading, signed by a deceased master of a vessel, for goods deliverable to a named consignee, is evidence of property in the consignee, even in trover for the goods against a third person. *Hadow v. Parry*, 3 Taunt. 305. Receipts of rent by a steward, specifying the tenure of the land in respect of which it is paid, have been held evidence of the tenure. *Doe d. Harpur v. Dodd*, 3 Wooddeson Comm. 332. So where the deceased agent of the owner A., of the servient tenement, paid 6d. to A., stating that it was for the lights of the dominant tenement, this was held to be evidence, against a subsequent owner of the latter, of payment of the rent. *Bewley v. Atkinson*, 13 Ch. D. 283; 49 L. J. Ch. 153. In an action against a co-surety for contribution, a receipt given by the deceased creditor, professing to acknowledge a payment by the plaintiff of a sum of money, "originally advanced to E. H.," is evidence not only of the payment, but also of the original advance to E. H. as principal debtor. *Davis v. Humphreys*, 9 L. J. Ex. 263; 6 M. & W. 153.

A declaration by a deceased occupier of land that he rents it under a certain person is evidence of that person's seisin. *Peaceable d. Uncle v. Watson*, 4 Taunt. 16; see also *Carne v. Nicoll*, 4 L. J. C. P. 89; 1 Bing. N. C. 430. The principle is, that occupation being presumptive evidence of a seisin in fee, any declaration claiming a less estate is against the party's presumed proprietary interest; *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919; and, therefore, a declaration by a deceased copyholder that he held only for his life is evidence of such limited interest; *Doe d. Welsh v. Langfield*, 16 M. & W. 497; and such declaration may be proved by production of the official books of an inclosure commission kept under an Act of Parliament, and containing an entry of a claim made by the declarant. S. C. Or, by the recital in a deed to which deceased was a party. *Sly v. Sly*, 2 P. D. 91; 46 L. J. P. 63. But the declaration of a party in possession as to what he heard a third person say is not evidence to cut down his estate, unless he has himself expressed his own belief of the statement. *Trimlestoun v. Kemmis*, 9 Cl. & Fin. 780. A declaration by a person in the management of an estate that he managed for his son is evidence of the son's interest. *De Bode's Case*, 8 Q. B. 208. A deed by a deceased party, shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. *Doe v. Coulthred*, 7 L. J. Q. B. 52; 7 Ad. & E. 235. So a written attornment to L. by a tenant in possession is evidence of L.'s seisin. *Doe d. Linsey v. Edwards*, 5 L. J. Q. B. 238; 5 Ad. & E. 95. Acceptance by A. of an allotment under an inclosure award is evidence that previously the allotment was not A.'s land. *Gery v. Redman*, 1 Q. B. 161; 45 L. J. Q. B. 267.

Land was held by A., B., C., &c., as successive tenants for life, with power to lease for 21 years, reserving the ancient rent. A paper in which the rent of the land was stated, indorsed by A., "a particular of my estate," was held admissible to show what the ancient rent was, for A. had an interest

to make the rent as low as possible, and so increase the fine upon renewal. *Roe d. Brune v. Rawlings*, 7 East, 279. A declaration by a deceased person that he held certain land as tenant at a rent of £20 a year was held to be evidence, in a question of settlement of a pauper, that the rent was over £10 a year. *R. v. Birmingham*, 1 B. & S. 763; 31 L. J. M. C. 63; *Reg. v. Exeter Union*, L. R. 4 Q. B. 341; 38 L. J. M. C. 126.

An oral declaration is as admissible as a written one. S. CC.; *Bewley v. Atkinson*, 13 Ch. D. 283; 49 L. J. Ch. 153.

In a probate suit, where it was alleged that the testatrix had destroyed her will when she was not of sound mind, a statement by her husband, who died before the commencement of the suit, that he did not think she was of sound mind when she destroyed the will, was admitted as being a declaration against his interest, inasmuch as under the will in question he took only a life estate, whereas under a settlement he would, in the events that happened, have been entitled to her estate absolutely. *Fawke v. Miles*, 27 Times L. R. 202.

Entries by a deceased collector of rates, charging himself with the receipt of money, and made by him in the books of his office, are admissible against his surety to prove the receipt. *Goss v. Watlington*, 3 B. & B. 132. The same has been held with regard to the entries of a clerk as against his surety. *Whitnash v. George*, 8 B. & C. 556. Entries in the land-tax collector's book stating A. B. to be rated for a particular house, and his payment of the sum rated, are evidence to show that A. B. was occupier of the premises at the time. *Doe d. Smith v. Cartwright*, Ry. & M. 62. See also *Doe d. Strode v. Seaton*, 4 L. J. K. B. 13; 2 Ad. & E. 171. Entries made by a deceased collector of taxes in a private book, charging himself with the receipt of money, are evidence against a surety of the receipt of the money, though the parties who paid it are alive, and might be called. *Middleton v. Melton*, 10 B. & C. 317.

It seems that the entries of receipts by a deceased accountant are admissible, though the balance may be discharged or be in his own favour. *Rowe v. Brenton*, 3 M. & Ry. 268; *Acc. per Patteson, J., Williams v. Graves*, 8 C. & P. 593. And ancient ministers' accounts, rendered to the lord of the manor, and debiting themselves with the issues and profits of the manor, are admissible in favour of a successor to show the possession of port dues, though the roll shows the account balanced and a quietus at the end of it; per *Ld. Denman, C.J., in Brune v. Thompson*, Car. & M. 34; *Acc. Erskine, J., S. C., Bodmin Sp. Ass. 1842*. Ancient receivers' accounts of a city, though unsigned and in the third person, are admissible on behalf of the city to prove the receipt of port dues. *Exeter (Mayor) v. Warren*, 5 Q. B. 773. Old accounts rendered to the corporation of vicars-choral, Exeter, by their officers, showing receipt of tithe, and balanced by payment, and a quietus, are evidence for them against a modus. *Short v. Lee*, 2 Jac. & W. 464. In *Beaufort (Duke) v. Smith*, 19 L. J. Ex. 97; 4 Ex. 450, accounts rendered to the plaintiff's ancestors, lords of Gower, by his receivers, showing the receipt of a manorial toll on coal exported out of the manor, formed the principal evidence upon which the plaintiff's right to it was established. In *Waddington v. Newton*, Wint. Sum. Ass. 1850, Coleridge, J., admitted the ministers', or receivers', accounts of the bishopric of Winchester, extending from the reign of John to Hen. 8, to show a right of fishery in the lord, by continual receipt of the issues of the fishery, value of fish sold, &c. In *Doe d. Kinglake v. Beviss*, 18 L. J. C. P. 128; 7 C. B. 456, the same series of accounts was tendered to show the lord's ownership of a certain wood, as against the copyholder, who claimed it; for this purpose the lord relied upon entries of receipts on the sale of timber, and also entries in the same roll in which the accountant discharged himself by payment of wages to the woodward of the same wood: the court held the receipt admissible, but not the discharge; and they cited *Knight v. Waterford*, 10 L. J. Ex. Eq. 57; 4 Y. & Coll. 283, in which the accounts of a deceased receiver were admitted to prove the receipt of rent for tithes by the lord

of the manor, but not to prove his liability to pay land-tax and poor-rate on them, by showing that the account had always allowed the amount to the person paying the rent, the two entries being separate and unconnected. *Accord. Whaley v. Carlisle*, 15 W. R. 1183. In *Bullen v. Michel*, 2 Price, 399, certain account rolls of the Abbey of Glaston were tendered to prove payment of tithe by certain lands of the abbey; the account showed receipts by the reeve, and payments out of the moneys received, which accounts were allowed at the foot by the bailiff of the abbey; among the payments were payments in respect of the tithe in question; they were put in evidence by the vicar to disprove a *modus* set up by the defendant, and other land-owners who did not claim under the abbey, but whose claim was shown to be inconsistent with the above payments by the abbey; held admissible both as to charge and discharge, because the two were part of one account, and because the discharge had been allowed by the bailiff of the abbey. *Query*, whether this case can be reconciled with *Doe d. Kinglake v. Beviss*, 18 L. J. C. P. 128; 7 C. B. 456, and *Knight v. Waterford*, 4 Y. & Coll. 283; 10 L. J. Ex. Eq. 57. It is observable on this class of documents that old *computi*, i.e., accountants' rolls, are almost invariably written in the third person, and name the accountant only at the head of the roll, and sometimes refer to *particulars* of the account elsewhere. It is further observable that a distinction has been taken between the public accounts of Crown officers and the accounts of private persons in favour of the superior credit due to the former, as public records.

To show title to a quit rent a party put in evidence a signed rental 100 years old, charging the party signing it, found in the same box with contemporaneous unsigned accounts, the amount of the sum received being the same in both papers; held, that the accounts and rental together were admissible. *Musgrave v. Emmerson*, 10 Q. B. 326; 16 L. J. Q. B. 174.

If the party who made the entry be alive, though out of the jurisdiction of the court so that he cannot be called, the proof or the entry is generally inadmissible. *Stephen v. Gwenap*, 1 M. & Rob. 121; *Spargo v. Brown*, 8 L. J. (O. S.) K. B. 67; 9 B. & C. 935. After the lapse of a long time, the death of the party accounting will be presumed; and in one case the lapse of 55 years was considered enough to dispense with proof of death, although, if alive, he would not have been of an age beyond the ordinary term of human life. *Doe d. Ashburnham (Lord) v. Michael*, 17 Q. B. 276; 20 L. J. Q. B. 480.

Generally the question of admitting statements against interest made by deceased persons occurs where the suit is *inter alios*, and the declarant is a stranger to it; and it has therefore been doubted whether, in a suit by an executor to recover the balance due on an alleged contract for work done, the plaintiff could put in evidence a declaration of the testator to a third person respecting a payment made by the defendant to the testator, in order to prove the liability of the defendant for certain extra work. *Per Jervis, C.J.*, in *Eddie v. Kingsford*, 14 C. B. 759; 23 L. J. C. P. 123. But in *Bradley v. James*, 13 C. B. 822; 22 L. J. C. P. 193, where the plaintiff sued as executor of the payee of a note, he was allowed to rebut the Statute of Limitations by proof of a written acknowledgment made in a book by the testator, of payment of interest on the note by defendant within six years. So, entries on the debtor side of testator's account-book of the receipt of interest on a sum of money for which the executors were suing, were held admissible to prove that the money was lent, and not given, to the defendant, the testator's son. *Peck v. Peck*, 21 L. T. 670. The cases decided on *Searle v. Barrington*, 2 Str. 826, also favour the reception of such declarations. In such cases it must distinctly appear to what the entries refer. *Newbould v. Smith*, 14 App. Cas. 423.

The declarations against interest, of persons who at the time of making them stood in the same situation and interest as the party to the suit, are evidence against that party; thus the declaration of a former owner of plaintiff's land that he had not the right claimed by plaintiff in respect

of it is admissible. *Woolway v. Rowe*, 3 L. J. K. B. 121; 1 Ad. & E. 114. Such declarations are admissible, though the maker is alive and not produced. S. C. So, the landlord's description of property in a former lease is evidence for a third person against a subsequent lessee of the same landlord, but not against a prior lessee. *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919. A declaration in an answer in Chancery by one who has sold property is not evidence against a person claiming under him by a conveyance anterior to the bill filed. *Gully v. Exeter (Bishop)*, 5 Bing. 171. The declarations of tenants are not evidence against reversioners, though their acts are. *Per Patteson, J., Tickle v. Brown*, 5 L. J. K. B. 119; 4 Ad. & E. 369, 378; *Papendick v. Bridgwater*, 5 E. & B. 166; 24 L. J. Q. B. 289; *Blandy-Jenkins v. Dunraven (Earl)*, 68 L. J. Ch. 589; [1899] 2 Ch. 121.

The declarations of parties identified in interest with those against whom they are offered are in the nature of admissions, and as such belong rather to another head of evidence.

Entries, &c., made in the regular discharge of ordinary business or office.] Where an entry or declaration is made by a *disinterested* person in the course of discharging a professional or official duty, it is, in general, admissible after the death of the party making it. Thus a notice, indorsed or served by a deceased clerk in a solicitor's office, whose duty it was to serve notices, is evidence of service. *Doe d. Patteshall v. Turford*, 1 L. J. K. B. 262; 3 B. & Ad. 890; *Doe d. Padwick v. Skinner*, 18 L. J. Ex. 107; 3 Ex. 84; *Reg. v. Dukinfield*, 11 Q. B. 678. The entries in the books of a deceased solicitor in his handwriting relating to a deed prepared by him and executed by a deceased client were good evidence of the execution of the deed. *Rawlins v. Rickards*, 28 Beav. 370. See *Waldy v. Gray*, 44 L. J. Ch. 394; L. R. 20 Eq. 238; *Sly v. Sly*, 46 L. J. P. 63; 2 P. D. 91. But this seems to have been doubted in *Hope v. Hope*, [1893] W. N. 20, where the entries were not made in pursuance of duty. And it must first be shown *aliunde* that the solicitor was authorised to act for the person on whose behalf he purported to act. *Bright v. Legerton*, 30 L. J. Ch. 338; 2 D. F. & J. 606. A receipt signed by a clerk employed by a collector to collect for him proves a payment to the collector himself. *Reg. v. S. Mary, Warwick*, 1 E. & B. 816; 22 L. J. M. C. 109. It should seem on principle that contemporary *oral* declarations so made in course of business may also be admissible. *Per* Ld. Campbell, *Sussex Peerage Case*, 11 Cl. & F. 113; *Semb. acc. per Cur. in Stapylton v. Clough*, 2 E. & B. 933; 23 L. J. Q. B. 5. Whether an oral statement made by a receiver on paying over money is evidence not only of the receipt, but also of the very party from whom it was received, was discussed, but not decided, in *Fursdon v. Clogg*, 10 M. & W. 572. An attorney's bill, with an indorsement upon it, "March 4, 1815, delivered a copy to C. D.," which is proved to be in the handwriting of a deceased clerk, whose duty it was to deliver a copy of the bill, and proved to have existed at the date, was held to be evidence to prove the delivery of the bill. *Champneys v. Peck*, 1 Stark. 404. It has been held that a banker's ledger was receivable in evidence in an action between the assignees in bankruptcy of a customer, and a third party, to show that the customer at a certain time had *no funds* in the banker's hands, without calling the clerks who made the entries therein. *Furness v. Cope*, 6 L. J. (O. S.) C. P. 242; 5 Bing. 114. *Semble*, such evidence would not be admissible to *prove assets*. S. C. But now see the Bankers' Books Evidence Act, 1879. An entry of dishonour of a bill, made by a notary's clerk in the usual course of business, is evidence of the fact of dishonour after the clerk's decease. *Poole v. Dicas*, 4 L. J. C. P. 196; 1 Bing. N. C. 649. In *Marks v. Lahee*, 6 L. J. C. P. 69; 3 Bing. N. C. 408, an entry by a deceased clerk of the plaintiff's attorney, in a daybook, stating a tender by him and refusal by the defendant, was held evidence of a replication to that effect; but there was a previous entry of a *receipt*

by him of the money for the purposes of such tender. Field book entries made by a deceased surveyor for the purpose of a survey, on which he was professionally employed, are admissible. *Mellor v. Walmesley*, 74 L. J. Ch. 475; [1905] 2 Ch. 164; *North Staffordshire Rly. v. Hanley Corporation*, 73 J. P. 477.

Upon the same principle *contemporaneous* entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of goods, are evidence for his master of such delivery. *Price v. Torrington (Lord)*, 1 Salk. 285; *Doe d. Patteshall v. Turford*, 1 L. J. K. B. 262; 3 B. & Ad. 890.

Entries by a deceased doctor in his case book as to the nature of the complaint for which he treated a patient are not admissible as evidence made in the course of business in pursuance of a duty—at all events, where he was not in partnership and did not make the entries in pursuance of any statutory rule or of any binding rule of the profession. *Mills v. Mills*, 36 T. L. R. 772.

To render such entries evidence it must appear that the shopman is dead; that he is abroad, and not likely to return, is not sufficient. *Cooper v. Marsden*, 1 Esp. 1. The entry, too, must be by the person who actually did the act recorded by it. *Polini v. Gray*, 49 L. J. Ch. 41; 12 Ch. D. 438. An entry of goods sold made by a witness on the dictation of A., who had received information of the sale from B., a servant of the vendor, whose duty it was to report the sale to A., was rejected as evidence of the sale, though A. and B. were both dead. *Brain v. Preece*, 11 M. & W. 773. Where a person employed to serve a notice on R. brought back the duplicate notice indorsed as so served, but stated orally that he had delivered it to W., it was held that, after the death of the person serving, it was not competent to give in evidence his oral statement of service on W. *Stapylton v. Clough*, 2 E. & B. 933; 23 L. J. Q. B. 5. The entry must relate to something actually done. *Rowlands v. De Vecchi*, 1 Cab. & E. 10. As to proof of notice of calls made by a public company from the memorandum of a deceased clerk, see *Eastern Union Ry. v. Symonds*, 19 L. J. Ex. 287; 5 Ex. 237. An entry in a letter-book kept by a deceased clerk in the course of duty is secondary proof of the contents of the letter sent, and of the posting of it, if that were the course of business. *Pritt v. Fairclough*, 3 Camp. 305; *Hagedorn v. Reid*, *Id.* 379.

By stat. 7 J. 1, c. 12, a tradesman's shop-books shall not be evidence in any action for wares delivered, or work done, above one year before the bringing of the action, except the tradesman or his executor shall have obtained a bill of debt or obligation of the debtor for his said debt, or shall have brought against him, or his executors, some action for the said debt within a year next after the delivery of the wares, or the work done. The Act is not to extend to traffic, or dealing between merchant and merchant, merchant and tradesman, or tradesman and tradesman, for anything within the compass of their mutual trades and merchandise. This statute seems to recognise the previous admissibility of shop-books; it has been continued by subsequent Acts; but it is of little practical importance, and the admissibility of such books at common law in favour of the tradesman must generally depend on the principles already referred to. See *Symonds v. Gas Light Co.*, 11 Beav. 283.

Entries made by deceased persons in the course of their business, or in discharge of their duty, are admissible only where it is the duty of the deceased both to do the act and to make an entry or record of having done it. *Smith v. Blakey*, L. R. 2 Q. B. 325; 36 L. J. Q. B. 156; *Massey v. Allen*, 13 Ch. D. 558; 49 L. J. Ch. 76; *Mercer v. Denne*, 74 L. J. Ch. 723; [1905] 2 Ch. 538. An entry of a hiring at certain wages in the deceased master's private book, with a memorandum of payment, is inadmissible evidence, *inter alios*: *Reg. v. Worth*, 12 L. J. Q. B. 144; 4 Q. B. 132; for it was neither his duty to make it, nor was he interested in making it in the proper sense of "interest." An entry purporting to be the substance

of a lease made by the lord of a manor, contained in a book of his steward 200 years old, is not evidence of the lease either as secondary evidence or as an entry made in the course of duty or business. *Doe d. Padwick v. Skinner*, 18 L. J. Ex. 107; 3 Ex. 84. See also *Doe d. Padwick v. Wittcomb*, 6 Ex. 601; 20 L. J. Ex. 297; 4 H. L. C. 425.

Entries made in the log of a ship by a deceased mate cannot be used as evidence for her owners in an action brought against them for collision. *The Henry Coxon*, 3 P. D. 156; 47 L. J. Adm. 83.

A book in which a deceased chief rabbi had made an entry of circumcisions performed by him was held inadmissible to prove the age of a Jew, although it was proved that a Jew was ordinarily circumcised on the eighth day after his birth. *Davis v. Lloyd*, 1 Car. & K. 275.

In *Edie v. Kingsford*, 14 C. B. 759; 23 L. J. C. P. 123, Jervis, C.J., stated that declarations "in the course of business" were, while declarations "in the course of duty" were not, receivable in evidence, but the cases, *supra*, recognise no such distinction.

Though a contemporaneous entry made in the course of office, reporting facts necessary to the performance of a duty, may be admissible, yet the statement in it of other extraneous circumstances, however naturally they may find a place in the narrative, is no proof of these circumstances. *Chambers v. Bernasconi*, 3 L. J. Ex. 273; 1 C. M. & R. 347; 4 Tyrw. 531; *Polini v. Gray*, 49 L. J. Ch. 41; 12 Ch. D. 411, 438. A return by a sheriff's officer of an arrest at a specified place is not evidence, *inter alios*, of the place of arrest. *Chambers v. Bernasconi*, *supra*.

ADMISSIONS.

Admissions by a party to the record out of court are evidence, and primary evidence, of the facts so admitted. In an action by M. and his wife, for injuries caused to the wife by defendants' negligence, the defendants were allowed to prove that M. and C., his attorney's clerk, had conspired to suborn false witnesses, as this was an admission, by conduct, of M., that he had a bad case. *Moriarty v. London, Chatham, and Dover Ry.*, L. R. 5 Q. B. 314; 39 L. J. Q. B. 109. The letters of a party may be proved against him without producing the rest of the correspondence on either side. *Barrymore (Lord) v. Taylor*, 1 Esp. 326. But though the express admissions of a party to the suit, or admissions implied from his conduct, are evidence against him, he is at liberty to prove that such admissions were mistaken or untrue, except in the case of estoppel. *Per Bayley, J., Heane v. Rogers*, 9 B. & C. 586. It matters not whether the mistake arose from misapprehension of law or of fact. Thus, it may be shown that the admission was made under an erroneous view of the party's own legal liability; *Newton v. Liddiard*, 12 Q. B. 925; 18 L. J. Q. B. 53; as where defendant made admissions under an impression that provisional committee-men were liable for work done for a company. S. C., *Id.* See also *Bailey v. Macaulay*, 13 Q. B. 815; 19 L. J. Q. B. 73. Such a mistaken impression, however, will not exclude his admission, though it will impair its weight as evidence against him. *Newton v. Belcher*, 9 Q. B. 612; 16 L. J. Q. B. 37. The value of an admission depends on the circumstances under which it was made; where it is a mere inference drawn from facts, the admission goes no further than the facts prove. See *Bulley v. Bulley*, L. R. 9 Ch. 739; 44 L. J. Ch. 79. A letter may be used as an admission, though if taken as a whole it negatives the inference sought to be drawn therefrom. *Brown v. Wren*, 64 L. J. Q. B. 119; [1895] 1 Q. B. 390. An admission that his trade is a nuisance is evidence, though not conclusive, against a defendant. *R. v. Neville*, 1 Peake, 91.

Admissions made with a view to a compromise, and in order "to buy peace," are not evidence against the maker. B. N. P. 236. But an acknowledgment of a party's handwriting, though made pending a treaty

of compromise, is evidence against him. *Waldridge v. Kennison*, 1 Esp. 143. So an admission of facts before arbitrators. *Gregory v. Howard*, 3 Esp. 113. An offer of a specific sum by way of compromise is evidence, unless accompanied with a caution that the offer is confidential, or without prejudice. *Wallace v. Small*, M. & M. 446; *Nicholson v. Smith*, 3 Stark. 128. But generally neither letters written "without prejudice," nor replies to such letters, though not similarly guarded, can be used as evidence. *Paddock v. Forrester*, 3 M. & Gr. 903; *Hoghton v. Hoghton*, 15 Beav. 278, 321; 21 L. J. Ch. 482, 493; *Walker v. Wilsher*, 23 Q. B. D. 335; 58 L. J. Q. B. 501; and see *In re River Steamer Co.*; *Mitchell's Claim*, L. R. 6 Ch. 822. So, where a correspondence has begun with a letter written "without prejudice," that covers the whole correspondence. *Ex pte. Harris*, 44 L. J. Bk. 33. The fact that offers have been made, though "without prejudice," may, however, sometimes be given in evidence for the person making the offer, to show that an attempt has been made to settle the dispute, in order to rebut the suggestion of laches, &c. *Jones v. Foxall*, 15 Beav. 388; 21 L. J. Ch. 725; *Walker v. Wilsher*, 23 Q. B. D. 338, 339; 58 L. J. Q. B. 501, *per* Lindley and Bowen, L.J.J., dissenting from *Williams v. Thomas*, 2 Dr. & S. 29; 31 L. J. Ch. 674. The principle of excluding offers made without prejudice does not apply "unless some person is in dispute or negotiation with another and terms are offered for the settlement of the dispute or negotiation." *Ex pte. Holt*; *In re Daintrey*, 62 L. J. Q. B. 511; [1893] 2 Q. B. 116. Thus it does not apply to a notice by a debtor to his creditor that he is about to suspend payment, when relied on as an act of bankruptcy. S. C. It is the duty of the judge to examine the document and decide whether from its nature it is admissible or not. S. C.

Admissions on compulsory process.] It is no objection to the proof of an admission that it was made under compulsory process; thus, an answer to a bill in Chancery, filed against the defendant by a stranger, may be read against him to show the admission of a particular fact. *Grant v. Jackson*, Peake, 203. The defendant's answer to interrogatories administered by the plaintiff to him in another suit is admissible against him. *Fleet v. Perrins*, L. R. 3 Q. B. 536; 37 L. J. Q. B. 233; L. R. 4 Q. B. 500; 38 L. J. Q. B. 257. But *semb.* the compulsion must not be illegal. *R. v. Garbett*, 1 Den. C. C. 236. See *Reg. v. Cooté*, L. R. 4 P. C. 599; 42 L. J. M. C. 114. The examination of a party before commissioners of bankrupt is evidence against him; *Robson v. Alexander*, 1 Moore & P. 448; *R. v. Wheeler*, 2 Moo. C. C. 45; although there was an irregularity in the proceedings which had been waived by the appearance of the bankrupt for examination; *R. v. Widdop*, L. R. 2 C. C. R. 3; 42 L. J. M. C. 9; or though part only of his deposition was noted down; *Milward v. Forbes*, 4 Esp. 172; or though the compulsory power was exercised on irrelevant matters. *Stockfleth v. De Tastet*, 4 Camp. 10. Testimony given in court may be used in an action against the witness, though he was prevented from entering into an explanation of the circumstances under which the fact took place, it being irrelevant. *Collett v. Keith (Lord)*, 4 Esp. 212. So testimony on process to compel attendance before the House of Commons. *R. v. Merceron*, 2 Stark. 366. See observation in *R. v. Gilham*, 1 Moo. C. C. 203. But such compulsory admission is no evidence of an account stated. *Tucker v. Barrow*, 6 L. J. (O. S.) K. B. 121; 7 B. & C. 623.

Admission of the contents of documents.] Though the contents of a written instrument cannot in general be proved by a witness without production of it, yet what a party to the record says is *primary* evidence against himself as an admission, though it relates to the contents of a written instrument, and though the contents be directly in issue in the cause. *Slatterie v. Pooley*, 10 L. J. Ex. 8; 6 M. & W. 664; followed by *King v. Cole*, 17 L. J. Ex. 283; 2 Ex. 628; *Fox v. Waters*, 9 L. J. Q. B. 329; 12 Ad. & E. 43. The doctrine has been impugned and regarded as

objectionable; see *Lawless v. Queale*, 8 Ir. L. R. 382; it is, however, established by subsequent cases. Such an admission ought, however, in some cases to have no weight; as where the party relying upon it is manifestly withholding more satisfactory evidence in his own power; or where the admission assumes a degree of knowledge, whether of law or of fact, which the party admitting is not likely to possess; as the construction of a deed of settlement; the contents of a fine or recovery, &c. "If the plaintiff is himself in the box, you may ask him as to the contents of a document, and his answer will be good evidence. . . . Perhaps the judge might say that the document ought to be produced. I should do so myself in some cases." *Per Pollock, C.B.*, in *Farrow v. Blomfield*, 1 F. & F. 653. See also the observations in *Boulter v. Peplow*, 9 C. B. 493; 19 L. J. C. P. 190. To make such oral admission of any value when it relates to a written document, it ought to be clear and distinct; thus where the defendant, in order to show that an expired lease had been renewed by the ancestor of the plaintiff, proved a statement by the ancestor many years ago, that the land had been "new-lived" by him, without more, it was held insufficient. *Doe d. Lord v. Crago* 6 C. B. 90.

A statement made by the plaintiff that his demand for work done had been referred to an arbitrator, who awarded that nothing was due, was admitted as evidence against him. *Murray v. Gregory*, 19 L. J. Ex. 355; 5 Ex. 468. The registered copy of a deed, signed and certified by the plaintiff, was held to be primary evidence of the contents against him. *Boulter v. Peplow*, *supra*. A copy of a document sent by a party is primary evidence against him. See *Stowe v. Querner*, L. R. 5 Ex. 155; 39 L. J. Ex. 60. A machine copy of a letter written by the plaintiff to a third person may be used as an admission on the part of the plaintiff, though not admissible as a letter. *Nathan v. Jacob*, 1 F. & F. 452. An abstract of title containing recitals, which had been relied upon by the defendant in a suit in Chancery, was admitted as evidence against him, in a subsequent action of the matters so recited, without producing the original deeds. *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J. C. P. 161. See also *Reg. v. Basingstoke*, 14 Q. B. 611; 19 L. J. M. C. 28.

The terms of a lease may be proved by oral admissions. *Howard v. Smith*, 10 L. J. C. P. 245; 3 M. & Gr. 254. An oral admission of a debt is evidence on an account stated, though it refers to a written instrument not produced. *Newhall v. Holt*, 9 L. J. Ex. 293; 6 M. & W. 662. A defendant in an action for the recovery of land may prove an admission of the plaintiff that he had sold and assigned his lease to a third person, though such assignment must be in writing. *Doe d. Louden v. Watson*, 2 Stark. 230. A notice signed by partners, stating that the partnership "has been dissolved," is evidence against them of the dissolution, though the partnership was by deed. *Doe d. Waithman v. Miles*, 1 Stark. 181; 4 Camp. 373. It was formerly held that an admission in an answer in Chancery of the execution of a deed was only secondary evidence, and did not supersede the necessity of proving it in the regular way. *Call v. Dunning*, 4 East, 53; *Cunliffe v. Sefton*, 2 East, 187, 188. So with regard to matters of record and judicial proceedings, as the insolvency and discharge of the plaintiff, oral evidence of admissions has been held insufficient. *Scott v. Clare*, 3 Camp. 236. But since the case of *Slatterie v. Pooley*, 6 M. & W. 664, the cases of *Scott v. Clare*, *Call v. Dunning*, *supra*, and other earlier cases are open to question.

Admission by acquiescence.] Admissions may sometimes be presumed from the silence or conduct of a party when certain statements are made. On this ground it is that the uncontradicted statements of any one, made in the presence and hearing of the party against whom they are offered, are evidence. *Bessela v. Stern*, 2 C. P. D. 265; 46 L. J. C. P. 467. But, of course, no inference against him can be reasonably drawn if the fact stated before him be one which is plainly not within his own knowledge,

for he may be unable either to admit or contradict it. The deposition of a witness, taken in a judicial proceeding against a party, is not evidence in another proceeding against that party merely on the ground that he was present, and did not cross-examine or contradict the witness; *Melen v. Andrews*, M. & M. 336; for the nature of a judicial proceeding prevents a party from interposing to contradict or comment on the statement of a witness, as he would in common conversation. *Accord. per Alderson, B.*, in *Short v. Stoy*, Winton Sum. Ass. 1836. Cases, however, may occur, in which the refusal of a person to contradict or cross-examine a witness, even in a judicial proceeding, may be admissible. See *Simpson v. Robinson*, 18 L. J. Q. B. 73; 12 Q. B. 511.

It should be observed that, although silence has been considered to be evidence of assent to a statement made orally in the presence of the party, no such inference can be fairly drawn from the mere omission of a party to reply to a letter; *Felthouse v. Bindley*, 11 C. B. (N. S.) 869, 875; 31 L. J. C. P. 204, *per Willes, J.*; *Richards v. Gellatly*, L. R. 7 C. P. 131, *per Id.*; *Wiedemann v. Walpole*, 60 L. J. Q. B. 762; [1891] 2 Q. B. 534, C. A.; unless sent under circumstances which entitle the writer to an answer. See S. C. C.; *Edwards v. Towels*, 12 L. J. C. P. 239; 5 M. & Gr. 624; *Richardson v. Dunn*, 10 L. J. Q. B. 282; 2 Q. B. 218. A statement which may be, but is not, immediately contradicted without further trouble than an oral denial, may be presumed to be true; but no one is, or ought to be, expected to answer every officious letter that is written to him. Such a letter may sometimes be used as evidence of a demand, and of so much as may explain the demand. Thus, where the plaintiff discovered that he had inadvertently paid a debt to the defendant twice over, and his accountant wrote repeatedly to the defendant, explaining how the mistake arose, and requesting repayment, but the defendant took no notice of the letters, it was held that the letters were all admissible in evidence against him in an action to recover back the payment. *Gaskill v. Skene*, 19 L. J. Q. B. 275; 14 Q. B. 664; and see *Fairlie v. Denton*, 3 C. & P. 103. So in the case of a letter written by A. to B., to which the position of the parties justifies A. in expecting an answer—as where the subject of it is a contract or negotiation before pending between them—the silence of B. may be important evidence against him. See *Lucy v. Mouflet*, 5 H. & N. 229; 29 L. J. Ex. 110; *Pignataro v. Gilroy*, 88 L. J. K. B. 726; [1919] 1 K. B. 459. Where the plaintiff puts in the letter written on his behalf by a third person to the defendant, the defendant is entitled to put in his answer to it, although it states, as a fact, a circumstance which, if true, is a defence to the action, for it shows that that circumstance has been brought under the plaintiff's notice. *Carne v. Steer*, 5 H. & N. 628; 29 L. J. Ex. 281.

The following are also examples of admissions implied from negative conduct or acquiescence:—If A., having title to premises in the possession of B., suffers B. to make alterations inconsistent with such title, it is evidence to go to the jury that A. has recognised the right of B., and has done such acts as are necessary to confirm it. *Doe d. Winckley v. Pye*, 1 Esp. 364; *A.-G. to Prince of Wales v. Collom*, 85 L. J. K. B. 1484; [1916] 2 K. B. 193. So where, upon a building lease of 59 feet, more or less, the lessee took 62½ feet, but the ground taken agreed with the abutments in the lease, and the lessor marked out the ground and saw the progress of the defendant's building without objection, this is evidence of the lessee's title. *Neale d. Leroux v. Parkin*, 1 Esp. 229. And in action for a debt evidence that the plaintiff was an insolvent debtor, and had not inserted the debt in question in his schedule, was an admission, as against him, of its not being due. *Nicholls v. Downes*, 1 M. & Rob. 13. But it was held that the attesting witness of the schedule must be called to prove it. *Streeter v. Bartlett*, 5 C. B. 562. As to which, see, however, *Bailey v. Bidwell*, 13 M. & W. 73.

To this head may also be referred the case in which the depositions or statements of third persons have been held to be evidence against a party who has, on a former occasion, caused them to be made and used them as

true for his own purposes. *Brickhill v. Hulse*, 7 L. J. Q. B. 18; 7 Ad. & E. 454; *Gardner v. Moulton*, 10 Ad. & E. 464; *Richards v. Morgan*, 4 B. & S. 641; 33 L. J. Q. B. 114; and the comments *per curiam* in *Boileau v. Rutlin*, 2 Ex. 665, 679, 680. But in an action by a bankrupt against his assignees to try the validity of his commission, depositions of deceased persons taken under the commission, and enrolled by the assignees, were not evidence against them as admissions by reason of such enrolment. *Chambers v. Bernasconi*, 3 L. J. Ex. 373; 1 C. M. & R. 347.

Receipts.] At common law the acknowledgment in a deed of the receipt of money was conclusive evidence as between the parties to it of such receipt. *Baker v. Dewey*, 1 L. J. (O. S.) K. B. 193; 1 B. & C. 704; *Rowntree v. Jacob*, 2 Taunt. 141. But not where the recital of the deed showed only an "agreement to pay," and the receipt was of money "so paid as above-mentioned," as usual in purchase deeds. *Bottrell v. Summers*, 2 Y. & J. 407; *Lampon v. Corke*, 5 B. & A. 606. Nor was the receipt indorsed on the back of the deed conclusive. *Straton v. Rastall*, 2 T. R. 366. In equity the absence of a receipt at the back of the deed would put a subsequent purchaser on inquiry as to whether the purchase-money had been paid; see *Kennedy v. Green*, 3 Myl. & K. 699; for the land in the hands of a purchaser with notice that the prior purchase-money remained unpaid, or of a volunteer, would be liable to lien for it, notwithstanding the conveyance expressed the consideration to have been paid, and there is an indorsed receipt. S. C.; *Winter v. Anson* (*Lord*), 3 Russ. 488. See notes to *Mackreth v. Symmons*, 2 White & T. Lead. Cases, 8th ed., 946. But now in case of deeds executed after December 31, 1881, the Conveyancing Act, 1881, s. 55, provides that "a receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall, in favour of a subsequent purchaser not having notice that the money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof." This section requires, as was necessary at common law, that there should be an express acknowledgment by the vendor of the receipt of the money. *Renner v. Tolley*, 68 L. T. 815. In general, a receipt not under seal is only a *prima facie* acknowledgment that the money has been paid, and therefore may be contradicted or explained. *Graves v. Key*, 3 B. & Ad. 318. Even though expressed to be "in full of all demands." *Fitch v. Sutton*, 5 East, 230; *Lee v. Lancashire and Yorkshire Ry.*, L. R. 6 Ch. 527; see also *Bowes v. Foster*, 2 H. & N. 779; 27 L. J. Ex. 262. These two last cases overrule *Ainer v. George*, 1 Camp. 392, *cor. Ld.* Ellenborough. See further notes to *Cumber v. Wane*, 1 Smith's L. C.; and as to the effect of a receipt "without prejudice," see *Oliver v. Nautilus Steam Shipping Co.*, [1903] 2 K. B. 639; 72 L. J. K. B. 857. A receipt being given in the settlement of an account may be evidence of sums being allowed on the settlement, and such allowance, being equivalent to the payment of money, cannot be afterwards recovered by the person making the allowance. *Bramston v. Robins*, 5 L. J. (O. S.) C. P. 13; 4 Bing. 11. As between the underwriter and the assured, the acknowledgment in the policy of the receipt of the premium by the broker is conclusive; *Dalzell v. Mair*, 1 Camp. 532; and see *Xenos v. Wickham*, L. R. 2 H. L. 296; 36 L. J. C. P. 313; unless there was a fraud practised by the assured to induce the broker to give credit to him. *Foy v. Bell*, 3 Taunt. 493. If an agent employed to receive money, and bound by his duty to his principal to communicate to him whether the money is received or not, renders an account from time to time which contains an intentional misstatement that the money has been received, he is so far bound by that account that he cannot make his principal refund moneys paid to him on it. *Shaw v. Picton*, 4 L. J. (O. S.) K. B. 29; 4 B. & C. 715; *Skyring v. Greenwood*, 4 B. & C. 281. A receipt may operate as an estoppel in favour of third persons, as where a transferee of a mortgage takes the security with an indorsed receipt, without

notice that the sum purporting to be secured has not in fact been advanced. *Bickerton v. Walker*, 31 Ch. D. 151; 55 L. J. Ch. 227; *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530.

Admissions implied from the acts of the party.] The plaintiff's title to sue, or the character in which the plaintiff sues, or in which the defendant is sued, is frequently admitted by the acts and conduct of the opposite party; and in some cases the admission, though not strictly an estoppel, is conclusive. Thus, if B. has dealt with A. as farmer of the post-horse duties, it is evidence in an action by A. against B. to prove that he is such farmer. *Radford v. M'Intosh*, 3 T. R. 632. And see *Peacock v. Harris*, 10 East, 104. So in an action for slandering the plaintiff in his profession of an attorney, the words themselves, importing that the defendant would have the plaintiff struck off the roll of attorneys, were held to be an admission of the plaintiff's character of attorney. *Berryman v. Wise*, 4 T. R. 366; *Pearce v. Whale*, 5 B. & C. 38; 4 L. J. (O. S.) K. B. 86. So in the case of a libel on the plaintiff as envoy of a foreign state. *Yrisarri v. Clement*, 4 L. J. (O. S.) C. P. 128; 3 Bing. 432. In an action for penalties against a collector of taxes, proof of the defendant having collected the taxes is sufficient proof of his being collector, though the appointment is by warrant. *Lister v. Priestley*, Wightw. 67. Payment of tithes by a parishioner to the plaintiff, is evidence against the former of the plaintiff's title to the living. *Chapman v. Beard*, 3 Anstr. 942. Where an auctioneer has advertised for sale the "property of J. S., a bankrupt," this is evidence of the bankruptcy in an action brought by the assignee against the auctioneer for the proceeds. *Maltby v. Christie*, 1 Esp. 340.

Where A. brings an action against B. to recover possession of land, he thereby admits B.'s possession of the land. *Stanford v. Hurlstone*, L. R. 9 Ch. 116.

Mere subscription of a paper, as witness, is not in itself a proof of his knowledge of its contents. *Harding v. Crethorn*, 1 Esp. 58.

Admission by trustees; or of persons not entitled to the suit, but interested in it.] An admission is evidence whether made by a trustee, or nominal party, who sues for the benefit of another; *Bauerman v. Radenius*, 7 T. R. 664; *Gibson v. Winter*, 2 L. J. K. B. 130; 5 B. & Ad. 96; or by husband in action by him and his wife; *Moriarty v. London, Chatham, and Dover Ry.*, L. R. 5 Q. B. 314; 39 L. J. Q. B. 109; or by the person really interested in the suit, but not named on the record. Thus, in action on a bond conditioned for the payment of money to L. D., the declaration of L. D. that the defendant owes nothing is evidence against the plaintiff. *Hanson v. Parker*, 1 Wils. 257. So in an action by the master of a ship for freight, brought for the benefit of the owner, the admissions of the latter are evidence. *Smith v. Lyon*, 3 Camp. 465. In actions on policies, the declarations of the party really interested are admissible. *Bell v. Ansley*, 16 East, 143. But the statement of a *cestui que trust* is either wholly inadmissible against his trustee, or admissible only as to his own interest, where the trustee holds in trust, not for him only, but for others. Thus, where an action of ejectment was brought by a trustee having the legal estate in fee, and the defendant offered evidence of admissions made by the *cestui que trust* of a particular estate, it was considered doubtful whether such evidence could be received, inasmuch as the interest of the *cestui que trust* was not co-extensive with that of the lessor of the plaintiff, and the declarations were prejudicial to the remainderman. *Doe d. Rowlandson v. Wainwright*, 7 L. J. Q. B. 222; 8 Ad. & E. 691. And according to *May v. Taylor*, 12 L. J. C. P. 314; 6 M. & Gr. 261, in order to make the statements of the *cestui que trust* admissible against the trustee, the interest of the *cestui que trust* ought to be identical with that of the trustee, and it is not enough to prove a subsisting trust without showing the nature and extent of it, or that the *cestui que trust* is the real party to the action, and the nominal party a mere agent.

Admissions by tenants of the existence of rights or easements are not evidence against their landlords. *Papendick v. Bridgwater*, 5 E. & B. 166; 24 L. J. Q. B. 289. But where, in an action of ejectment, one of the defendants defended, in the character of landlord to the other defendants, their admissions were evidence against him. *Doe d. Mee v. Litherland*, 6 L. J. Q. B. 267; 4 Ad. & E. 784.

On an appeal against an order of removal, the admissions of rated inhabitants of a parish are evidence against that parish, for they are the parties really interested. *R. v. Whitley*, 1 M. & S. 636. In an action against the sheriff, the declarations of a party, who has indemnified the sheriff, are evidence against the defendant. *Dyke v. Aldridge*, cited 7 T. R. 665. In trover for a deed, which the defendant detained at the request of W., and in the detainer of which W. was substantially interested, the declarations of W. in favour of the plaintiff's claim were held admissible. *Harrison v. Vallance*, 1 Bing. 45; and see *Robson v. Andrade*, 1 Stark. 372. So the declarations of the party for whose benefit the plaintiff sues on a bill; *Welstead v. Levy*, 1 M. & Rob. 138; or of a party from whom he received the bill or note when overdue, are evidence against the plaintiff. *Beauchamp v. Parry*, 8 L. J. (O. S.) K. B. 367; 1 B. & Ad. 89. Admissions by one of several trustees will not affect his co-trustees where they are not all personally liable. *Davies v. Ridge*, 3 Esp. 101.

The declarations of a party proved to be a joint contractor with the defendant, though not joined in the action, or though *nol-prossed* on a plea of bankruptcy, were admissible. *Grant v. Jackson*, Peake, 203; *Wood v. Braddick*, 1 Taunt. 104. But admissions by co-trespassers, or joint defendants, in actions for *tort*, are not generally evidence except against themselves, unless there be proof of common motive and object, and the declarations relate to them. *Daniels v. Potter*, M. & M. 501; and see the observations in *R. v. Hardwick*, 11 East, 578. Nor are they evidence in actions *ex contractu*, unless they relate to a matter in which there is an identity of interest: thus where the plaintiff in covenant alleged an eviction by two defendants under a prior lawful title, an admission by *one* of the defendants after eviction was held no evidence of such title, although the defendants were co-executors of the covenant, and had joined in the eviction. *Fox v. Waters*, 9 L. J. Q. B. 329; 12 Ad. & E. 43.

An admission by a private individual of a corporation is not evidence against the corporate body. *London (Mayor, &c.) v. Long*, 1 Camp. 23. But where a corporation sues for a disturbance in exercising a corporate office, what is said by the officer respecting the exercise of it is evidence against the corporation. *Id.* 25, *per* Ld. Ellenborough.

Where plaintiff sued as administrator *durante absentia* of the executor, the admissions of the executor were held inadmissible against the plaintiff. *Rush v. Peacock*, 2 M. & Rob. 162. In a suit by assignees of bankrupt, admissions by them before their appointment were received in evidence against them by Tindal, C.J., in *Smith v. Morgan*, *Id.* 257; but they were rejected, by Abbott, C.J., in a previous case of *Fenwick v. Thornton*, M. & M. 51. In *Legge v. Edmonds*, 25 L. J. Ch. 125, letters written by a defendant, sued as administratrix, containing admissions made by her before letters of administration had been taken out, were rejected as evidence against her. When an official manager of a company, appointed under the Winding-up Act, 11 & 12 V. c. 45, was substituted as defendant by order in Chancery, instead of a shareholder D., who had been sued by a creditor of the company "as *nominal defendant*," it was held that the declarations of D., while defendant, were not evidence against the official manager. *Armstrong v. Normandy*, 5 Ex. 409. The decision here turned on the misnaming of D. on the record as "*nominal defendant only*."

Admissions by guardian and prochein amy.] The admissions of a guardian are not evidence against an infant who sues by his guardian. *Cowling v.*

Ely, 2 Stark. 366; *Eggleston v. Speke*, 3 Mod. 258. Nor the admission of *prochein amy*. *Webb v. Smith*, Ry. & M. 106.

Admissions by agents and servants.] Where a party to the suit directly or impliedly constitutes a third person his agent for the purpose of an admission, the admission so made is evidence. Thus, if a person agree to admit a claim, provided J. S. will make an affidavit in support of it, such affidavit is proof against him. *Lloyd v. Willan*, 1 Esp. 178; *Stevens v. Thacker*, Peake, 187. And it is conclusive in an action founded on the special agreement. *Amy v. Andrews*, Freem. 133. But see *Garnet v. Ball*, 3 Stark. 160. So if the vendee of goods deny having received them, but add, "If the carrier's servant says he delivered the goods, I will pay you," the answer of the servant when applied to on the subject may be given in evidence. *Daniel v. Pitt*, 1 Camp. 366, n.; *Williams v. Innes*, *Id.* 364. In an action for the loss of a horse through the defendant's negligence in not fencing a shaft, defendant consented to pay compensation if a miners' jury should say the shaft was his; held, that the finding of such jury was evidence against him of negligence, though not conclusive. *Sybray v. White*, 5 L. J. Ex. 173; 1 M. & W. 435.

With regard to the admissions of agents in general, the rule is this: When it is proved that A. is agent of B., whatever A. does, or says, or writes, in the making of a contract as agent of B., is admissible in evidence against B., because it is part of the contract which he makes for B., and which therefore binds B.; but it is not admissible merely as the agent's account of what has passed. *Per Gibbs, J., Langhorn v. Allnutt*, 4 Taunt. 519. The declaration of a servant employed to sell a horse is evidence to charge the master with a warranty, if made at the time of sale; but statements made at any other time are not admissible against him. *Helyear v. Hawke*, 5 Esp. 72. Where the servant of a horsedealer, who was employed to take a horse to the stables of the purchaser, had signed a receipt containing a warranty, this receipt without proof of the servant's authority to give a warranty was rejected in an action against his master. *Woodin v. Burford*, 3 L. J. Ex. 75; 2 Cr. & M. 391. An admission by a servant, in a transaction not relating to the business in which he is employed, is not evidence against his master. Thus where a pawnbroker's shopman was heard to state that his master had lent £200 at 5 per cent. on the security of certain plate, this was held inadmissible as against the master. *Garth v. Howard*, 1 L. J. (O. S.) C. P. 129; 8 Bing. 451. But if the statement had been made by him in the course of a transaction in the ordinary course of a pawnbroker's business, it would have been different. *Id.* 453; *Schumack v. Lock*, 3 L. J. (O. S.) C. P. 57; 10 Moore, 39. The letters of an agent to his principal, containing a narrative of past transactions in which he had been employed, are not admissible in evidence against the principal. *Kahl v. Jansen*, 4 Taunt. 565; *Fairlie v. Hastings*, 10 Ves. 128; *Betham v. Benson*, Gow. 45. An admission by a person who has generally managed A.'s landed property, and received his rents, is not evidence against A. as to his employer's title, there being no other proof of his agency *ad hoc*. *Ley v. Peter*, 3 H. & N. 101; 27 L. J. Ex. 239. In an action against a surety, the admissions or declarations of the principal, to whom goods have been sent by the plaintiff at the defendant's request, are not evidence against the defendant either as to the receipt of the goods, or as to other facts respecting them. *Evans v. Beattie*, 5 Esp. 26; *Bacon v. Chesney*, 1 Stark. 192.

But a letter from an agent abroad stating the receipt of money, coupled with the answer of the principal directing the disposition of the money, will be evidence of the receipt by the principal. *Coates v. Bainbridge*, 6 L. J. (O. S.) C. P. 220; 5 Bing. 58. And a letter from the master of a ship to her owners has been held admissible against them, with regard to the facts, but not to the opinions therein stated. *The Solway*, 54 L. J. P. 83; 10 P. D. 137. The admissions of an under-sheriff are evidence against a sheriff, for he is the general agent of the sheriff; *Drake v. Sykes*, 7 T. R. 117;

but not unless they accompany an act done, or they tend to charge himself; he being the real party in the cause. *Snowball v. Goodricke*, 2 L. J. K. B. 53; 4 B. & Ad. 541. The admissions of a bailiff are evidence against the sheriff, like the statements of any other agent, only when they form part of the transaction. *North v. Miles*, 1 Camp. 389.

The admissions of a surveyor of a corporation respecting a house belonging to the corporation, are evidence against the latter in an action for an injury to the plaintiff's house by works done on the defendant's premises. *Peyton v. S. Thomas's Hospital*, 3 M. & Ry. 625, n.; 3 C. & P. 363; and see *London (Mayor) v. Long*, 1 Camp. 25; and *R. v. Adderbury (East)*, 13 L. J. M. C. 9; 5 Q. B. 187. Evidence may be given against companies, of admissions made by their directors or agents relating to matters within the scope of their authority. In *Meux's Executors' Case*, 2 De G. M. & G. 522, a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M., was admitted on behalf of his executors, in proceedings against them. See also *National Exchange Co. of Glasgow v. Drew*, 2 Macq. H. L. 103. But a statement made by the chairman of a company incorporated under the Companies Act, 1862, at a general meeting of the company, cannot be used as an admission against the company. In *re Devala Provident Gold Mining Co.*, 52 L. J. Ch. 434; 22 Ch. D. 593. And the secretary of a projected company has not, by virtue only of his office, any power to bind the members of the provisional committee by admissions. *Burnside v. Dayrell*, 19 L. J. Ex. 46; 3 Ex. 224. In *Bruff v. G. N. Ry.*, 1 F. & F. 345, Willes, J., rejected an admission of the secretary of a company as to the receipt of a letter. And an admission by the board meeting of a company registered under 7 & 8 V. c. 110, consisting of a less number of directors than was required by the deed of settlement, was rejected in *Ridley v. Plymouth Baking Co.*, 17 L. J. Ex. 252; 2 Ex. 711. In an action against an incorporated company by one of its members on a bond, entries in a book kept by the clerk of the company, to which all members by the act of incorporation had access, cannot be used against the plaintiff as an admission. *Hill v. Manchester and Salford Waterworks Co.*, 3 L. J. K. B. 19; 5 B. & Ad. 866. Admissions by servants of a company as to the ferocious habits of a dog, were not allowed to bind the company, in the absence of evidence that these servants had the care of the animal. *Stiles v. Cardiff Steam Navigation Co.*, 33 L. J. Q. B. 310. As to admissibility of statements by servants of a railway company with reference to delay in delivery or loss of goods, see *G. W. Ry. v. Willis*, 18 C. B. (N. S.) 748; 34 L. J. C. P. 195; and *Kirkstall Brewery Co. v. Furness Ry.*, L. R. 9 Q. B. 468; 43 L. J. Q. B. 142.

Before the admissions of an agent can be received, the fact of his agency must be proved. This can be done by proving that the agent has acquired credit by acting in that capacity, and that he has been recognised by the principal in other instances of a similar character to that in question. In *Watkins v. Vince*, 2 Stark. 368, a guarantee signed by a son for his father was admitted upon proof of the son having signed for his father upon three or four previous occasions. But in *Courteen v. Touse*, 1 Camp. 43, n., where, in an action upon a policy, a witness proved that he had often seen B. sign policies for the defendant, but was not acquainted with any instance in which the defendant had paid a loss upon a policy so subscribed, it was held that the agency was not sufficiently proved.

A receipt for debt and costs, indorsed by the plaintiff's solicitor's town agent on a writ of summons, is evidence of payment against the plaintiff, without further proof of agency. *Weary v. Alderson*, 2 M. & Rob. 127. Where the statements of a party's agent are admissible, the statements of the agent's interpreter, made while acting as such in the agent's presence, may be given in evidence, without calling the interpreter. *Reid v. Hoskins*, 5 E. & B. 729.

Admissions by partner.] By the Partnership Act, 1890, 53 & 54 V. c. 39,

s. 15, "An admission or representation made by any partner concerning the partnership affairs, and in the ordinary course of its business, is evidence against the firm." After *prima facie* evidence of partnership, the declaration of one partner is evidence against his co-partners as to partnership business; *Nicholls v. Dowding*, 1 Stark. 81; *Grant v. Jackson*, Peake, 203; though the former is no party to the suit. *Wood v. Braddick*, 1 Taunt. 104; but see *Rooth v. Quin*, 7 Price, 198. And it is evidence, though made after the dissolution of partnership, if made as to a transaction which took place before the dissolution; *Wood v. Braddick*, *supra*; but not so as to bind his co-partners as to a transaction which occurred previously to the partnership, unless a joint responsibility be proved as a foundation for the evidence. *Catt v. Howard*, 3 Stark. 3. Admissions made by one of several partners after the dissolution of the partnership, are admissible to prove payment, after the dissolution, of a debt due to the partnership. *Pritchard v. Draper*, 1 Russ. & M. 191. A declaration by one of several partners, joint plaintiffs, that goods, the subject-matter of the suit, were his separate property, is evidence against all the plaintiffs; *Lucas v. De la Cour*, 1 M. & S. 249; but an admission by a partner as to a subject, not of co-partnership, but of *joint ownership* of a vessel, is not admissible against his co-partner. *Jaggers v. Binnings*, 1 Stark. 64. In an action against two partners on a deed purporting to be executed by one defendant "for self and partner," a subsequent acknowledgment of the deed by the other defendant was held not evidence to prove the actual execution by him, without producing the authority under seal. *Steiglitz v. Eggington*, Holt, N. P. 141. But see *Ball v. Dunsterville*, 4 T. R. 313. And in *Harvey v. Kay*, 7 L. J. (O. S.) K. B. 167; 9 B. & C. 356, letters of a member of a joint stock company, admitting that he was a partner in it, were received as proof of that fact, without any evidence of his having executed the deed of settlement by which the company was formed. A statement by one who became partner after the cause of action arose, is not evidence against his co-partner who sues on it. *Tunley v. Evans*, 2 D. & L. 747.

Admissions by wife.] In general, the admissions of a wife will not affect the husband. Thus, the wife's receipt for money, or admission of a trespass, is not evidence against the husband. *Hall v. Hill*, Stra. 1094; *Denn v. White*, 7 T. R. 112. But where the wife can be considered the agent of her husband, her admissions may be received as evidence against him. *Emerson v. Blonden*, 1 Esp. 142; *Anderson v. Sanderson*, 2 Stark. 204; S. C., Holt, N. P. 591. Thus, in an action for goods sold and delivered at the defendant's shop, an offer made by his wife to settle the demand is admissible in evidence, if she were accustomed to serve in the shop, and to transact the business in her husband's absence; *Clifford v. Burton*, 1 L. J. (O. S.) C. P. 61; 1 Bing. 199; and her admission, under such circumstances, will take a case out of the Statute of Limitations. *Pulethorp v. Furnish*, 2 Esp. 511, n. But her admissions are not evidence of the terms of her husband's tenancy of the shop, in a suit for the rent, although she is carrying on business in it by her husband's authority in his absence. *Mcredith v. Footner*, 12 L. J. Ex. 183; 11 M. & W. 202. A wife's declaration that she agreed to pay 4s. a week for nursing a child will charge the husband, it being a matter usually transacted by women. *Anon.*, Stra. 527. In an action against defendant, as administrator of his wife, for money lent to her before marriage, admissions of the debt made by her during coverture are evidence. *Humphreys v. Boyce*, 1 M. & Rob. 140. But in an action by husband and wife for a loan by the wife *dum sola*, her admissions, after coverture, negating the debt, were refused by Ld. Kenyon, C.J. *Kelly v. Small*, 2 Esp. 716. So, where plaintiff sued, with his wife as executrix, her declarations were inadmissible. *Alban v. Pritchett*, 6 T. R. 680. A joint answer in Chancery by husband and wife was not evidence against her, being considered as the answer of the husband alone. *Elston v. Wood*, 2 My. & K. 678. In *Shelberry v. Briggs*, 2 Vern. 249, in a bill against husband and wife for

payment of a legacy under a will, of which the wife was executrix, the answer was admitted against the wife after the death of her husband. See *Wrottesley v. Bendish*, 3 P. Wms. 238. In the case of a wife sued, with her husband, in respect of her separate estate, it would seem that her admissions, but not those of her husband, would be evidence against her. Where the conduct of the wife is in question, her declarations have, in some cases, been held admissible for her husband, in an action against him. Thus, in an action for necessities supplied to the wife, the defence being that the husband had turned her out of doors for adultery, her declarations as to the adultery, made previously to her expulsion, were admitted by Abbott, C.J., *Walton v. Green*, 1 C. & P. 621; this decision, however, as reported, seems unsatisfactory. In an action for seduction, declarations of defendant's wife, tending to show that she aided and colluded with the defendant in seducing the plaintiff's daughter, were admitted as evidence in aggravation. *Per Gurney, B., Knowles v. Compigne*, Winton Sum. Ass. 1835.

Admissions by counsel or solicitor.] In *Colledge v. Horn*, 3 L. J. (O. S.) C. P. 184; 3 Bing. 122, Burrough, J., expressed an opinion that if one of the parties to a cause were in court and had heard an admission made by his counsel in his opening statement, this was evidence against him. In *Haller v. Worman*, 2 F. & F. 165, where, in an action of detinue, it was proved that the defendant's counsel had stated, while attending a summons at chambers, that his client had the papers in his possession; this was admitted at the trial to negative the plea of "not possessed." When the counsel in a cause so conducts it as to lead to an inference that a certain fact is admitted by him, the jury may take it as proved; *Stracy v. Blake*, 1 M. & W. 168; and the judge is also warranted in acting upon such tacit admission. *Semble, Doe d. Child v. Roe*, 22 L. J. Q. B. 102; 1 E. & B. 279. So, where a fact is assumed as *Nisi Prius* for the purpose of supporting one issue, it must be taken as admitted for the purpose of disproving another issue. *Semble, Bolton v. Sherman*, 2 M. & W. 403. And if counsel for the plaintiff open a fact from which his client's possession of a document may be presumed (as payment of a cheque), though he offers no proof of it, yet defendant may give secondary evidence of it after notice to produce, without further proof of the plaintiff's possession. *Duncombe v. Daniell*, 8 C. & P. 222. Where, after a verdict subject to a special case, a new trial was directed, the special case, signed by counsel on both sides, was held evidence of the facts there stated. *Van Wart v. Wolley, Ry. & M.* 4. In a case where the statement of counsel as to the limitations of a deed on a former trial was offered as secondary evidence of its contents, the admissibility of it was considered questionable, even if the parties had been the same; but it was rejected on the ground that the defendant, against whom it was offered, was different. *Doe d. Gilbert v. Ross*, 10 L. J. Ex. 201; 7 M. & W. 102.

An admission made by the solicitor of one of the parties to prevent the necessity of proving a fact on the trial is sufficient evidence of that fact; *Young v. Wright*, 1 Camp. 141; as where he admits the handwriting of an attesting witness. *Milward v. Temple, Id.* 375; and see *Truslove v. Burton*, 2 L. J. (O. S.) C. P. 105; 9 Moore, 64. See also Rules, O. xxxii. r. 1.

Admissions made by the defendant's solicitor, when making proposals on behalf of his client respecting the plaintiff's demand (the solicitor refusing to be examined), are evidence against the defendant; and proof that they were made by the solicitor on the record will be sufficient to establish his agency. *Gainsford v. Grammar*, 2 Camp. 9. But an admission made in a letter written by a solicitor (who was afterwards the solicitor in the cause) before the commencement of the action, is not evidence against the defendant, without some proof of his having authorized the communication. *Wagstaff v. Wilson*, 4 B. & Ad. 339; *Ley v. Peter*, 3 H. & N. 101, 111; 27 L. J. Ex. 239, 242, *per Watson, B.* See also *Blackstone v. Wilson*, 27 L. J. Ex. 229. And an admission made in the course of conversation between the two

solicitors respecting the cause, but not with a view to dispense with proof, cannot be given in evidence. *Petch v. Lyon*, 15 L. J. Q. B. 393; 9 Q. B. 147. See *Parkins v. Hawkshaw*, 2 Stark. 239. An undertaking to appear for "Messrs. T. & M., joint owners of the sloop A.," given by the solicitor on the record, is evidence of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. An agreement by the solicitor "to admit on the trial of this cause," &c., may be used on a new trial; *Elton v. Larkins*, 1 M. & Rob. 196; even though the solicitor retract it before the new trial. *Doe d. Wetherell v. Bird*, 7 C. & P. 6.

Admission under a notice to admit.] By Rules, 1883, O. xxxii., provision is made enabling each party to call upon his opponent to admit as evidence any documents, saving all just exceptions, for the purpose only of the particular cause or matter: see Rules 2, 4, and 7; and these rules apply to every document a party means to adduce in evidence, and are not confined to documents in his custody or control; *Rutter v. Chapman*, 11 L. J. Ex. 178; 8 M. & W. 388, in which case the costs of proving signatures to a petition for a charter, under 1 V. c. 71, s. 49, were not allowed, no notice to admit having been given. It seems that "any document" includes a foreign judgment. *Smith v. Bird*, 3 Dowl. P. C. 641.

A saving of "just exceptions" does not allow exceptions to the authenticity of any part of letters admitted. *Hawk v. Freund*, 1 F. & F. 295, Byles, J.

The party must serve the proper notice, although the document may be alleged by the opposite party, in his pleadings or otherwise, to be a forgery, and although the opposite party may have notified his intention not to admit it. *Spencer v. Barough*, 11 L. J. Ex. 378; 9 M. & W. 425. Admissions made under the above provision are, of course, conclusive at the trial; but facts incidentally stated in the description of the document as admitted, are not to be taken as also conclusively admitted, though the description may be *prima facie* evidence against the party admitting. *Pilgrim v. Southampton & Dorchester Ry.*, 18 L. J. C. P. 330; 8 C. B. 25. The description of a letter respecting a certain field, "then in the plaintiff's possession," was admitted as evidence, but not conclusive, of such possession. S. C.

The party called upon to make admissions should be cautious not to admit more than the mere document mentioned in the notice, and to guard against being inadvertently drawn into admissions of the kind referred to in *Wilkes v. Hopkins*, 14 L. J. C. P. 225; 1 C. B. 737; *Hunt v. Wise*, 1 F. & F. 445; and *Pilgrim v. Southampton & Dorchester Ry.*, *supra*.

An admission, under notice, of the accuracy of a copy, will not dispense with notice to produce the original, or with other pre-requisites for the reception of secondary evidence. See *Sharpe v. Lamb*, 9 L. J. Q. B. 185; 11 Ad. & E. 805.

Admissions by payment of money into court.] The practice as to payment of money into court is regulated by Rules, 1883, O. xxii.

As to the question how far payment into court, *simpliciter*, under that Order, operates as an admission of the plaintiff's entire claim, it must be observed that O. xxi., r. 4, provides that "no denial or defence shall be necessary as to damages claimed or their amount, but they shall be deemed to be put in issue in all cases unless expressly admitted," and O. xix., r. 17, which requires each party to "deal specifically with each allegation of fact of which he does not admit the truth," expressly excepts damages, hence it follows that payment into court does not admit the *quantum* of liability where the action sounds in damages. Thus it is no admission of a total loss on a policy. *Rucker v. Palsgrave*, 1 Camp. 557. The effect of such payment into court may, it seems, be thus summarised:—1. That where there is a general money claim, *Hennell v. Davies*, 62 L. J. Q. B. 220; [1893] 1 Q. B. 367; or a general and divisible allegation of wrong (as in case of trespass or trover for several articles taken or converted), *Schreger v. Carden*, 11 C. B. 851; 21 L. J. C. P. 135; payment into court does not dispense with

proof of a cause of action upon the issue of damages, *ultra*. 2. That where the claim, whether in contract or tort, is special, and the breach single and indivisible, payment into court relieves the plaintiff from proof of any part of the cause of action, except so far as may happen to be necessarily incidental to the proof of damages, *ultra*. *Perren v. Monmouthshire Ry.*, 11 C. B. 855; 22 L. J. C. P. 162; *Dumbleton v. Williams*, 76 L. T. 81. As to the effect of payment into court with a defence admitting negligence but denying the damage alleged, see *Munday v. London County Council*, 85 L. J. K. B. 1508; (1916) 2 K. B. 331, and *Davies v. Scott Lewis*, (1918) W. N. 166; and as to the effect of acceptance of money paid in with a denial of liability, see *Cooté v. Ford*, 68 L. J. Ch. 508; [1899] 2 Ch. 93.

Admission by recital—Estoppel.] A recital in a deed is evidence against him who executed the deed, or any person claiming under him. Com. Dig. Evid. (B. 5). Such recital operates as an estoppel in an action founded on the deed. *Carpenter v. Buller*, 8 M. & W. 212; *Pearl Life Assurance Co. v. Johnson*, 78 L. J. K. B. 777; [1909] 2 K. B. 288; unless the parties in their pleading voluntarily waive it, and instead of replying the estoppel, submit the fact recited to a jury. *Young v. Raincock*, 18 L. J. C. P. 193; 7 C. B. 310. Thus the recital of a lease in a release is evidence of the lease against the releasor, and those claiming under him. *Ford v. Grey*, 1 Salk. 286; *Crease v. Barrett*, 4 L. J. Ex. 297; 1 C. M. & R. 919. To create an estoppel, the deed must contain a precise statement of the fact relied on: e.g., in a grant of land by A., that A. was seised of the legal estate; a covenant that the grantor had power to grant is insufficient. *General Finance Co. v. Liberator Building Society*, 10 Ch. D. 15; *Onward Building Society v. Smithson*, 62 L. J. Ch. 138; [1893] 1 Ch. 1; *Poulton v. Moore*, 84 L. J. K. B. 462; [1915] 1 K. B. 400. Where the recital in a lease has ceased to be an estoppel in consequence of its dropping, it continues to be *prima facie* evidence against those who claim under the parties to it. *Bayley v. Bradley*, 16 L. J. C. P. 206; 5 C. B. 396. In trespass against a sheriff, a bill of sale executed by him, reciting the writ, the taking, and the sale of the goods, is evidence against him of those facts. *Woodward v. Larking*, 3 Esp. 286. The recital of an ancient royal charter in a modern charter is evidence. *Per Abbot, J., Gervis v. Grand Water Canal Co.*, 5 M. & S. 78. The recitals in a deed may confine the effect of admissions in the same instrument. *Lampon v. Corke*, 5 B. & A. 607. But the recital in a bond, that the parties had agreed to execute a bond in the sum of £500, will not confine the bond to that sum, if actually executed in the penal sum of £1,000. *Ingleby v. Swift*, 2 L. J. C. P. 261; 10 Bing. 84. A party claiming under a certain title does not necessarily admit statements in previous deeds which make up his title; thus, where a deed, reciting the bankruptcy of A., conveys an estate to B., and B. (being a party to, but not having executed that deed) conveys the estate to another by a deed making no such recital, the above deeds are no evidence of the bankruptcy as against B. in an action concerning other lands. *Doe d. Shelton v. Shelton*, 4 L. J. K. B. 167; 3 Ad. & E. 265. A recital is not necessarily an estoppel to both parties unless the mutuality appears; if it is the statement of one party only, it estops only that party. *Stroughill v. Buck*, 19 L. J. Q. B. 209; 14 Q. B. 781. Where the recital in a deed is used as an admission, it must be proved strictly, although cancelled; *Bretton v. Cope*, Peake, 44; and a recited instrument is only admitted for so much as is recited; if any other part of it is to be proved, it must be produced and proved in the usual way. *Gillett v. Abbott*, 7 L. J. Q. B. 61; 7 Ad. & E. 783. *Semble*, the doctrine of estoppel by recital applies to the case of an easement. *Poulton v. Moore*, *supra*. See further, as to estoppels by deed, notes to *Kingston's (Duchess) Case*, 2 Smith's L. C., 12th ed. 857 *et seq.*

Admission by estoppel in pais.] A party may be estopped or precluded by his wilful misstatement in *pais* from disputing a state of things upon the faith

of which another party has been induced to act or to rely to his own prejudice. *Shaw v. Picton*, 4 L. J. (O. S.) K. B. 29; 4 B. & C. 715, is an instance. *Pickard v. Sears*, 6 Ad. & E. 469; *Gregg v. Wells*, 10 Ad. & E. 90; *Freeman v. Cooke*, 18 L. J. Ex. 114; 2 Ex. 654, established the doctrine that a voluntary misstatement of fact by A.,—such as a misrepresentation of the property in goods, whereby a party, B., is deceived,—precludes A. from denying such property in a suit between A. and B.. See on the principle of these cases, *Foster v. Mentor Life Insurance Co.*, 3 E. & B. 48; 23 L. J. Q. B. 145; *Clarke v. Hart*, 6 H. L. C. 633; 27 L. J. Ch. 615. This doctrine has been extended to the case of sale where the defendant has so conducted himself as unintentionally to induce a belief in the plaintiff that defendant had bought the goods. *Cornish v. Abington*, 4 H. & N. 549; 28 L. J. Ex. 262. So where a negotiable security is intrusted by the owner to an agent for a specific purpose, any innocent transferee for value from the agent acquires a good title against the owner. *Goodwin v. Robarts*, 45 L. J. Ex. 748; 1 App. Cas. 476; *Rumball v. Metropolitan Bank*, 46 L. J. Q. B. 346; 2 Q. B. D. 194; *Webb v. Alexandria Water Co.*, 21 T. L. R. 572. The propositions on estoppel *in pais* are summed up in the judgment in *Carr v. L. & N. W. Ry.*, 44 L. J. C. P. 109; L. R. 10 C. P. 307. See thereon *Dixon v. Kennaway*, [1900] 1 Ch. 833; 69 L. J. Ch. 501; *Whitechurch v. Cavanagh*, [1902] A. C. 117; 71 L. J. K. B. 400. There must be a representation of a fact; a statement of intention is not sufficient. *Citizens' Bank of Louisiana v. First National Bank of New Orleans*, 43 L. J. Ch. 269; L. R. 6 H. L. 352. The misstatement or negligence whereby the other person is injured must be in the transaction itself and be the approximate cause of the injury; *In re United Service Co., Ex pte. Johnstone*, 40 L. J. Ch. 286; L. R. 6 Ch. 212; *Baxendale v. Bennett*, 47 L. J. Q. B. 624; 3 Q. B. D. 525; *Swan v. North British Australasian Co.*, 7 H. & N. 603; 31 L. J. Ex. 425; 2 H. & C. 175; 32 L. J. Ex. 273; and the negligence must be of some duty owing to him. S.C.; *Johnson v. Crédit Lyonnais Co.*, 47 L. J. C. P. 241; 3 C. P. D. 32; *Union Credit Bank v. Mersey Docks & Harbour Board*, 68 L. J. Q. B. 842; [1899] 2 Q. B. 204; *Carlisle & Cumberland Banking Co. v. Bragg*, 80 L. J. K. B. 472; [1911] 1 K. B. 489. The estoppel may arise from an innocent misstatement. *Low v. Bouverie*, 60 L. J. Ch. 594; [1891] 3 Ch. 82, *per C. A.* See also *Arnold v. Cheque Bank*, 1 C. P. D. 578; *Coventry v. G. E. Ry.*, 11 Q. B. D. 776; *Seton v. Lafone*, 18 Q. B. D. 139; 19 *Id.* 68, C. A.; and *Bank of England v. Vagliano*, 60 L. J. Q. B. 145; [1891] A. C. 107. It does not arise where such misstatement was induced by the misrepresentation or concealment of the persons to whom it was made. *Porter v. Moore*, 73 L. J. Ch. 729; [1904] 2 Ch. 367. As to an estoppel arising from silence, see *McKenzie v. British Linen Co.*, 6 App. Cas. 82; *Ogilvie v. West Australian Corporation*, 65 L. J. P. C. 46; [1896] A. C. 257. As to that arising from the issue of a blank transfer of shares, see *Williams v. Colonial Bank*, 57 L. J. Ch. 826; 38 Ch. D. 388; 15 App. Cas. 267; *Fuller v. Glyn, Mills, Currie & Co.*, 83 L. J. K. B. 764; [1914] 2 K. B. 168. Where a company issues share or debenture certificates, stating that a certain person is the holder of the shares or debentures, or where they register shares in his name, this may operate as an estoppel against the company; see *Actions by and against Companies, post*, where also the effect of "certification" by a company on a transfer of their shares, that the certificates of the shares have been lodged with them is dealt with. See further as to estoppels *in pais*, 2 Smith's L. C., 12th ed. 866 *et seq.*

Admissions on the record.] By Rules, 1883, O. xix. r. 13, allegations of fact in pleadings if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the opposite party, are to be taken to be admitted, except as against an infant, lunatic, or person of unsound mind, not so found by inquisition. Rule 15 requires each party to raise by his pleading all matters which show the action or counter-claim not to be maintainable, or that the transaction is either void or voidable in

point of law, and all such grounds of defence or reply, as the case may be, as if not raised would be likely to take the opposite party by surprise, or would raise issues of fact not arising out of the preceding pleadings, as, for instance, fraud, Statute of Limitations, release, payment, performance, facts showing illegality, either by statute or common law, or Statute of Frauds. By rule 17, it is not sufficient for a defendant in his statement of defence to deny generally the grounds alleged by the statement of claim, or for a plaintiff in his reply to deny generally the grounds alleged in a defence by way of counter-claim, but each party must deal specifically with each allegation of fact of which he does not admit the truth, except damages.

It seems that statements made by parties in the course of their pleadings in *another action* are not to be used as admissions by them in a subsequent action, except where they are estoppels. As several claims or defences are often put in, contradictory admissions might be proved, if such evidence were allowed. *Semble, Boileau v. Rutlin*, 2 Ex. 665. See also *Carter v. James*, 13 L. J. Ex. 373; 13 M. & W. 137. A plea in a discontinued action was not evidence against the defendant in another action. *Allen v. Hartley*, 4 Doug. 20.

Suffering a *judgment by default* is an admission on the record of the cause of action. Thus in an action against the acceptor of a bill, the defendant, by suffering judgment by default, admits a cause of action to the amount of the bill, unless part payment be indorsed. *Green v. Hearne*, 3 T. R. 301. So in an action on a contract the defendant cannot, after judgment by default, insist upon the fraud of the plaintiff. *East India Co. v. Glover*, 1 Stra. 612.

Whole admission to be taken together.] The whole of an admission must be taken together; therefore, where an amount rendered by the defendant is produced to establish the plaintiff's demand, it is evidence to prove both the debtor and creditor side of the account. *Randle v. Blackburn*, 5 Taunt. 245; *Thomson v. Austen*, 1 L. J. (O. S.) K. B. 99; 2 D. & Ry. 359. But the jury are not bound to believe both sides of the account; therefore, where the plaintiff put in evidence an account rendered by the defendant in which he had stated a counter-claim, the plaintiff was permitted to disprove the counter-claim, and to recover the amount admitted. *Rose v. Savory*, 4 L. J. C. P. 275; 2 Bing. N. C. 145. And see *Baildon v. Walton*, 1 Ex. 617; 17 L. J. Ex. 357. Where the plaintiff put in the defendant's answer in Chancery to prove an admission, defendant had a right to have the bill read, but the judge cautioned the jury not to take the allegations as true. *Pennell v. Meyer*, 2 M. & Rob. 98. The assertion of a party, in a conversation given in evidence against him, of facts in his favour, is evidence for him of those facts. *Smith v. Blandy*, Ry. & M. 257. But a party cannot examine a witness, who is called to prove the conversation against him, as to *unconnected* statements made by him (the party) on the same occasion containing distinct assertions of his own rights. In other words, there are limits to the general proposition that the *whole* of a conversation is evidence, where part is admissible. *Semb. Prince v. Sams*, 7 Ad. & E. 627.

OBJECT OF EVIDENCE.

The object of evidence is to prove the point in issue between the parties; and in doing this there are three general rules to be kept in view: 1. That the evidence be confined to the issue; 2. That the substance of the issue only need be proved; 3. That the burden of proof lies on the party asserting an affirmative fact, if it be unsupported by any presumption of law.

EVIDENCE CONFINED TO THE ISSUE.

As the object of pleading is to reduce the matters in difference between the parties to distinct and simple issues, so the rules of evidence require that no proof, oral or documentary, shall be received that is not referable to those issues. All evidence of matters which the courts judicially notice, or of matters immaterial, superfluous, or irrelevant, is therefore excluded.

Thus, where the inquiry is whether A. made a qualified or an unqualified sale of goods to B., and A. denies the qualification, it cannot be shown in disproof of the denial that he had sold to others the like articles subject to such qualification; and it is doubtful whether he can be asked the question, though merely to test his veracity of memory, *Hollingham v. Head*, 4 C. B. (N. S.) 338; 27 L. J. C. P. 241. For another instance of this rule, see *Hyde v. Palmer*, 3 B. & S. 657; 32 L. J. Q. B. 126.

Facts of which the court will take judicial notice.] There are many facts which the courts will notice judicially, and of which it is therefore unnecessary to give any evidence. The following are examples:—The order and course of proceedings in Parliament, *Lake v. King*, 1 Wms. Saund. 131 *b*; the established privileges of the House of Commons, *Stockdale v. Hansard*, 8 L. J. Q. B. 294; 9 Ad. & E. 1; *Bradlaugh v. Gossett*, 53 L. J. Q. B. 209; 12 Q. B. D. 271; the existence of war with a foreign state, *R. v. De Berenger*, 3 M. & S. 67; the existence of a foreign state recognised by the British Government; but not otherwise, *Taylor v. Barclay*, 7 L. J. (O. S.) Ch. 65; 2 Sim. 213; *Berne, City of, v. Bank of England*, 9 Ves. 347; *Foster v. Globe Venture Syndicate*, 69 L. J. Ch. 375; [1900] 1 Ch. 811; and whether a certain territory is within it; S. C.; the several seals of the King; as the great seal, *Ld. Melville's Case*, 29 How. St. Tr. 707; privy seal, privy signet, and seal of the Exchequer attached to leases of land in its management; *Lane's Case*, 2 Rep. 17 *b*; the seal of the city of London; *Doe d. Woodmass v. Mason*, 1 Esp. 53; so of a seal of a superior court of Westminster. *Tooker v. Beauport (Duke)*, Say. 297. It is said also that the seals of the Great Sessions of Wales, and of the Ecclesiastical and Admiralty Courts, prove themselves; but the cases usually cited to show this are not satisfactory. See *Kempton v. Cross*, Cas. temp. Hardw. 108 (Ecclesiastical Courts); *Green v. Waller*, 2 Ld. Raym. 893 (Admiralty Court); *Olive v. Guin*, 2 Sid. 145; Hardres, 118 (the Great Sessions of Wales), Com. Dig. Testim. (A. 1), (A. 2); which have ruled that the seal of those courts authenticates their proceedings; but not that it proves itself, nor does it follow that where a statute authorises the use of a seal the court is to take notice of the seal without proof of it.

The following seals are required by statute to be judicially noticed: The Chancery Common Law Seal, 12 & 13 V. c. 109, s. 11; the Seal of the Enrolment Office in Chancery, 12 & 13 V. c. 109, s. 17; of the Probate Court, 20 & 21 V. c. 77, s. 22; of the Divorce Court, 20 & 21 V. c. 85, s. 13; of the Admiralty Court, 24 & 25 V. c. 10, s. 14; of the Bankruptcy Court, 46 & 47 V. c. 52, s. 137; the Wafer Great Seal, and Wafer Privy Seal, 40 & 41 V. c. 41, ss. 4, 5 (3a); the Patent Office Seal, 46 & 47 V. c. 57, s. 84; the Seal of the Railway and Canal Commission, 51 & 52 V. c. 25, s. 2.

By Rules, 1883, O. lxi. r. 7, "all copies, certificates, and other documents appearing to be sealed with the seal of the Central Office shall be presumed to be office copies or certificates or other documents issued from the Central Office, and if duly stamped may be received in evidence, and no signature or other formality, except the sealing with a seal of the Central Office, shall be required for the authentication of any such copy, certificate, or other document."

By the J. Act, 1873, s. 61, writs and documents, and all exemplifications and copies thereof, purporting to be sealed with the seal of a district registry of the High Court of Justice, shall be received in evidence without further proof.

The seal of a notary public has been judicially noticed; Bayley on Bills, 6th ed. 490; *Anon.*, 12 Mod. 345; *Cole v. Sherard*, 11 Ex. 482.

By the Evidence Act, 1851. (14 & 15 V. c. 99), s. 10, documents admissible in evidence in the Irish courts, without proof of the seal, or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same, are made admissible in the English courts, to the same extent, and for the same purposes, without proof of the seal or stamp, or signature authenticating the same, or of the judicial or official character of the person appearing to have signed the same.

By the Commissioners for Oaths Act, 1889 (52 & 53 V. c. 10), s. 3 (1), "Any oath or affidavit required for the purpose of any court or matter in England, or for the purpose of the registration of any instrument in any part of the United Kingdom, may be taken or made in any place out of England before any person having authority to administer an oath in that place. (2) In the case of a person having such authority otherwise than by the law of a foreign country, judicial and official notice shall be taken of his seal or signature affixed, impressed, or subscribed to or on any such oath or affidavit."

By sect. 6 (1), as extended by sect. 2 of 54 & 55 V. c. 50, "Every oath, affidavit, and notarial act administered, sworn, or done by or before any British ambassador, envoy, minister, chargé d'affaires, and secretary of embassy or legation exercising his functions in any foreign country, and every British consul-general, consul, vice-consul, acting-consul, pro-consul, and consular agent, *acting consul-general, acting vice-consul, and acting consular agent*" shall be as effectual as if duly administered, sworn, or done by or before any lawful authority in the United Kingdom. (2) "Any document purporting to have affixed, impressed, or subscribed thereon or thereto the seal and signature of any person authorized by this section to administer an oath in testimony of any oath, affidavit, or act being administered, taken, or done by or before him, shall be admitted in evidence without proof of the seal or signature being the seal or signature of that person, or of the official character of that person."

By the 8 & 9 V. c. 113, s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners, judicially acting, and other judicial officers shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at *Westminster*, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document." This section applies when the signature is affixed by a stamp in the usual manner. See *Blades v. Lawrence*, 43 L. J. Q. B. 133; L. R. 9 Q. B. 374.

By the Bankruptcy Act, 1914 (4 & 5 G. 5, c. 59), s. 142, judicial notice shall in all legal proceedings be taken of the seal and of the signature of the judge or registrar of any court having jurisdiction in bankruptcy. By sect. 132 general rules and orders made under the Act are to be judicially noticed.

By the Railway and Canal Traffic Act, 1888 (51 & 52 V. c. 25), s. 20, general rules made by the railway and canal commission under that Act, for carrying it into effect, are to be judicially noticed.

By 52 & 53 V. c. 30, s. 6 (2), the seal of the Board of Agriculture shall be "judicially noticed, and such seal shall be authenticated by the signature of the president," &c. See also sect. 7, as to orders and certificates. This Board is now styled the Ministry of Agriculture and Fisheries; 9 & 10 G. 5, c. 91. Similar provisions are made by 62 & 63 V. c. 33, s. 7, with respect to the Board of Education; by 5 & 6 G. 5, c. 51, s. 4, with respect to the Ministry of Munitions; by 6 & 7 G. 5, c. 65, s. 6, with respect to the Ministry of Pensions; and by 7 & 8 G. 5, c. 44, s. 4, with respect to the Ministry of Reconstruction.

Rules made under the Land Transfer Act, 1875 (38 & 39 V. c. 87), s. 111, are to be judicially noticed.

There is no doubt that the existence of all the superior courts will be

judicially noticed; *Tregany v. Fletcher*, 1 Ld. Raym. 154; and so, of course, will that of all courts established by Act of Parliament. In *Dobson v. Bell*, 2 Lev. 176, and *Pugh v. Robinson*, 1 T. R. 118, it was stated, generally, that the practice of the superior courts would be judicially noticed; but in *Caldwell v. Hunter*, 10 Q. B. 86, Maule, J., seemed inclined to doubt whether, the jury having found the practice to be one way, the court could hold it to be another, when the practice was not prescribed by statute, or by the common law, by which latter expression he seems to mean immemorial usage, as distinguished from modern usage. The doubt is altogether not very clearly expressed, and Parke, B., appears not to have shared it.

The courts formerly took notice of the law of England as administered in the Court of Chancery. *Sims v. Marryatt*, 17 Q. B. 281; 20 L. J. Q. B. 454. But the practice of that court was proved by oral evidence, as in *Dicas v. Brougham (Lord)*, 1 M. & Rob. 309, where Ld. Eldon was called as a witness to prove that practice; and in *Tucker v. Inman (or Southcote)*, 12 L. J. C. P. 21; 4 M. & Gr. 1049, where equity counsel were called for a similar purpose. In *Place v. Potts*, 8 Ex. 705; 22 L. J. Ex. 269, the court informed itself by private inquiry as to the jurisdiction of, and proceedings in, the Court of Admiralty, which is the same thing as taking judicial notice of it. The court took a similar course with reference to the practice in the Enrolment Office of the Court of Chancery in *Doe d. Williams v. Lloyd*, 10 L. J. C. P. 128; 1 M. & Gr. 670. Now under the J. Act, 1873, s. 24, all the courts constituted under that Act are to give effect to every equitable estate, right, and ground of relief. It would seem, therefore, that every judge of the High Court is bound to take judicial notice of the practice of the several divisions of the court. In *Pilkington v. Cooke*, 16 M. & W. 615, the court refused to take judicial notice of it when an order of the judges, allowing a scale of fees to be taken by sheriffs, was made.

The courts take notice of the diocese in which the superior courts at Westminster are situate, *Adams v. Savage*, 6 Mod. 134; the privileges of their officers, including those of solicitors, *Stokes v. Mason*, 9 East, 426; *Ogle v. Norcliffe*, 2 Ld. Raym. 869; the beginning and end of terms, *Estwick v. Cooke*, *Id.* 1557; the King's proclamation, at least if the Gazette or other authorized copy be produced, *Van Omeron v. Dowick*, 2 Camp. 44; *Dupays v. Shepherd*, 12 Mod. 216. They will take notice of the different counties, palatinates, and counties corporate, in England, 2 Inst. 557; *Deybel's Case*, 4 B. & A. 248; *R. v. S. Maurice*, 16 Q. B. 908; 20 L. J. M. C. 221; the existence of the two ancient English universities, and of the purposes of their institution, viz., religion and learning, *Re Oxford Rate*, 8 E. & B. 184; the days of festivals appointed by the calendar of the Church of England, *Brough v. Perkins*, 6 Mod. 81; the number of days in a particular month, 1 Rol. Ab. 524; that a particular day of the month in a year falls on Sunday, *Hanson v. Shackelton*, 4 Dowl. P. C. 48; that a place lies east or west of Greenwich, and that its true time therefore differs from that of Greenwich, *Curtis v. Marsh*, 28 L. J. Ex. 36; that a colony, or place therein, is not in England, *Cooke v. Wilson*, 1 C. B. (N. S.) 153; 26 L. J. C. P. 15; that the value of money has diminished since the time of Richard I., *Bryant v. Foot*, 37 L. J. Q. B. 217; L. R. 3 Q. B. 497. In construing a marine policy, the court will take judicial notice of what appears on the Admiralty chart of the portion of the sea to which the insurance relates; *Birrell v. Dryer*, 9 App. Cas. 345—347, 353.

A company incorporated by public statute will be noticed, and its identity with the one named in the pleadings will be assumed. *MacGregor v. Deal & Dover Ry.*, 22 L. J. Q. B. 69; 18 Q. B. 618; *Church v. Imperial Gas Light and Coke Co.*, 7 L. J. Q. B. 118; 6 Ad. & E. 846. When any facts are notified by a public Act of Parliament, it seems that they must be judicially noticed; thus the courts will notice that the Isle of Ely is a franchise in the nature of a riding, liable to the repair of its bridges since 7 W. 4 & 1 V. c. 53. *R. v. Ely*, 19 L. J. M. C. 223; 15 Q. B. 827. In *R. v. Anderson*, 9 Q. B. 663, the court took judicial notice that the assessor and

collector of the land-tax assessed taxes were "public annual" officers within the meaning of the 3 W. & M. c. 11, s. 6.

The courts will *not* notice judicially the nature and jurisdiction of a local inferior court, *Moravia v. Sloper*, Willes, 37; nor Scotch, colonial, or foreign law; nor particular customs, as those of London, *Argyle v. Hunt*, Stra. 187; unless duly certified by the recorder, *Blacquiere v. Hawkins*, 1 Doug. 378; *Piper v. Chappell*, 14 M. & W. 624; as to which see 1 Taylor Ev. 10th ed. § 5, pp. 7, 8; nor that a particular town is within a certain diocese, *R. v. Sympson*, 2 Ld. Raym. 1379. It is indeed said, in the report of *Adams v. Savage*, *Id.* 854, that the courts notice the "limits of ecclesiastical jurisdiction"; but the report in 6 Mod. 134 shows only that the courts at Westminster will take notice in what diocese *they* are, and that there is an ecclesiastical division of England into provinces and dioceses. They will not notice the local situation of a town or a street in a county, *Deybel's Case*, 4 B. & A. 243; *Humphreys v. Budd*, 9 Dowl. P. C. 1000; nor that part of the Tower of London is within the city of London, *Brune v. Thompson*, 2 Q. B. 789; nor that a particular town (as Dublin) is in Ireland, *Kearney v. King*, 2 B. & A. 303; *sed quære?* for this appears in several Acts of Parliament. Though the courts took judicial notice of the articles of war which were printed by the King's printer, *Bradley v. Arthur*, 4 B. & C. 304; *R. v. Withers*, cited 5 T. R. 446, and are now bound to do so by the Army Act, 1881, s. 69, yet the book called "Rules and Regulations for the Government of the Army" will not be noticed. *Bradley v. Arthur*, *supra*; *Todd v. Anderson*, [1912] S. C. (J.) 105.

The courts now notice the seal or proceedings of a foreign court, 14 & 15 V. c. 99, s. 7.

The courts are bound to take notice of the law and privilege of the Stannaries. Co. Litt. 11 b; *Gaved v. Martyn*, 19 C. B. (N. S.) 732, 757; 34 L. J. C. P. 353, 362.

As to how far judicial notice will be taken of the custom of gavelkind and borough English, see Co. Litt. 175 b (4); Robinson on Gavelkind, 3rd ed., 48; *Rider v. Wood*, 1 Kay & J. 644; 24 L. J. Ch. 737; *In re Chenoweth*; *Ward v. Dwelley*, 71 L. J. Ch. 739; [1902] 2 Ch. 488. There are other customs of which judicial notice would be taken, especially some of those in use amongst persons engaged in commerce. See *Lethulier's Case*, 2 Salk. 443. "When a general usage has been judicially ascertained and established, it becomes part of the law merchant which courts of justice are bound to recognize." *Brandao v. Barnett*, 3 C. B. 519, 530, *per* Ld. Campbell, C. See also *Ex pte. Reynolds*; *In re Barnett*, 54 L. J. Q. B. 354; 15 Q. B. D. 169, 184, 185. The court took judicial notice of the lien of bankers on the securities of customers in their custody. *Brandao v. Barnett*, *supra*. So of the negotiability of bonds, &c., "to bearer"; *Edelstein v. Schuler*, 71 L. J. K. B. 572; [1902] 2 K. B. 144. Probably judicial notice would, in some cases, be taken of the practice of solicitors. *Shoreditch Vestry v. Hughes*, 17 C. B. (N. S.) 137; 33 L. J. C. P. 349. In *In re Bodmin United Mines*, 23 Beav. 370; 26 L. J. Ch. 570, Romilly, M.R., refused to take judicial notice of the nature of an association on the cost-book principle; but the constitution of these associations has since been recognised in the Stannaries Act, 1869 (32 & 33 V. c. 19). A custom of which judicial notice is taken ought to be considered, not as a fact, but as part of the general law of the land.

The courts of the city of London will take judicial notice of the city customs; Com. Dig. London (N. 1), (N. 7); 1 Doug. 380, u.; and the Court of Quarter Sessions, of petty sessional divisions of a county. *Reg. v. Whittles*, 18 L. J. M. C. 96; 13 Q. B. 248.

Evidence of collateral facts.] In general, evidence of collateral facts, not pertinent to the issue, is not admissible. Thus, where the question was whether beer supplied by plaintiff to the defendant was good, the plaintiff was not allowed to give evidence of the quality of beer supplied

by him to other persons. *Holcombe v. Hewson*, 2 Camp. 391. In an action by indorsee against the acceptor of a bill, who defends on the ground of forgery, evidence that the drawer suspected of the forgery has forged the defendant's name in other instances is inadmissible. *Balcetti v. Serani*, Peake, 142; *Griffiths v. Payne*, 9 L. J. Q. B. 34; 11 Ad. & E. 131. See also *Hollingham v. Head*, 4 C. B. (N. S.) 338; 27 L. J. C. P. 241. But where a collateral fact is material to the proof of the issue joined between the parties, evidence of such fact is admissible. Thus, in an action for work done and materials supplied to certain houses on the orders of a third person, the defendant denying that he is the owner of the house or the real principal, evidence is admissible to show that other persons had received orders from the defendant to do work at the same houses without showing that the plaintiff knew of these orders at the time he did the work. *Woodward v. Buchanan*, 39 L. J. Q. B. 71; L. R. 5 Q. B. 285. So in an action by a rector for tithes, where the question is whether a modus exists of a certain sum of money for a particular farm in a township within the parish, the plaintiff may inquire whether other farms in the same township are not subject to the same payment for the purpose of showing that such payments cannot be a farm modus. *Blundell v. Howard*, 1 M. & S. 292. So proof of the local usage of trade, &c., may be material to explain a contract, or to disprove an alleged breach of it. *Noble v. Kennoway*, 2 Doug. 510. But the usage at Lloyd's is not evidence, unless the contract he made with reference to that usage. *Gabay v. Lloyd*, 3 L. J. (O. S.) K. B. 116; 3 B. & C. 793. In a case of libel, where the meaning is ambiguous, other similar libels on the plaintiff by the same defendant may be shown against him. Upon a question of skill and judgment evidence may be given of facts which, although in other respects collateral, are by means of the skill and judgment of the witness connected with, and tend to elucidate, the issue. *Folkes v. Chadd*, 3 Doug. 157. Where the object of the evidence is to show the *knowledge* of the party with regard to the nature of a particular transaction, evidence of his having been engaged in other transactions of the same kind is admissible: thus, in cases of forgery and coining, proof that the prisoner has passed other forged notes, or other counterfeit coin, is constantly admitted. So also upon questions of *intent* evidence of other transactions is admissible. In an action for bribery evidence of other acts of bribery by the defendant at the same time and place is admissible to show the *animus*. *Webb v. Smith*, 9 L. J. C. P. 191; 4 Bing. N. C. 373. The seditious object of a meeting may be shown by the acts of similar meetings in other places convened by the same person. *Redford v. Birley*, 3 Stark. 93. To show a negligent course of conduct evidence of similar acts or omissions was held admissible in *Hales v. Kerr*, 77 L. J. K. B. 870; [1908] 2 K. B. 601. To prove that the acceptor of a bill knew the payee to be a fictitious person, or that the drawer had a general authority from him to fill up bills with the name of a fictitious payee, evidence may be adduced that he had accepted other similar bills under circumstances that indicated such knowledge or authority. *Gibson v. Hunter*, 2 H. Bl. 288. It may be said, generally, that all proof of facts which merely tends to create an unjust prejudice, or unduly to influence the jury, or occupy the time of the court in irrelevant inquiries, is inadmissible; but if the proof be directly or inferentially pertinent to the issue, it will be admitted.

As to the admission, in a *quia timet* action to restrain the erection of a smallpox hospital on the ground of apprehended nuisance, of evidence of what has occurred in the neighbourhood of other smallpox hospitals carried on under similar conditions, see *A.-G. v. Nottingham Corporation*, 73 L. J. Ch. 512; [1904] 1 Ch. 673.

[*Evidence of rights in other manors and places.*] As a general rule, proof of a customary right in a particular manor or parish is no evidence as to the customary right in an adjoining manor or parish. *Somerset (Duke) v.*

France, 1 Stra. 661. But there are occasions on which such evidence is relevant. Thus, where there is proof that all the manors in a particular district are held under the same tenure, and a question arises in one of the manors as to an incident to the tenure, evidence may be given of the usage prevailing in the others. S. C.; *Champion v. Atkinson*, 3 Keb. 90; *R. v. Ellis*, 1 M. & S. 662. So where in each of several detached manors called by the common name of "assessmentable manors," and parcel of the possessions of an ancient earldom and duchy, it appeared that there was a peculiar class of tenants answering the same description, to whom tenements were granted by similar words, it was held that evidence of the mineral and other rights enjoyed by those tenants in one manor might be received to show what were their rights in another. *Rowe v. Brenton*, 8 B. & C. 765 (case of the duchy of Cornwall). But mere contiguity, or the identity of the leet or parish in which two manors are situate, or payment of a chief rent by one to the other, will not let in such evidence. *Anglesey (Marquess) v. Hatherton (Lord)*, 12 L. J. Ex. 57; 10 M. & W. 218. Where the question was whether a slip of land between some old inclosures and the highway was vested in the lord of the manor or the owner of the adjoining freehold, it was held that evidence could not be received of acts of ownership by the lord of the manor on *similar*, but *distinct*, slips of land within the manor. *Aliter*, if the strips, though detached, could be regarded as part of a continuous tract of waste adjoining the same highway. *Doe d. Barrett v. Kemp*, 4 L. J. Ex. 331; 2 Bing. N. C. 102. And even if the continuity be broken, it is a question for the jury whether such strips alongside the same road be not waste. *Dendy v. Simpson*, 18 C. B. 331. Where the question was as to the right to certain trees growing in a woody belt held entire and undivided under one title, evidence was admitted of acts of ownership in different parts of the belt. *Stanley v. White*, 14 East, 332. So acts of ownership in part of a wood, though unenclosed, or in part of a continuous fence, are evidence as to the whole. *Jones v. Williams*, 6 L. J. Ex. 107; 2 M. & W. 326. Where the plaintiff claims the whole bed of a river between his land and the defendant's, acts of ownership over the river just below the defendant's land are admissible; and the evidence need not be confined to the precise spot of the trespass. *Id.* 336; *Neill v. Devonshire (Duke)*, 8 App. Cas. 135. This principle applies also to the foreshore of a navigable tidal river. *Lord Advocate v. Blantyre (Lord)*, 4 App. Cas. 770. So in the case of an inland non-tidal lake. *Bristow v. Cormican*, 3 App. Cas. 641, 670; see also *Johnston v. O'Neill*, 81 L. J. P. C. 17; [1911] A. C. 552. But in trespass by the proprietors of a canal it was doubted whether evidence of acts of ownership by the proprietors on other parts of the banks than those in question was admissible to prove property without showing that they had belonged to one person; for the proprietors may have bought the freehold in one place and not in another, and, being unnecessary, there was no ground for presuming such a purchase in any place. *Hollis v. Goldfinch*, 1 L. J. (O. S.) K. B. 91; 1 B. & C. 205; *Tyrwhitt v. Wynne*, 2 B. & A. 554. In proof of the boundary between the manors A. and B., evidence is admissible of the boundary between A. and C. being a manor abutting on B., and separated from A. by a natural boundary (namely, a mountain ridge), which continued between A. and B. *Brisco v. Lomax*, 7 L. J. Q. B. 1482; 8 Ad. & E. 198. Under a lease of all minerals under a tract of waste land called M. mountain, working a mine under one part of it is evidence of possession of the whole subject of demise, so as to entitle the lessee to sue in trover for ore taken by a wrongdoer from any part of it. *Taylor v. Parry*, 9 L. J. C. P. 298; 1 M. & Gr. 604; *Wild v. Holt*, 11 L. J. Ex. 285; 9 M. & W. 672. Where the question was whether a township, A., was liable to repair an ancient highway, the conviction of an adjoining township, B., for non-repair of the part situate in the latter, is evidence against A. that the highway situate in A. is also ancient. *R. v. Brightside Bierlow*, 19 L. J. M. C. 50; 13 Q. B. 933. Where the construction of the charters of the Duchy of Lancaster was in question, proof that under them coroners

were always appointed in some parts of the Duchy was admitted to prove the like right of appointment in any part. *Jewison v. Dyson*, 11 L. J. Ex. 401; 9 M. & W. 540.

Evidence of damage.] By Rules, 1883, O. xxi. r. 4, damages, unless expressly admitted, are deemed to be put in issue. Evidence tending to increase or diminish the damage is, of course, admissible, though not expressly involved in the issue. Thus, in an action for breach of promise of marriage, plaintiff may give evidence of the defendant's fortune; for it obviously tends to prove the loss sustained by the plaintiff; but not in an action for adultery; *James v. Biddington*, 6 C. & P. 589; nor for seduction; *Hodsoll v. Taylor*, 43 L. J. Q. B. 14; L. R. 9 Q. B. 79; nor for malicious prosecution; for it is nothing to the purpose "that damages are taken from a deep pocket." *Short v. Stoy*, Winton Sum. As. 1836, per Alderson B.

But special damage cannot be shown unless alleged with certainty in the statement of claim. Where, in an action for an irregular distress, it was averred that the plaintiff, in consequence of the injury, had lost *divers* lodgers, without naming any, Ld. Ellenborough rejected evidence of the damage. *Westwood v. Cowne*, 1 Stark. 172. See further *Craft v. Boite*, 1 Wms. Saund. 243 d. (5); *Martin v. Henrickson*, 2 Ld. Raym. 1007; and Rules, 1883, O. xix. r. 15.

Evidence of character.] In general, in actions unconnected with character evidence as to the character of either of the parties to a suit is inadmissible, being foreign to the point in issue, and only calculated to create prejudice. For the same reason where particular acts of misconduct are imputed to a party, evidence of general character is excluded; but it is otherwise where general character is put in issue; *Doe d. Farr v. Hicks*, per Buller, J., cited 4 Esp. 51; *Jones v. James*, 18 L. T. 243; 1 Taylor, Evid. 10th ed., §§ 354, 355; for evidence of bad character is admitted in some actions with a view to the amount of damages. In seduction, the defendant may show the previous bad character of the person seduced. But even in such cases it has been held that the plaintiff cannot give evidence of the good character of the daughter, until evidence has been offered on the other side to impeach it; *Bamfield v. Massey*, 1 Camp. 460; and if such evidence be not general, but go only to a specific instance, it has been ruled that the plaintiff cannot, in reply, give evidence of general character, but must be restricted to disproof of the specific instance. S. C.; *Dodd v. Norris*, 3 Camp. 519. In an action for slander imputing dishonesty to the plaintiff, he cannot adduce evidence in the first instance of good character. *Stuart v. Lovell*, 2 Stark. 93; *Cornwall v. Richardson*, Ry. & M. 305. Where the cross-examination of the plaintiff's witness has been directed to impeach the character of the plaintiff, and the witnesses deny the imputation intended, proof of the plaintiff's good character is not admissible. *King v. Francis*, 3 Esp. 116.

The practice, as reported in some of the above cases, which excludes the proof of general good character, where it is obviously attacked at the trial, though unsuccessfully, has been generally condemned by later text writers; and there are some authorities at N. P. for the admissibility of such testimony.

In an action for breach of promise of marriage, where the defendant by his defence sets up a general charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanor; though this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T. 243. Where a general character is in issue, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236.

Plaintiff confined to his particulars.] Where the plaintiff has delivered particulars of his demand, he will be precluded from giving any evidence of demand not contained in them. But the plaintiff may recover more than his

particulars demand, where it appears to be due on the defendant's own evidence; as where the defendant gave in evidence an account from which it appeared that there was a sum of money due to the plaintiff beyond that claimed in his particulars. *Hurst v. Watkis*, 1 Camp. 68. *Accord. per Parke, B.*, in *Fisher v. Wainwright*, 5 L. J. Ex. 217; 1 M. & W. 480. See also *Green v. Marsh*, 5 Dowl. 669. A mistake in the particulars, not tending to mislead, is immaterial. The materiality of the variance is a question for the judge, subject to the opinion of the court above.

The particulars may be amended, even after the discovery of their insufficiency on the trial; and where the mistake has been made inadvertently, and the defendant has not been prejudiced, they will be amended almost as a matter of course. If the amendment may prejudice the defendant the judge may sometimes think proper to adjourn the cause. See *Fromant v. Ashley*, 22 L. J. Q. B. 237; 1 E. & B. 723; *M'Carthy v. Fitzgerald* [1909] 2 Ir. R. 445. This power of amendment renders it useless to retain many cases formerly collected under this head. After delivery of particulars under a judge's order (or, *ut semb.*, under O. xix. r. 6), fresh or amended particulars cannot be delivered except by a judge's order or by consent, so as to supersede the first at the trial. *Brown v. Watts*, 1 Taunt. 353. It is, however, competent for the opposite party to waive the objection and accept the second particulars; and if the party served plead over and go to trial, he will be taken to have accepted them. *Fromant v. Ashley*, 22 L. J. Q. B. 237; 1 E. & B. 723.

If the particulars are too general, or not sufficiently explicit, the remedy is to apply for better; for it seems to be no ground of objection at the trial, except in the case of particulars of set-off, and in that case, where the terms of the order exclude the proof unless the particulars comply strictly with the terms of the order, if the particulars do not strictly comply with the order, the judge will reject the proof of it at the trial; *Ibbett v. Leaver*, 16 L. J. Ex. 208; 16 M. & W. 771; *Young v. Geiger*, 18 L. J. C. P. 43; 6 C. B. 552; and the plaintiff does not waive the objection by merely denying the set-off and going to trial. S. CC. Irregular particulars of set-off may, however, be waived. Thus, where the order was to deliver it in a fortnight, and the plaintiff accepted it three weeks later, and the plaintiff afterwards amended his declaration by consent, *Ld. Tenterden, C.J.*, admitted proof of the set-off. *Wallis v. Anderson*, M. & M. 291; also *Lovelock v. Cheveley*, *Holt*, N. P. 552.

Effect of particulars as an admission.] The object of particulars is to control the generality of the claim, or set-off, in respect of which they are delivered. Their value as an admission depends upon the mode in which they are framed. When they merely limit the amount claimed in the pleadings, no admission can be implied; but where they, in addition, give credit to the opposing party for some particular specific item, they are evidence in his favour as to the date, origin, and nature of that item. In *Rymer v. Cook*, M. & M. 86, n., where the defendant put in particulars of the plaintiff's demand, containing an admission that he was indebted to the defendant in a certain sum, it was held that that admission was evidence. In *Kenyon v. Wakes*, 6 L. J. Ex. 180; 2 M. & W. 764, where a payment on account to the amount of £70 was admitted in the particulars, and the jury found that £70 was all that was due, it was held that the particulars were properly received in evidence as an admission of the payment of that sum. See *Boulton v. Pritchard*, 15 L. J. Q. B. 356; 4 D. & L. 117, and *Rowland v. Blaksley*, 11 L. J. Q. B. 279; 1 Q. B. 403. In *Buckmaster v. Meiklejohn*, 8 Ex. 634; 22 L. J. Ex. 242, particulars delivered with a plea of set-off, which had been withdrawn, were admitted in support of a replication of fraud to a plea *puis darrein continuance*. It would seem, however, that particulars can only be made use of as an admission in an issue upon the pleadings in respect of which they are delivered. Therefore, in *Miller v. Johnson*, 2 Esp. 602, where the notice of

set-off contained an admission of a sale, this was not allowed to be taken as an admission of the sale upon the plea of never indebted. In *Harington v. Macmorris*, 5 Taunt. 229, an admission of the debt in the notice of set-off was not received in the issue raised upon *non-assumpsit*. And in *Burkitt v. Blanshard*, 18 L. J. Ex. 34; 3 Ex. 89, where a simple payment of £50 was inserted in the particulars of set-off, Parke, B., expressed an opinion that the plaintiff could not have taken this as an admission of a part payment in order to prevent the operation of the Statute of Limitations.

Proof of particulars.] The particulars were formerly proved by the production and proof of the judge's order and the particulars themselves: and by proof of the signature of the party, his attorney, or agent. The R. G. H. T. 1853, r. 19, which directed that a copy of the particulars of demand and the defendant's set-off should be annexed by the plaintiff's attorney to the record at the time it is entered for trial, obviated the necessity of proving the delivery of them. *Macarthy v. Smith*, 1 L. J. C. P. 73; 8 Bing. 145. But the particulars were not thereby made part of the N. P. record and incorporated with the pleading to which they were annexed. *Booth v. Howard*, 5 Dowl. P. C. 438; *Ferguson v. Mahon*, 9 Ad. & E. 245. The Rules, 1883, contain no provision similar to R. G. H. T. 1853, r. 19, *supra*, and it seems therefore that particulars, unless they are in the pleadings, or have been entered with them, must be proved in the same way as was done before 1853. If the defendant require to prove a special indorsement under Rules, 1883, O. iii. r. 6, on the writ of summons, the copy writ served on him would, it seems, be primary evidence against the plaintiff.

It the particulars of demand refer to a fuller account already delivered (which it may do without re-stating it, *ut semb. Hatchet v. Marshall*, Peake, N. P., 172), the plaintiff ought either to enter the account also with the pleadings, or prove it at the trial. See 2 Chit. Prac., 12th ed. 1456. If the plaintiff delivers "further and better" particulars, in which he omits a specific credit given in his first, it seems that both should be annexed to the record; and if the second alone is annexed, the defendant may nevertheless prove the first in order to dispense with a plea of payment. *Boulton v. Pritchard*, 15 L. J. Q. B. 356; 4 D. & L. 117. Where the particulars annexed differ from those delivered, the defendant may prove the latter, and confine the plaintiff to those. But if the defendant is not prepared to prove the real particulars, the plaintiff, if he obtain a verdict for any items not contained in them, is in peril of a new trial. *Morgan v. Harris*, 1 L. J. Ex. 143; 2 C. & J. 461. If none are annexed, the judge may order the plaintiff to annex them at N. P.

THE SUBSTANCE OF THE ISSUE ONLY NEED BE PROVED.

It was always the common law rule that the *substance* of the issue joined between the parties need alone be proved, and numerous illustrations of this principle will be found under various titles in this work.

Variances requiring amendment.] It is a general rule that a party must recover *secundum allegata et probata*, and cannot succeed upon a proof that differs from his allegation; if his proof so differ it is called a variance. Now, however, by Rules, 1883, O. xxviii. r. 1, either party may at any time be allowed to amend their pleadings, "and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." Since this rule parties ought to anticipate that all amendments will be allowed which are necessary to determine the real question in controversy, which both parties must have had in contemplation when the suit commenced.

Variance in the parties.] The objection on the ground of variance in the parties is now reduced to within very narrow limits by Rules, 1883. By O. xvi. r. 1 (as amended in 1896 by the addition of the words in italics), "All persons may be joined in one action as plaintiffs in whom any right to relief *in respect of or arising out of the same transaction or series of transactions* is alleged to exist, whether jointly, severally, or in the alternative, *where if such persons brought separate actions any common question of law or fact would arise*;" . . . "and judgment may be given for such one or more of the plaintiffs as may be found to be entitled to relief, for such relief as he or they may be entitled to, without any amendment;" rule 3 provides that the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim if the defendant prove it as against the other plaintiffs; rule 4 contains similar provisions with respect to defendants; rule 5 provides that it shall not be necessary for every defendant to be interested as to all the relief prayed for or as to every cause of action included in the action; by rule 6, the plaintiff may join "all or any of the persons severally or jointly and severally liable on any one contract, including parties to bills of exchange and promissory notes;" by rule 7, where the plaintiff is in doubt, he may join two or more defendants, so that the question as to which, if any, is liable, and to what extent, may be determined as between all parties. By rule 2, provision is made for the substitution or addition of a plaintiff in the case of a *bonâ fide* mistake. By rule 11, no cause or matter is to be defeated by any misjoinder or nonjoinder of parties. The court or a judge may, at any stage of the proceedings, order that the names of any parties improperly joined, whether as plaintiffs or as defendants, be struck out, and that the names of any parties, whether plaintiffs or defendants, who ought to have been joined, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all the questions involved in the cause or matter, be added. No person shall be added as a plaintiff suing without a next friend, or as the next friend of a plaintiff under any disability, without his own consent *in writing* thereto.

The object of the alteration of O. xvi. r. 1, was to allow plaintiffs to join different causes of action where under the old rules, as in *Smurthwaite v. Hannay*, 63 L. J. Q. B. 737; [1894] A. C. 494, they could not do so; such causes may now be joined when the right to relief arises out of the same transaction, and there is also a common question of law or fact. *Stroud v. Lawson*, 67 L. J. Q. B. 718; [1898] 2 Q. B. 44; *Walters v. Green*, 68 L. J. Ch. 730; [1899] 2 Ch. 696. "Transaction" does not necessarily imply something taking place between two parties. *Drincqbier v. Wood*, 68 L. J. Ch. 181; [1899] 1 Ch. 393. Thus, four persons who each separately took debentures of a company on the faith of statements in the prospectus, and covering letter issued by the directors, may join in an action against the directors for misrepresentations contained therein. S. C.; and a plaintiff may join in one action claims against the company and the directors, even though the relief claimed against the several defendants may differ in kind, the substance of the action being the improper issue of the prospectus. *Frankenburg v. Great Horseless Carriage Co.*, 69 L. J. Q. B. 147; [1900] 1 Q. B. 504. See also *Oxford & Cambridge Universities v. Gill*, 68 L. J. Ch. 34; [1899] 1 Ch. 55; *Bennetts v. McIlwraith*, 65 L. J. Q. B. 632; [1896] 2 Q. B. 464, and *Ellis v. Bedford (Duke)*, 70 L. J. Ch. 102; [1901] A. C. 1; *Compania Sansinena v. Houlder*, 79 L. J. Q. B. 1094; [1910] 2 K. B. 354. But the order does not enable a plaintiff to bring separate causes of action arising out of several torts against different persons in one action, although the resulting damage may be the same in each case. *Thompson v. London County Council*, 68 L. J. Q. B. 625; [1899] 1 Q. B. 840.

Where a child sued the husband on the covenant for maintenance in a separation deed, the wife and the trustees of the deed were allowed to be added as plaintiffs under rule 2. *Gandy v. Gandy*, 54 L. J. Ch. 1154; 30 Ch. D. 57. So, where the real question in the action was the effect of a

covenant, and it appeared that some personal bar might exist against the plaintiff, a plaintiff in a similar position, but without the bar, may be added. *Ayscough v. Bullar*, 58 L. J. Ch. 474; 41 Ch. D. 341. So where a plaintiff H. sued after he had assigned his cause of action to L., the name of L. was allowed to be substituted for that of H. *Hughes v. Pump House Hotel Co.*, 71 L. J. K. B. 803; [1902] 2 K. B. 485. But a party can only be added under rule 2, where there has been a *bonâ fide* mistake; *Clowes v. Hilliard*, 46 L. J. Ch. 271; 4 Ch. D. 413; a mistake of law is sufficient. *Duckett v. Gover*, 46 L. J. Ch. 407; 6 Ch. D. 82.

A defendant may be added under rule 4, although alternative relief is claimed against him which is inconsistent with that claimed against the other defendant. *Child v. Stenning*, 5 Ch. D. 695. The alteration made in 1896 in O. xvi. r. 1, extends by implication to the other rules of that order, including r. 4. *Oesterreichische Export, &c. v. British Indemnity Co.*, 83 L. J. K. B. 971; [1914] 2 K. B. 747.

Any objection as to parties which was formerly taken by plea in abatement may now be taken by the application for an order under O. xvi. r. 11; *Kendall v. Hamilton*, 48 L. J. C. P. 705; 4 App. Cas. 504, 516; *Wegg-Prosser v. Evans*, 64 L. J. Q. B. 1; [1895] 1 Q. B. 108, 114, 116, 118; before the trial; *Sheehan v. G. E. Ry.*, 50 L. J. Ch. 68; 16 Ch. D. 59.

A person, W., will not be added as plaintiff, unless his consent in writing, signed by him, has been obtained, see r. 11; the consent of his solicitor, C., written and signed by C. in W.'s presence, is insufficient. *Fricker v. Van Grutten*, 65 L. J. Ch. 823; [1896] 2 Ch. 649. This consent of W. is required even although terms necessary for his indemnity have been offered to him; *Tryon v. National Provident Institution*, 55 L. J. Q. B. 236; 16 Q. B. D. 678; and although he is trustee for the plaintiff of the property in respect of which the action is brought. *Besley v. Besley*, 57 L. J. Ch. 464; 37 Ch. D. 648. The plaintiff may now, however, join as a co-defendant any person to whose nonjoinder as a co-plaintiff exception is taken, and who has not consented to be co-plaintiff on an indemnity against costs having been tendered him. *Cullen v. Knowles*, 67 L. J. Q. B. 821; [1898] 2 Q. B. 380. See also *Van Gelder v. Sowerby Bridge Flour Society*, 59 L. J. Ch. 583; 44 Ch. D. 374.

The judge will usually, in his discretion, grant a defendant in an action of contract, an order for the joinder of his co-contractors as defendants, if they are all residing within the jurisdiction. *Pilley v. Robinson*, 57 L. J. Q. B. 54; 20 Q. B. D. 155; see *Wilson, Sons & Co. v. Balcarras Brook SS. Co.*, 62 L. J. Q. B. 245; [1893] 1 Q. B. 422; but not otherwise, S. C. Where the order has been made the action will not be stayed if the plaintiff cannot find the new defendant although he be within the jurisdiction. *Robinson v. Geisel*, 64 L. J. Q. B. 52; [1894] 2 Q. B. 685. See also *Byrne v. Brown*, 58 L. J. Q. B. 410; 22 Q. B. D. 657. But where M. having a joint and several claim against G. and X. sues G. alone, X. will not be added as a co-defendant without M.'s consent. *McCheane v. Giles* (No. 2), 71 L. J. Ch. 446; [1902] 1 Ch. 911.

In an action for nuisance from noise, brought by the owner, A., of an unlet house L., and his tenant, B., of a house M., the house L. was, after action, let to C. and B. refused to continue the action; C. was allowed at the trial, under rule 11, to be substituted for B. as co-plaintiff. *House Property Investment Co. v. Horse Nail Co.*, 54 L. J. Ch. 715; 29 Ch. D. 190. Such amendment may it seems be made at any time before final judgment. See *Bucclough (Duke)*, 61 L. J. P. 57; [1892] P. 201. But a plaintiff A. cannot be allowed to join B. as a co-plaintiff, when the question to be tried between A. and the defendant C. is wholly different from that between B. and C. *Walcott v. Lyons*, 54 L. J. Ch. 847; 29 Ch. D. 584, explained in *Ayscough v. Bullar*, 58 L. J. Ch. 474; 41 Ch. D. 341.

As to amendment of misjoinder of husband, suing with his wife in respect of her separate estate, see *Roberts v. Evons*, 47 L. J. Ch. 469; 7 Ch. D. 830.

At common law in an action of tort the omission of a person who ought to be joined as plaintiff was only ground of plea in abatement, and was no

variance. *Dockwray v. Dickenson*, Skin. 640; *Blowam v. Hubbard*, 5 East, 407. And the omission of a person who might have been joined as defendant could not, in general, be taken advantage of; 1 Wms. Saund. 291 f. g. (4); unless in the case of one parcener, joint-tenant, or tenant in common of land sued in respect of the land, in which case he might plead the non-joinder of his co-tenant in abatement.

In an action of contract it was a variance if it appeared in evidence that a party who ought to be joined as plaintiff had been omitted; *Graham v. Robertson*, 2 T. R. 282; *Jones v. Smith*, 1 Ex. 831; or that a party joined as plaintiff or defendant was no party to the contract; but it was no variance to omit a co-executor as plaintiff; 1 Wms. Saund. 291 k. l.; nor to omit a person who ought to be joined as defendant; *Id.* 291 d. (4); for the non-joinder could only be pleaded in abatement. Where the cause of action is, in substance, contract, the liability of the defendant cannot be altered by framing the statement of claim in tort. *Alton v. Midland Ry.*, 19 C. B. (N. S.) 213; 34 L. J. C. P. 292.

Where three persons agreed to be jointly interested in certain goods, but that they should be bought by one of them in his own name only, and he made the contract accordingly; it was held that all the three might sue for a breach of that contract; *Cothay v. Fennell*, 8 L. J. (O. S.) K. B. 302; 10 B. & C. 671; for the action may be maintained either in the name of the person who actually made the contract, or in the name of the parties really interested. *Skinner v. Stocks*, 4 B. & A. 437; *Clay v. Southern*, 7 Ex. 717; 21 L. J. Ex. 202. But, regularly, on a written contract by A. "on behalf of B.," B. should be sued, and not A.; *Dowman v. Williams*, 14 L. J. Q. B. 226; 7 Q. B. 103; *Lewis v. Nicholson*, 21 L. J. Q. B. 311; 18 Q. B. 503; *Collen v. Wright*, 7 E. & B. 301; 26 L. J. Q. B. 147; 8 E. & B. 647; 27 L. J. Q. B. 215; *Jenkins v. Hutchinson*, 18 L. J. Q. B. 274; 13 Q. B. 744; unless A. be the real principal, and proof of this lies on the plaintiff. Thus, if A. falsely represent himself as agent of a person *not named*, being really himself the principal, he may then be sued as such. See *Carr v. Jackson*, 7 Ex. 382; 21 L. J. Ex. 137. So the real principal may sue on a contract in which he calls himself agent of a third person unnamed. *Schmalz v. Avery*, 16 Q. B. 655; 20 L. J. Q. B. 228; *Harper v. Vigers*, 78 L. J. K. B. 867; [1909] 2 K. B. 549. But a party contracting as agent of B. cannot be sued personally as principal if he be neither authorized by B. nor be himself the real principal; the only remedy against him will be for the false representation or breach of warranty of authority; *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J. Q. B. 311; unless indeed B. has no existence, in which case the agent is personally liable. *Kelner v. Baxter*, 36 L. J. C. P. 94; L. R. 2 C. P. 174. A *del credere* agent selling for a disclosed principal cannot sue in his own name; *Bramble v. Spiller*, 21 L. T. 672; nor can a broker. *Fairlie v. Fenton*, 39 L. J. Ex. 107; L. R. 5 Ex. 169. The fact of the contracting party being called in the contract the agent of a named principal does not necessarily show that he ought not to be the party to a suit on the contract, although he be really such agent: it is a question of intention arising on the construction of the contract itself; "and it may be laid down as a general rule that, where a person signs a contract in his own name without qualification, he is *prima facie* to be deemed to be a person contracting personally; and in order to prevent this liability from attaching, it must be apparent from the other portions of the document that he did not intend to bind himself as principal." 2 Smith's L. C., 12th ed. p. 379, notes to *Thomson v. Davenport*; *Dutton v. Marsh*, 40 L. J. Q. B. 175; L. R. 6 Q. B. 361; *Norton v. Herron*, Ry. & M. 229; *Lennard v. Robinson*, 5 E. & B. 125; 24 L. J. Q. B. 275; *Parker v. Winlow*, 7 E. & B. 942; 27 L. J. Q. B. 49; *Southwell v. Bowditch*, 45 L. J. C. P. 630; 1 C. P. D. 374; *Gadd v. Houghton*, 1 Ex. D. 357. In these two last cases, though the agent signed without qualification, the contract showed that the intention was that he should not be bound personally, and in the latter case the decision in *Paice v. Walker*, 39 L. J. Ex. 109; L. R. 5 Ex.

173, was doubted; it was indeed followed in *Hough v. Manzanos*, 48 L. J. Ex. 398; 4 Ex. D. 104, but the last two cases have been overruled by *Haigh v. Suart*, W. N. (1890), 213. See further *Wagstaff v. Anderson*, 49 L. J. C. P. 485; 5 C. P. D. 171, 175, per Bramwell, L.J. Where the agent is acting for an undisclosed foreign principal, see *Harper v. Keller, Bryant & Co.*, 84 L. J. K. B. 1696; *Miller, Gibb & Co. v. Smith & Tyrer*, 86 L. J. K. B. 1259; [1917] 2 K. B. 141; and *Mercer v. Wright, Graham & Co.*, 33 T. L. R. 343. The addition of the word "broker" to the agent's signature will not exonerate him from personal liability. *Hutcheson v. Eaton*, 13 Q. B. D. 861.

Where an attorney carried on business under the firm of "A. and Son," the son not being in fact a partner, but only a clerk, it was held that A. might sue in his own name for the amount of a bill for business done. *Kell v. Nainby*, 8 L. J. (O. S.) K. B. 99; 10 B. & C. 20. An agent who purchases for an unnamed principal (the bought and sold notes being made out in the agent's name) may, on the renunciation of the contract by his principal, sue for the non-delivery of the goods in his own name. *Short v. Spackman*, 2 B. & Ad. 962. Provisional directors of a proposed company invited applications for shares to a committee of management appointed by and from themselves. The defendant applied for, and received, shares on the terms that he should pay a deposit, and got a form of receipt for the deposit on account of the "provisional committee." Held, that the action to recover the deposit should be by the provisional committee of directors at large, and not by the committee of management. *Woolmer v. Toby*, 16 L. J. Q. B. 225; 10 Q. B. 691.

Plaintiff may join, as co-defendant, a dormant partner not known to him at the time of the contract, even where there was a written agreement (not under seal) to which such partner was not party. *Drake v. Beckham*, 12 L. J. Ex. 486; 11 M. & W. 315. But this does not apply to the case of a bill of exchange or promissory note; see the Bills of Exchange Act, 1882, s. 23; and if the agreement were in terms with "A. and B. and the survivor of them," it cannot be stated as one between A. and C. (the dormant partner) and the survivor of them. *Beckham v. Knight*, 7 L. J. C. P. 19; 1 M. & Gr. 738; *De Mautort v. Saunders*, 9 L. J. (O. S.) K. B. 51; 1 B. & Ad. 398.

Where a married woman deposited the moneys of her husband with a banker in the name of a child under age, it was held that the husband might sue the bankers for money had and received. *Calland v. Leyd*, 9 L. J. Ex. 56; 6 M. & W. 26.

By the Bankruptcy Act, 1914, s. 118, "Where a bankrupt is a contractor in respect of any contract jointly with any person or persons, such person or persons may sue or be sued in respect of the contract, without the joinder of the bankrupt."

ONUS PROBANDI.

Generally he who asserts a fact is bound to prove it, if there be no presumption in favour of it; and a negative need not ordinarily be proved. *Ross v. Hunter*, 4 T. R. 33; *Calder v. Rutherford*, 3 B. & B. 302. See *Over v. Harwood*, 69 L. J. Q. B. 272; [1900] 1 Q. B. 803. In an action against a solicitor for negligently letting judgment go by default, after the plaintiff has proved the default, it lies on the defendant to show good ground for it, and not on the plaintiff to show that there was a good defence. *Godefroy v. Jay*, 7 Bing. 413. It must, however, be borne in mind that regard must be had to the effect and substance of the issue, and not to its grammatical form. *Soward v. Leggatt*, 7 C. & P. 613; *Doe d. Worcester School, &c., Trustees v. Rowlands*, 9 C. & P. 734; *Belcher v. M'Intosh*, 8 C. & P. 720. Where the assertion of a negative is part of the plaintiff's case he must prove it as the want of reasonable and probable cause in an action for malicious prosecution. *Abrath v. N. E. Ry.*, 52 L. J. Q. B.

620; 11 Q. B. D. 440; 55 L. J. Q. B. 457; 11 App. Cas. 247. For illustrations of the shifting of the onus of proof during a trial, see *Medawar v. Grand Hotel Co.*, 60 L. J. Q. B. 209; [1891] 2 Q. B. 11; *Gordon v. Williamson*, 61 L. J. Q. B. 820; [1892] 2 Q. B. 459, 464.

Where the presumption is in favour of the affirmative, as where the issue involves a charge of a culpable omission, it is incumbent on the party making the charge to prove it; for the other party shall be presumed innocent until proved to be guilty. See Best on Evid., 10th ed. §§ 314, 346. Thus where, in a suit for tithes in the spiritual court, the defendant pleaded that the plaintiff had *not* read the Thirty-nine Articles, it was held that the proof of the issue lay on the defendant. *Monke v. Butler*, 1 Roll. Rep. 83. See also *R. v. Hawkins*, 10 East, 211. In an action by the owner of a ship for putting combustibles on board, "without giving due notice thereof," it was held that the plaintiff was bound to prove the want of notice, as the omission to give such notice would have amounted to criminal negligence on the part of the defendant. *Williams v. E. India Co.*, 3 East, 193. So in an action for the price of goods sold in the ordinary course of business, by a company in liquidation, it was held that it lay on the defendant to show that the sale was illegal under the Companies Act, 1862, s. 131, on the ground that it was not required for the beneficial winding-up of the company. *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387. In actions for negligence it lies on the plaintiff to prove it, and not on the defendant to show reasonable care. *Marsh v. Horne*, 4 L. J. (O. S.) K. B. 267; 5 B. & C. 322. Again, where the issue is as to the legitimacy of a child born in lawful wedlock, it is incumbent on the party asserting the illegitimacy to prove it; *Banbury Peerage Case*, 1 Sim. & St. 153; and where the issue is on the life of a person who is proved to have been alive within seven years, the party asserting his death must prove it.

It has been stated to be a rule that, where the affirmative is peculiarly within the knowledge of the party charged, the presumption of law in favour of innocence is not allowed to operate, but the general rule applies, viz., that he who asserts the affirmative is to prove it, and not he who avers the negative. It has been said that in action on a *covenant* for not insuring premises against fire, it lies on the defendant to prove that he has insured. *Doe d. Bridger v. Whitehead*, 7 L. J. Q. B. 250; 8 Ad. & E. 571. *Accord. Toleman v. Portbury*, 39 L. J. Q. B. 136; L. R. 5 Q. B. 288, 294, *per* Willes, J. In an action on the game laws, though the plaintiff must aver that the defendant was not duly qualified, yet he cannot be called upon to prove the want of qualification. *Spieres v. Parker*, 1 T. R. 145; *R. v. Turner*, 5 M. & S. 206. In an action against a person for practising as an apothecary without having obtained a certificate according to 55 G. 3, c. 194, the proof of certificate was held to lie upon the defendant. *Apothecaries' Co. v. Bentley, Ry. & M.* 159. It has, however, been observed that the Act itself seems to throw upon him such proof. *Elkin v. Janson*, 14 L. J. Ex. 201; 13 M. & W. 655, 662, *per* Alderson, B. So where, on a conviction for selling ale without a licence, the only evidence given was that the party sold ale, and no proof was offered of his want of a licence; it was held that the conviction was right, for that the informer was not bound to sustain in evidence the negative averment; and it was said by Abbott, C.J., that the party thus called on to answer sustains no inconvenience from the general rule, for he can immediately produce his licence; whereas if the case is taken the other way, the informer would be put to considerable inconvenience. *R. v. Harrison*, Paley on Convictions, 2nd ed., 45, n. From the observations of the court in *Doe d. Bridger v. Whitehead*, *infra*, it would seem that the burden of proof in the instances above cited of convictions, &c., lies on the defendant, not because the matter is peculiarly within his knowledge, for that cannot vary the rule of the law, but because the Legislature has in those cases, by a general prohibition, made the act of the defendant *primâ facie* unlawful. See also *Abrath v. N. E. Ry.*, 11 Q. B. D. 440, 457,

per Bowen, L.J. And in actions for the recovery of possession of land, on the ground of forfeiture, it always rests on the lessor, the plaintiff, to show that the estate which he has granted has been forfeited by the tenant. *Toleman v. Portbury*, *infra*. Where the action is brought on a breach of a condition to insure "in some office in or near London," it lies on the plaintiff to prove the omission. *Doe d. Bridger v. Whitehead*, 7 L. J. Q. B. 250; 8 Ad. & E. 571; see also *Price v. Worwood*, 4 H. & N. 512; 28 L. J. Ex. 329. So where A. was lessee of a dwelling-house under a condition not to permit a sale by auction on the premises without his lessor's consent in writing, and he sublet to the defendant with the lessor's consent, and subsequently assigned his goods on the premises to X., who there sold them by auction, it was held that, in the absence of evidence that the sale was by A.'s permission, there was no forfeiture, and, further, that the onus was thrown on the lessor of showing the non-existence of a written consent to the sale. *Toleman v. Portbury*, 39 L. J. Q. B. 136; L. R. 5 Q. B. 288.

In an action on a common money bond the plaintiff need not show that the bond is forfeited; it rests on the defendant to prove payment. *Penny v. Foy*, 6 L. J. (O. S.) K. B. 230; 8 B. & C. 11, 13.

The question of the *onus* of proof is one which may arise in any stage of a trial, and is therefore not necessarily connected with, nor in all cases determined by, the same considerations as the right to begin on trials at *Nisi Prius*.

In many cases there are statutable provisions regulating the burden of proof. See them collected in 1 Taylor, *Evid.*, 10th ed., §§ 372-374; but these chiefly relate to criminal proceedings.

PROOF OF DOCUMENTS.

Under the present head will be considered the mode in which various kinds of documents, usually adduced in evidence, must be proved.

As a general rule, before a document can be proved at a trial it must itself be produced in court, but there are certain documents of a public character which either at common law or by statute are provable by copies without production of the original in court. And under O. xxx. r. 7, an order may be made that evidence of a specific fact shall be given by copies of documents or entries in books.

Before enumerating the means of proving the several documents under their respective heads, it will be convenient to show here when and how this method of proof is admissible.

PROOF BY COPIES.

The various kinds of copies by which original documents may in general be proved may be classed under four heads, viz.: 1. Exemplifications; 2. Office copies; 3. Examined copies; and 4. Certified copies.

Proof by Exemplification.

Exemplifications are of two kinds—under the Great Seal, or under the seal of the court in which the record is preserved. An exemplification under the Great Seal may be obtained of any record of the Court of Chancery, or of any record which has been removed thither by *certiorari*; but private deeds, so exemplified, will not be admitted in evidence. B. N. P. 227. An exemplification produced from the proper custody, and purporting to

exemplify a commission from the Crown, is evidence, though the seal has been lost. *Beverley (Mayor) v. Craven*, 2 M. & Rob. 140. An exemplification under the seal of the Exchequer is evidence of a commission out of that court, and of the return thereto, in respect of Crown lands. *Tooker v. Beaufort (Duke)*, Sayer, 297. So an exemplification of a recovery under the seal of the Great Sessions of Wales, *Olive v. Guin*, 2 Sid. 145. So of Chester S. C. *Id.* And the seals of those courts (it is said) prove themselves. Com. Dig. Testm. (A. 2). Exemplifications may be given of a lost probate. *Shepherd v. Shorthose*, Stra. 412.

Proof by Office Copy.

An office copy, that is, a copy made by the officer having custody of the document, always was, in the same court and in the same cause, equivalent to the document of which it was a copy. *Per* Ld. Mansfield in *Denn v. Lucas v. Fulford*, 2 Burr. 1179; B. N. P. 229. And for this purpose the judge who tried the issue was considered as acting under the authority of the court in which the action is pending, and as an emanation of that court. *R. v. Jolliffe*, 4 T. R. 285, 292. And now by the J. Act, 1873, ss. 29, 30, a judge or commissioner trying causes shall be deemed to constitute a court of the High Court of Justice. An office copy of depositions in Chancery was evidence in that court, but would not be admitted in a court of common law without examination with the original; B. N. P. 229; unless, perhaps, in the case of the trial of an issue out of Chancery. See *Highfield v. Peake*, M. & M. 109, *per* Littledale, J. See, however, *Burnand v. Nerot*, 1 C. & P. 578, *cor.* Best, C.J., *contra*. In an action against the sheriff for a false return, the plaintiff could not use office copies of the writ and return, though the original cause was in the same court, for the cause is a different one. *Pitcher v. King*, 1 Car. & K. 655.

By Rules, 1883, O. xxxvii. r. 4, "Office copies of all writs, records, pleadings, and documents filed in the High Court of Justice shall be admissible in evidence in all causes and matters, and between all persons or parties to the same extent as the original would be admissible." The rule, however, in so far as it alters the rule of evidence above stated, seems to be *ultra vires*; see J. Act, 1875, s. 20. By O. lxi. r. 7, office copies are sufficiently authenticated if they appear to be stamped with a seal of the Central Office.

Office copies of documents registered or deposited in the Central Office, *e.g.*, bills of sale, under 41 & 42 V. c. 31, s. 16; powers of attorney, under 44 & 45 V. c. 41, s. 48, are made evidence in some cases by statute.

Where a copy is made by a public officer specially intrusted to make copies and to deliver them to the parties as part of their title, it is admissible in evidence without proof of having been actually examined. B. N. P. 229; *Appleton v. Braybrook, Ltd.*, 6 M. & S. 34, 38. But a copy of a judgment purporting to have been examined by the clerk of the Treasury (who is not intrusted to make copies), is not admissible without proof of its accuracy. B. N. P. 229.

Proof by Examined Copy.

The contents of a document of a public nature required by law to be kept, may be proved by producing a copy verified by the oath of a witness who has compared it with the original, and will swear that it is complete and correct. Public documents, in this sense, although never very accurately defined, seem to include all documents in which the community at large is interested, and which it is desirable not to remove from their place of deposit. *Lynch v. Clerke*, 3 Salk. 154. The term would clearly include all records of any court, and all registers of births, deaths, and marriages; registers having reference to shipping and navigation, to trade, and to the

public health. The rule applies equally to such public registers kept abroad, as there is a presumption that the foreign authority in whose custody they are, would not allow their removal to this country. *R. v. Castro*, Q. B., trial at bar (shorthand notes, pp. 3033-4) 28th Nov., 1873, following *Lanesborough's (Earl) Claim*, 1 H. L. C. 510, n., and *Abbott v. Abbott*, 29 L. J. P. 57. See *Burnaby v. Baillie*, 42 Ch. D. 282.

An examined copy of a record or other document must be proved by a witness who has examined it line for line with the original, or who has examined the copy while another person read the original. *Reid v. Margison*, 1 Camp. 469. And it is not necessary (though in peerage cases a more rigorous rule prevails; *Slane Peerage*, 5 Cl. & Fin. 42) for the persons examining to exchange papers, and read them alternately. *Gyles v. Hill*, 1 Camp. 471, n.; *Rolf v. Dart*, 2 Taunt. 52. The copy must not contain abbreviations which do not occur in the original. *R. v. Christian*, Car. & M. 388. Where an examined copy is put in evidence some account should be given of the original record; thus, it ought to be shown that the record, from which the copy was taken, was seen in the hands of the proper officer, or was in the proper place for the custody of such records. *Adamthwaite v. Synge*, 1 Stark. 183; S. C. 4 Camp. 372.

14 & 15 V. c. 99, s. 14, contains provisions for the admissibility of examined copies of public books and documents, and puts examined copies and copies certified under that Act on the same footing.

Proof by Certified Copy.

By the Public Record Offices Act, 1838 (1 & 2 V. c. 94), s. 12, "the Master of the Rolls, or deputy keeper of the records, may allow copies to be made of any records in the custody of the Master of the Rolls, at the request and costs of any person desirous of procuring the same: and any copy so made shall be examined and certified as a true and authentic copy by the deputy keeper of the records, or one of the assistant record keepers," appointed under the Act, "and shall be sealed or stamped with the seal of the Record Office, and delivered to the party for whose use it was made." Sect. 13: "Every copy of a record in the custody of the Master of the Rolls, certified as aforesaid, and purporting to be sealed or stamped with the seal of the Record Office, shall be received as evidence in all courts of justice, and before all legal tribunals, and before either House of Parliament, or any committee of either house, without any further or other proof thereof, in every case in which the original record could have been received there as evidence." See *Att.-Gen. v. Horner (No. 2)*, [1913] 2 Ch. 140.

The records of all the superior courts, and some public records not of a judicial character, are, after the lapse of a certain time, deposited in the Record Office, in the custody of the Master of the Rolls.

The following is a list of the principal statutes (alphabetically arranged) under which certified copies of documents are made evidence: Army Act, 1881 (44 & 45 V. c. 58), s. 165 (court-martial proceedings); Assurance Companies Act, 1909 (9 Ed. 7, c. 49), s. 21 (documents deposited under Act); Bankruptcy Act, 1914 (4 & 5 G. 5, c. 59), s. 139 (proceedings in bankruptcy); Births and Deaths Registration Act, 1836 (6 & 7 Wm. 4, c. 86), s. 38 (certificates of births, &c.); British Nationality and Status of Aliens Act, 1914 (4 & 5 Geo. 5, c. 17), ss. 20, 21, 22 (declarations, certificates, &c., of naturalization); Building Societies Act, 1874 (37 & 38 V. c. 42), s. 20 (certificates and rules); Charitable Trusts Act, 1853 (16 & 17 V. c. 137), s. 8 (orders, schemes, &c.); Charitable Trusts Amendment Act, 1855 (18 & 19 V. c. 124), s. 5 (orders, schemes, &c.); Charitable Trusts Act, 1887 (50 & 51 V. c. 49), s. 3 (orders, schemes, &c.); Children Act, 1908 (8 Ed. 7, c. 67), s. 88 (certificates, rules, &c.); Colonial Laws Validity Act, 1865 (28 & 29 V. c. 63), s. 6 (colonial laws); Commons Act, 1899 (62 & 63 V. c. 30), s. 10 (bye-laws); Companies (Consolidation) Act, 1908 (8 Ed. 7, c. 69),

s. 243 (documents registered under Act); Conveyancing Act, 1882 (45 & 46 V. c. 39), s. 7 (acknowledgments of deeds by married women); County Bankers Act, 1826 (7 G. 4, c. 46), s. 6 (returns); County Courts Act, 1888 (51 & 52 V. c. 43), s. 28 (entries in registrar's book); Criminal Justice Administration Act, 1914 (4 & 5 G. 5, c. 58), s. 28 (convictions); Deeds of Arrangement Act, 1914 (4 & 5 G. 5, c. 47), s. 25 (deeds of arrangement); Ecclesiastical Leases Act, 1842 (5 & 6 V. c. 27), s. 14 (leases); Ecclesiastical Leasing Act, 1842 (5 & 6 V. c. 108), s. 29 (leases); Elementary Education Act, 1870 (33 & 34 V. c. 75), s. 83 (orders, minutes, &c.); Evidence Act, 1851 (14 & 15 V. c. 99), s. 7 (foreign and colonial acts of state, judgments, &c.), s. 13 (convictions); Friendly Societies Act, 1896 (59 & 60 V. c. 25), s. 100 (documents signed by registrar); Inclosure Act, 1833 (3 & 4 Wm. 4, c. 87), s. 2 (awards); Inclosure Act, 1845 (8 & 9 V. c. 118), s. 146 (awards); Industrial and Provident Societies Act, 1893 (56 & 57 V. c. 39), s. 75 (rules, &c.); Inland Revenue Regulation Act, 1890 (53 & 54 V. c. 21), s. 24 (regulations, minutes and notices); Lands Clauses Consolidation Act, 1845 (8 & 9 V. c. 18), s. 50 (verdicts and judgments); Land Transfer Act, 1875 (38 & 39 V. c. 87), ss. 80, 120 (certificates, &c., in land registry); Licensing (Consolidation) Act, 1910 (10 Ed. 7 & 1 G. 5, c. 24), s. 53 (licences); Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), s. 16 (certificates); London Hackney Carriages Act, 1843 (6 & 7 V. c. 86), s. 16 (cab licences); Lunacy Act, 1890 (53 & 54 V. c. 5), s. 144 (orders and reports); Medical Act, 1886 (49 & 50 V. c. 48), s. 23 (orders under Medical Acts and Dentists Act); Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 695 (shipping documents); Newspaper Label and Registration Act, 1881 (44 & 45 V. c. 59), s. 15 (register of newspaper proprietors); Open Spaces Act, 1906 (6 Ed. 7, c. 25), s. 15 (bye-laws); Patents and Designs Act, 1907 (7 Ed. 7, c. 29), s. 79 (documents in Patent Office); Poor Law Amendment Act, 1844 (7 & 8 V. c. 101), s. 69 (certificates of chargeability); Public Health Act, 1858 (21 & 22 V. c. 97), s. 7 (orders, &c., of Privy Council); Public Health Act, 1875 (38 & 39 V. c. 55), s. 186 (bye-laws); Public Health (London) Act, 1891 (54 & 55 V. c. 76), s. 114 (bye-laws); Railways Clauses Consolidation Act, 1845 (8 & 9 V. c. 20), s. 10 (plans and books of reference); Registration of Business Names Act, 1916 (6 & 7 G. 5, c. 58), s. 16 (certificates); Shops Act, 1912 (2 G. 5, c. 3), s. 18 (orders of local authorities); Trade Marks Act, 1905 (5 Ed. 7, c. 15), s. 50 (trade marks); Valuation (Metropolis) Act, 1869 (32 & 33 V. c. 63), s. 64 (valuation list).

By the Crown Lands Act, 1873 (36 & 37 V. c. 36), s. 6, a print purporting to have been made by order of Parliament, of a report made by the Commissioners of Woods and Forests to His Majesty or Parliament, is as good evidence as the original.

By the Documentary Evidence Act (8 & 9 V. c. 113), s. 1, "Whenever any certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or any certified copy of any document, bye-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any parliamentary or judicial proceeding, the same shall respectively be admitted in evidence, provided they purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or impressed with a stamp, and signed as directed by the respective Acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature, or of the official character of the person appearing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

The signature of a *de facto* officer, who by virtue of that office has the custody of the records, is sufficient under this section, even though he be not the officer *de jure*. *Reg. v. Parsons*, 35 L. J. M. C. 167; L. R. 1 C. C. R. 24.

Sec. 7 of the Evidence Act, 1851 (14 & 15 V. c. 99), which does not extend to Scotland, provides that proclamations, treaties, and other acts of state of

any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved by examined copies, or by copies authenticated as hereinafter mentioned; that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or an affidavit, pleading, or other legal document filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs, or in the event of such court having no seal, to be signed by the judge, or if there be more than one judge, by any one of the judges of the said court, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or signed as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement.

A foreign patent is an "act of state" within the meaning of this section. *In re Bett's Patent*, 1 Moore P. C. (N. S.) 49. And an order of a foreign court made *ex parte* on a shareholder is a judicial proceeding within the same section. *Leishman v. Cochrane*, *Id.* 315. Where the seal of the foreign court is affixed to a copy of the proceedings, for the double purpose of authenticating the proceedings and cancelling a stamp affixed thereon, that is sufficient. *Loibl v. Strampfer*, 16 L. T. 720. It seems that the seal should be used, though so much worn as no longer to make any impression. *Cavan v. Stewart*, 1 Stark. 525.

By sect. 8, a certificate of the qualification of an apothecary, purporting to be under the common seal of the society of apothecaries of the city of London, shall be received in evidence, without further proof.

By sect. 13: The conviction or acquittal of a person charged with an indictable offence may be certified, or purport to be certified, under the hand of the clerk or deputy clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, omitting the formal parts thereof.

See *Reg. v. Parsons*, 35 L. J. M. C. 167; L. R. 1 C. C. R. 24. This section applies to proof in civil proceedings, even on the issue of *nul tiel record*. *Richardson v. Willis*, 42 L. J. Ex. 15; L. R. 8 Ex. 69. 34 & 35 V. c. 112, s. 18 is to the same effect as regards the proof of convictions, and includes summary convictions; see also sect. 28 of the Criminal Justice Administration Act, 1914 (4 & 5 G. 5, c. 58).

By sect. 14, "Whenever any book or other document is of such a public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence, . . . provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is entrusted;" and the officer is required to furnish such certified copy or extract on application at a reasonable time and payment of a reasonable sum not exceeding 4d. per folio of 90 words.

Where the copy is signed and certified as the section provides, it is admissible on its mere production in court. *Reg. v. Weaver*, 43 L. J. M. C. 13; L. R. 2 C. C. R. 85. Where a copy is informally certified, and therefore inadmissible, under this section, it may yet be proved to be an examined copy by *vivâ voce* evidence, for the provisions of the section are cumulative. *Reg. v. Manwaring*, 1 Dears. & B. 132, 141; 26 L. J. M. C. 10, 14.

The register of parliamentary voters of a borough, and the poll books were provable under this section by copies; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J. Ex. 452; so are registers of births, marriages, &c.; and Scottish parochial registers of baptism; *Lyell v. Kennedy*, 59 L. J. Q. B. 268; 14 App. Cas. 437; and the bye-laws of a railway company duly made and allowed under 8 & 9 V. c. 20, ss. 108—111, may be proved by a certified copy under the hand of the secretary of the company in whose custody they are. *Motteram v. E. Counties Ry.*, 7 C. B. (N. S.) 58; 29 L. J. M. C. 57. As to proof of the bye-laws of a municipal corporation under 45 & 46 V. c. 50, s. 24, see *Robinson v. Gregory*, 74 L. J. K. B. 367; [1905] 1 K. B. 534.

It should be observed that copies or extracts, attested or in any manner authenticated, are in many cases liable to stamp duty.

CUSTODY OF ANCIENT WRITINGS.

In general the admissibility of ancient writings, which are incapable of direct proof, depends upon the custody from which they are produced, and from which their genuineness may be inferred.

Ancient ecclesiastical terriers are not admissible unless found in a proper repository, viz., the registry of the bishop, or of the archdeacon of the diocese; *Atkins v. Hatton*, 2 Anstr. 386; *Potts v. Durant*, 3 Anstr. 795; or, as it seems, the church chest; *Armstrong v. Hewitt*, 4 Price, 216; which are also the proper repositories for the vicar's books; S. C. A terrier found in the registry of the dean and chapter of Lichfield has been admitted as against a prebendary of Lichfield. *Miller v. Foster*, 2 Anstr. 387, n. But mere private custody is not sufficient. *Potts v. Durant*, 3 Anstr. 789; *Atkins v. Drake*, M'Cl. & Y. 213. See also, as to terriers, *R. v. Hall*, 35 L. J. M. C. 251; L. R. 1 Q. B. 632. On an issue respecting the boundaries of two parishes, certain old papers were produced by the plaintiff (the rector of one of the parishes), which had come into the possession of the son of a former rector on his father's death, and had been delivered by him, as papers belonging to the parish, to the witness (an attorney); it was held that the papers were sufficiently authenticated without calling the son of the former rector. *Earl v. Lewis*, 4 Esp. 1. Where a book, purporting to be the book of a former rector, came out of the custody of the defendant, his grandson, the proof was held insufficient; it not appearing how it came into the defendant's possession. *Randolph v. Gordon*, 5 Price, 312. In a suit for tithes, a receipt purporting to be a receipt given by a former rector forty-five years ago to a person of the same name as the defendant, and produced from the custody of the defendant, has been held admissible. *Bertie v. Beaumont*, 2 Price, 303. Where A., the defendant in a tithe suit, offered in evidence a receipt purporting to be a receipt from one B. to one A. fifty years before, without showing who B. was, or where the paper had been kept, it was rejected. *Manby v. Curtis*, 1 Price, 225.

An ancient document relating to the interest of all the estates in the parish would reasonably be expected to be found among the title deeds of a large estate in the parish. *Reg. v. Mytton Overseers*, 2 E. & E. 557; S. C., *sub nom. Mytton Overseers v. Thornbury*, 29 L. J. M. C. 109.

An ancient writing enumerating the possessions of a monastery, produced from the Herald's Office, is inadmissible. *Lygon v. Strutt*, 2 Anstr. 601. So an old grant to an abbey, contained in a manuscript register entitled "Secretum Abbatis" in the Bodleian Library, was rejected, as not coming

from the proper repository. *Michell v. Rabbetts*, cited 3 Taunt. 91; *Bank of England v. Anderson*, 4 Scott, 83. An ancient grant to a priory among the Cottonian manuscripts in the British Museum was rejected; it not appearing that the possession of the grant was connected with any person having an interest in the estate. *Swinerton v. Stafford (Marquis)*, 3 Taunt. 91.

In order to make an old document, as a manor book, &c., evidence, it was held not enough to produce it in court by the counsel of the party to whose custody it belongs, or by his steward, or even by the party himself; some witness who can speak as to the custody of it, should be sworn in court. *Evans v. Rees*, 9 L. J. M. C. 83; 10 Ad. & E. 151. And if any suspicion arise as to the genuineness of it, the judge, before he admits it in evidence, will require information where it has been kept for some years back; when it was first seen, &c. *R. v. Mothersell*, Stra. 93. But however reasonable this security against fraud may be in some cases, it has been held enough if it be shown that such an instrument as an expired lease comes from the possession of the land agent of the lessor, though he may not be in court to produce it; *Doe d. Shrewsbury (Earl) v. Keeling*, 17 L. J. Q. B. 199; 11 Q. B. 884; or from the family solicitor; *Doe d. Jacobs v. Phillips*, 15 L. J. Q. B. 47; 8 Q. B. 158. In this, as in other cases, the admissibility of the evidence is for the determination of the court.

The "proper custody" means that in which the document may be reasonably expected to be found, although in strictness it ought to be in another place; thus a cartulary in the possession of the owner of a part of some abbey lands is admissible, though not owner of the greater part: in such a case the Augmentation Office will also be a proper place of deposit. *Bullen v. Michel*, 2 Price, 413; 4 Dow, 297. So, a tithe collector's book, produced from the possession of his successor. *Jones v. Waller*, 3 Gwill. 847. So, a bond to indemnify overseers in a case of bastardy from a chest in the union workhouse. *Slater v. Hodgson*, 9 Q. B. 727. So, a document relating to a bishop's see may be produced from the custody either of his descendants or of his successors in the see. *Meath (Bishop) v. Winchester (Marquis)*, 3 Bing. N. C. 183; and see *Id.* 201, *per* Tindal, C.J.; *Doe d. Neale v. Samples*, 7 L. J. Q. B. 140; 8 Ad. & E. 151; *Croughton v. Blake*, 13 L. J. Ex. 78; 12 M. & W. 205; *Doe d. Jacobs v. Phillips*; and *R. v. Mytton (Overseers)*, 29 L. J. M. C. 109; 2 E. & E. 557.

In a suit for tithes by a rector against occupiers, the defendants pleaded a modus payable to the vicar for the tithes claimed. It was held, first, that the copy of the vicar's endowment, contained in an old book, recording the acts of former bishops of the diocese, was admissible for the plaintiff (the bishop's registry having been searched for the original without success), and that no search was necessary either in the public Record Offices, or in the vicar's house, although it was expressed in the instrument that one part of it was to remain with the vicar; secondly, that a terrier appearing to be signed by a former incumbent, who was both rector and vicar of the parish, and whose handwriting was proved by the churchwardens, was admissible for the plaintiff, though produced from the custody of one who claimed the tithes in a particular district in the parish, and not from the usual depositories. *Tucker v. Wilkins*, 4 Sim. 241. The bishop's registry is the proper place for sequestrator's receipts and accounts. *Pulley v. Hilton*, 12 Price, 629.

A will of lands relating also to personal property is properly produced from a box containing the title deeds of the tenant for life of the lands. *Andrew v. Motley*, 12 C. B. (N. S.) 527; 32 L. J. C. P. 128. Expired leases, coming from the possession of the lessor, are admissible. *Plaxton v. Dare*, 8 L. J. (O. S.) K. B. 98; 10 B. & C. 17; *Doe d. Shrewsbury (Earl) v. Keeling*, *supra*. Or from that of the lessee. *Hall v. Ball*, 10 L. J. C. P. 285; 3 M. & Gr. 242; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J. Ex. 42.

Proof of Acts and Journals of Parliament.

Acts of Parliament may be divided into four classes:—1. Public general Acts; 2. Public local and personal Acts; 3. Private Acts, printed by the King's printer; 4. Private Acts, not printed by the King's printer. This division is only established by custom, and this a very uncertain one, at least until lately. A table (No. iii.) of all these classes is given at the end of the King's printer's edition of the statutes.

By a resolution of both Houses of Parliament, which took effect in the year 1798 (38 G. 3), public Acts were divided into two series: public general Acts, and public local and personal Acts; and all public local and personal Acts have, since that time, been printed. The other Acts were all classed as private, although they included many which ought clearly to come under the denomination of local and personal; as, for instance, Inclosure Acts.

Since 1815 the series of public local and personal Acts have been numbered by small Roman numerals, by way of distinction.

In 1815 a resolution was passed, under which almost all private Acts—except name Acts, estate Acts, naturalization Acts, and divorce Acts—have been printed. These form a third series of printed Acts; they are numbered by italic Arabic numerals.

All public Acts, whether general or local and personal, are part of the law of the land, which all tribunals are bound to notice and apply.

By the Interpretation Act, 1889 (52 & 53 V. c. 63), s. 9, it is provided that "every Act" (including, by sect. 39, a local and personal Act, and a private Act), "passed after the year 1850, whether before or after the commencement of this Act" (Jan. 1st, 1890) "shall be a public Act, and shall be judicially noticed as such, unless the contrary is expressly provided by the Act."

The printed statute book is used as evidence of a public statute, not as an authentic copy of the record itself, but as aids to the memory of that which is supposed to be in every man's mind already. Gilb. Evid., 6th ed. 8, 9.

By 8 & 9 V. c. 113, s. 3, "all copies of private, and local and personal Acts of Parliament, not public Acts, if purporting to be printed by the Queen's printers, and all copies of the journals of either House of Parliament, and of royal proclamations, purporting to be printed by the printers to the Crown, or by the printers to either House of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

While the marginal note in a public general Act forms no part of the statute itself, and cannot strictly be used to explain or construe the section; *Claydon v. Green*, L. R. 3 C. P. 511; in fact it is often taken into account and as was said by Collins, M.R., in *Bushell v. Hammond*, 73 L. J. K. B. 1005, 1007; [1904] 2 K. B. 563, 567, it "is of some assistance, inasmuch as it shows the drift of the section." In some private Acts the marginal notes may form part of the statute, *per* Phillimore, L.J., in *In re Woking Urban Council (Basingstoke Canal) Act*, 1911, 83 L. J. Ch. 201; [1914] 1 Ch. 300. Whether the title to sections or groups of sections is part of the Act has been considered in *Reg. v. Local Government Board*, 52 L. J. M. C. 4; 10 Q. B. D. 321; *In re Noyce*, 61 L. J. Q. B. 628; [1892] 1 Q. B. 642, 644, 645; in *Inglis v. Robertson*, 67 L. J. P. C. 108; [1898] A. C. 616; *Lang v. Kerr*, 3 App. Cas. 529, 535; *Eastern Counties, &c., Railway v. Marriage*, 31 L. J. Ex. 73; 9 H. L. C. 32; *M'Ewan v. Perth Magistrates*, 7 F. 714. In *Fletcher v. Birkenhead Cor.*, 76 L. J. K. B. 218; [1907] 1 K. B. 205, it was held that the effect of words in a section perfectly clear in themselves is not limited by general words in the heading.

The title of a statute is part of the statute. *Fielden (or Fielding) v. Morley Cor.*, 67 L. J. Ch. 611; [1899] 1 Ch. 1; see also *Debtor, In re*, 72

L. J. K. B. 382; [1903] K. B. 705, 708, *per* Collins, M.R. The punctuation of a section cannot be regarded. *Claydon v. Green*, 37 L. J. C. P. 226, 232; L. R. 3 Q. B. 511, 522; nor can brackets. *Devonshire (Duke) v. O'Connor*, 24 Q. B. D. 468, 478.

A private Act, not printed by the King's printer, is proved by procuring an examined copy of the Parliament roll. B. N. P. 225. This was the way in which the journals of Parliament were formerly proved, the printed journals not being evidence of them. *Melville's (Lord) Case*, 29 How. St. Tr. 683; *R. v. Gordon*, 2 Doug. 593. As to secondary proof of a private Act, see *Doe d. Bacon v. Brydges*, 6 M. & Gr. 282.

In searching for private Acts, Vardon's Index to the Local and Personal and Private Acts from 1798 to 1839, Bramwell's Analytical Table of the Private Statutes from 1727 to 1812, and the Index to the Statutes, Public and Private, published by the Select Committee on the Library of the House of Lords, from 1810 to 1859, and the later Index published by the Stationery Office, will be found useful.

The stat. 41 G. 3, c. 90, s. 9, provides for the proof of Irish statutes passed prior to the Union.

Proof of Proclamations and Orders.

By sect. 2 of the Documentary Evidence Act, 1868 (31 & 32 V. c. 37), "*primâ facie* evidence of any proclamation, order, or regulation issued before or after the passing of this Act by her Majesty or by the Privy Council, also of any proclamation, order, or regulation issued before or after the passing of this Act by or under the authority of any such department of the Government or officer as is mentioned in the first column of the schedule hereto, may be given in all courts of justice and in all legal proceedings whatsoever, in all or any of the modes hereinafter mentioned: that is to say,

- (1.) "By the production of a copy of the Gazette purporting to contain such proclamation, order, or regulation." See *The Olivia*, 1 Lush. 497.
- (2.) "By the production of a copy of such proclamation, order, or regulation purporting to be printed by the Government printer." See *R. v. Wallace*, 14 W. R. 462, C. C. R. Ir. Or by a copy purporting "to be printed under the superintendence or authority of her Majesty's Stationery Office." Documentary Evidence Act, 1862 (45 & 46 V. c. 9), s. 2. The production of such evidence is *primâ facie* evidence of publication of the order. *Huggins v. Ward*, L. R. 8 Q. B. 521. Regulations are proved by the mere production of a copy purporting to be printed by a Government printer, but the court does not take judicial notice of the regulations. *Todd v. Anderson*, [1912] S. C. (J.) 105.
- (3.) "By the production, in the case of any proclamation, order, or regulation issued by her Majesty or by the Privy Council, of a copy or extract purporting to be certified to be true by the clerk of the Privy Council, or by any one of the lords or others of the Privy Council; and in the case of any proclamation, order, or regulation issued by or under the authority of any of the said departments or officers, by the production of a copy or extract purporting to be certified to be true by the person or persons specified in the second column of the said schedule in connexion with such department or officer.

"Any copy or extract made in pursuance of this Act may be in print or in writing, or partly in print and partly in writing.

"No proof shall be required of the handwriting or official position of any person certifying, in pursuance of this Act, to the truth of any copy of or extract from any proclamation, order, or regulation."

" SCHEDULE.

Column 1.	Column 2.
<i>Names of Department or Officer.</i>	<i>Names of Certifying Officers.</i>
The Commissioners of the Treasury.	Any Commissioner, Secretary, or Assistant-Secretary of the Treasury.
The Commissioners for executing the office of Lord High Admiral.	Any of the Commissioners for executing the office of Lord High Admiral, or either of the Secretaries to the said Commissioners.
Secretaries of State.	Any Secretary or Under Secretary of State.
Committee of Privy Council for Trade.	Any member of the Committee of Privy Council for Trade or any Secretary or Assistant-Secretary of the said Committee.
The Poor Law Board.	Any Commissioner of the Poor Law Board, or any Secretary or Assistant-Secretary of the said Board." <i>Vide infra.</i>

This schedule has been extended by subsequent Acts, as follows :—

The Education Department (33 & 34 V. c. 75, s. 83).	Any member of the Education Department, or any Secretary or Assistant-Secretary thereof.
The Postmaster-General (33 & 34 V. c. 79, s. 21).	Any Secretary or Assistant-Secretary of the Post Office.
The Board of Agriculture (58 & 59 V. c. 9).	The President or any member of the Board, or the Secretary of the Board, or any person authorised by the President to act on behalf of the Secretary.

The Act applies to the Local Government Board appointed under 34 & 35 V. c. 70; to the Prison Act, 1877 (40 & 41 V. c. 21), s. 51; to a bye-law made under the Military Land Act, 1892 (55 & 56 V. c. 43) : see sect. 17 (3); and to proclamations, &c., by the Lord Lieutenant of Ireland; 45 & 46 V. c. 9, s. 4. See also the Salmon Fishery Act, 1873 (36 & 37 V. c. 71), s. 64.

A regulation or order which does not state when it is to come into operation, comes into force when it becomes known, and not from its date, if that is earlier : *Johnson v. Sargant & Sons*, 87 L. J. K. B. 122; [1918] 1 K. B. 101.

Proof of Letters Patent of the Crown.

Letters patent may be proved by production of them under the Great Seal; or by an examined copy of the original enrolment of them in the public records, or a copy certified by the Master of the Rolls under 1 & 2 V. c. 94; or by an exemplification under the Great Seal. Letters patent for inventions are now sealed with the seal of the Patent Office, impressions of which shall be judicially noticed and received in evidence. Patents and Designs Act, 1907 (7 Ed. 7, c. 29), ss. 14, 64.

Proof of Records and Judgments.

The proceedings of a court of record can be proved only by the record thereof; the record may be made up at any time when it becomes necessary to put it in evidence. Com. Dig. Record (A) (B); *Kemp v. Neville*, 10 C. B. (N. S.) 523; 31 L. J. C. P. 158; *Kelly v. Morray*, L. R. 1 C. P. 667.

Assize courts and the Central Criminal Court are now included in the High Court of Justice—see *J. Act, 1873, s. 16 (ii)* and *R. v. Parke, 72 L. J. K. B. 839; [1903] 2 K. B. 432*—and their records are therefore records of that Court.

In the case of a judgment prior to the J. Acts, upon an issue of *nul tiel record*, the proof is by the production of the original record, or by the tenor of it duly certified under writ of *certiorari*. In case of variance the court may amend under Rules, 1883, O. xxviii. r. 1. See *Hunter v. Emanuel, 15 C. B. 290; 24 L. J. C. P. 16*. Where the record is in the custody of the M.R. it seems that a copy certified under the seal of the Record Office is, under 1 & 2 V. c. 94, ss. 12, 13, as admissible in evidence as the original record. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies and observations thereon. A criminal record may, even in civil proceedings, be proved by a certified copy under 14 & 15 V. c. 99, s. 13. *Richardson v. Willis, 42 L. J. Ex. 15; L. R. 8 Ex. 69*; and may in some circumstances be proof not only of the conviction but also as *prima facie* evidence of the commission of the crime: *In re Crippen, 80 L. J. P. 47; [1911] P. 108*.

Where there is not an issue of *nul tiel record*, but it is necessary to prove a record in support of some allegation in the pleadings, the record is to be proved either by production of the original when complete, by an exemplification, or by an examined or other authenticated copy.

Records of judgments of the Superior Courts at Westminster, &c., prior to the J. Acts, were not complete until entered on parchment and enrolled; *B. N. P. 228; Glynn v. Thorpe, 1 B. & A. 153*; and a copy of a judgment in paper, signed by the Master, was not evidence of the judgment, for it had not yet become permanent; *B. N. P. 228*; though such entry was sufficient to warrant execution. In *Fagan v. Dawson, 4 M. & Gr. 711*, the issue roll not under the seal of the court, with a *nolle pros.* entered thereon against a co-defendant, was held insufficient proof of the *nolle pros.* It should seem that a regular entry on record was necessary. But a certified copy of the entry of a judgment in the entry book of judgments in the Court of Exchequer has been admitted in bankruptcy in proof of the judgment. *Ex pte. Anderson, In re Tollemache, 54 L. J. Q. B. 383; 14 Q. B. D. 606*. In this case, however, the point was not argued. Where the pleadings did not allege any matter of record, but only averred the pendency of a judicial proceeding before the record is made up,—as that a trial was had,—the fact might be proved by the production of the *Nisi Prius* record, or indictment, with the official minutes; and, in some cases, perhaps, by mere oral evidence. *Pitton v. Walter, Stra. 162; R. v. Browne, M. & M. 815; R. v. A. H. Newman, 21 L. J. M. C. 75; 2 Den. C. C. 390*.

Now by the Rules, 1883, O. xli. r. 1, "every judgment shall be entered by the proper officer in the book to be kept for the purpose. The party entering the judgment shall deliver to the officer a copy of the whole of the pleadings in the cause." The pleadings will be filed by the officer, and under O. v. rr. 12, 13, a copy of the writ of summons will have previously been filed; and it is presumed by analogy to the former Chancery practice that these documents, together with the judgment, now constitute the record, and that no enrolment is necessary. This record may in every case be proved by its production under a judge's order, by an examined or certified copy, or perhaps by an office copy under O. xxxvii. r. 4. Where the judgment is pleaded in a general form as an estoppel, the court will examine the pleadings and judgment to see what questions were in issue in the former action. *Houstoun v. Sligo (Marquis), 29 Ch. D. 448*. The grounds of the judgment may, it seems, be proved by a shorthand note sworn by the writer. *S. C., Id. 457, 458*.

It has been held that the minute book of the clerk of the peace is not enough to prove that an indictment was preferred; nor is the original indictment itself, though indorsed as a true bill; *R. v. Smith, 6 L. J. (O. S.) M. C. 99; 8 B. & C. 341; per Patteson, J., Porter v. Cooper, 1 C. M. & R. 388*; yet in both these cases the allegation of the indictment was only intro-

ductory to the gist of the proceeding, which was a conspiracy to keep back a witness in one case, and an action on an agreement, after indictment found, in the other. Nor is the minute book in which the proceedings at sessions are entered, and from which the record is made up, evidence of the names of the justices in attendance at the trial of it. *R. v. Bellamy*, Ry. & M. 171. Where the record alleges an adjournment by A. and others, parol evidence may be given as to the justices actually present. S. C. The minutes of proceedings are evidence of them on a trial before the same court sitting under the same commission. *R. v. Tooke*, cited 8 B. & C. 343; *R. v. A. H. Newman*, *supra*. An allegation that an appeal came on to be heard at the sessions must be proved by the production of the record regularly made up in parchment; *R. v. Ward*, 6 C. & P. 366; *Accord. Giles v. Siney*, 13 W. R. 92; but where (as is usually the case) no record but the minute book is kept by the sessions, such book was admitted in evidence. *R. v. Yeoveley*, 8 L. J. M. C. 9; 8 Ad. & E. 806.

By 34 & 35 V. c. 112, s. 18, a conviction may be proved in any legal proceeding by production of a copy of the conviction purporting to be signed by any justice having jurisdiction over the offence, or signed by the proper officer of the court, or by the clerk or other officer of any court to which such conviction has been returned, or by a copy of the minute or memorandum of the conviction entered in the register kept under 42 & 43 V. c. 49, s. 22, and purporting to be signed by the clerk of the court by whom the register is kept. Criminal Justice Administration Act, 1914, s. 28 (1). The dismissal of a complaint was proved in a similar way in *R. v. Hutchins*, 49 L. J. M. C. 64; 5 Q. B. D. 353, 356. The dismissal of an information or complaint may also be proved by the certificate given under 11 & 12 V. c. 43, s. 14, *vide* S. C. In *Watson v. Little*, 5 H. & N. 472; 29 L. J. Ex. 267, a bastardy order, made by two deceased magistrates, was admitted in evidence on proof of their handwriting, on the ground that it was an official minute of the proceedings made in discharge of their judicial duty.

A condemnation by any justice under the Customs Laws may be proved by production of a certificate thereof purporting to be signed by the justice, or by an examined copy of the record of such condemnation certified by his clerk. 39 & 40 V. c. 36, s. 263.

Where an ancient record of a judgment has been lost, it may be proved to the jury by parol or other testimony. *Green v. Proude*, 1 Mod. 117; S. C., 1 Vent. 257. The enrolment of the decree respecting London tithes under the 37 H. 8, c. 12, being lost, has been proved by user. S. C.; *Macdougall v. Young*, Ry. & M. 392.

On a question whether a decree in equity had been reversed by the House of Lords, a copy of the minutes of the judgment in the Journals is evidence; *Jones v. Randall*, Cowp. 17; and now see 8 & 9 V. c. 113, s. 3. But as a judgment of the House on error or appeal from the Superior Courts of *Common Law* was entered on record, it would seem that in such case the minutes would not be sufficient. See also C. L. P. Act, 1852, ss. 155, 157. Under the Appellate Jurisdiction Act, 1876 (39 & 40 V. c. 59), this distinction, however, is now abolished, and it seems that any judgment of the House given since 1875 (see J. Act, 1875, s. 2), may now be proved by a copy of the minutes in its Journals.

Proof of Fines and Common Recoveries.

A common recovery is proved in the same manner as the record of a judgment in an adverse suit.

The chirograph or indenture of a fine, as formerly delivered by the chirographer, is the proper evidence of it. B. N. P. 229. But it has been held that the indorsement of proclamations on it is not evidence of them, because he has no official authority to deliver a copy of such indorsement. B. N. P. 230; *Doe d. Hatch v. Bluck*, 6 Taunt. 485. The original entry

of the proclamations was usually filed with the *note* of the fine, and was in the custody of the chirographer, and this "note" is said to be the "*principale recordum*," from which others are amendable. 3 Leon. 183. Besides these records, the proceedings on a fine were formerly enrolled in the Court of C. P. under stats. 5 H. 4, c. 14, and 23 El. c. 3; and it should seem that examined copies of these enrolments of record when found, or office copies stamped with the seal of the Record Office (1 & 2 V. c. 94), are legitimate evidence. See generally, on the mode of recording fines, 5 Rep. 39 a, and 2nd Report of Deputy Keeper of Public Records (1841), Appendix 1.

By 5 & 6 W. 4, c. 82, other officers were substituted for the chirographer, whose copies were made as available as the old ones, and all the records of fine (with a few recent exceptions) are now in the custody of the M.R., under 1 & 2 V. c. 94. The 11 & 12 V. c. 70, enacted that all fines levied in the C. P. should be conclusively deemed to have been levied with proclamations, except where, at the passing of the Act (August 31st, 1848), the land was actually enjoyed under a title inconsistent with such fine. The Act was expressly designed to save the expense of other proof of proclamations.

In the case of Welsh fines there is a special statute to facilitate the proof of them. See 4 V. c. 32, s. 2; and *Doe d. Cadwalader v. Price*, 16 M. & W. 603.

Proof of Verdicts.

When a verdict is offered as evidence of the truth of the facts found, the *postea* alone was not sufficient, but the judgment must also have been proved to show that it had not been arrested, nor a new trial granted; *Pitton v. Walter*, Stra. 162; B. N. P. 234; except in the case of an issue, when no judgment was entered up; B. N. P. 234. But *semb.* the verdict should in that case have been shown to have been satisfactory by proof of the decree, or other adoption by the court. *Id.* See *Robinson v. Duleep Singh*, 48 L. J. Ch. 758; 11 Ch. D. 798. The *Nisi Prius* record with the *postea* indorsed, or with minute of the verdict indorsed by the officer of the court, was sufficient where the only object was to show that the cause came on to be tried. *Pitton v. Walter*, *supra*; *R. v. Browne*, M. & M. 315. But without such minute, the N. P. record alone was no evidence of the trial. *Per Lord Tenterden, C.J., Id.*

Under Rules, 1883, O. xxxvi. r. 30, two copies of the pleadings in the action are delivered to the officer when the action is entered for trial, one of which is for the use of the Judge at the trial; this delivery corresponds with the former delivery of the N. P. record (see O. xxvi. r. 1); and by r. 41, "the associate or master shall enter all such findings of fact as the judge may direct to be entered, and the directions, if any, of the judge as to judgment," in a book to be kept for the purpose. Under r. 42, where the judge directs any judgment to be entered for any party absolutely, judgment may be entered on a certificate given by the associate in Form 17, App. B.; this certificate seems to correspond to the *postea*.

Proof of Writs.

A writ must be proved by a copy of the record of it after its return; and this is said to be necessary whenever it is the gist of the action (*i.e.*, *ut semble* wherever it is treated as matter of record in the pleading); B. N. P. 234; otherwise the writ itself may be produced, or secondary evidence given, when its non-production is accounted for. A copy of the judgment-roll containing an award of an *elegit* and the return of the inquisition is evidence (and *ut semble* the best evidence) of the *elegit* and inquisition. *Ramsbottom v. Buckhurst*, 2 M. & S. 565. To prove that the defendant issued a writ, it is not sufficient secondary evidence to produce the filacer's book unless it be

shown that it has not been returned but is in the defendant's hands, who has had notice to produce it. *Edmonstone v. Plaisted*, 4 Esp. 160. Where a writ is pleaded in terms, and *nul tiel record* is replied, it must be proved by the production of the record, as in other cases of records. As to proof by office copy, see Rules, 1883, O. xxxvii. r. 4.

A writ of summons may be proved by production of the original writ, or by the copy thereof left with and filed by the officer under Rules, 1883, O. v. rr. 12, 13. *R. v. Scott*, 46 L. J. M. C. 259; 2 Q. B. D. 415. If the defendant has to prove the writ, it should seem that the copy served on him by the plaintiff is primary evidence.

Proof of Inquisitions.

Where the return to an inquisition is given in evidence, it is in general necessary to show that the inquiry was made under proper authority. On this head some distinctions are observable. Inquests of office are either by commission under the Great Seal, as officers of entitling, &c.; or by commission or writ under the seal of the Exchequer; or they are taken *ex-officio*, as by coroners, escheators, &c. The returns made under any of the above special commissions, or writs, are generally inadmissible as evidence, unless the commission be proved, or the non-production of it accounted for. But inquisitions taken *ex-officio* by officers acting under a *general* commission or appointment, as escheators, &c., seem to be admissible on principle, without further evidence of authority than that they were acting as such officers. See generally as to the nature of inquests of office, 3 Bl. Com. 258; 16 Vin. Ab. 79, tit. *Office*.

In the case of an inquisition *post mortem*, and such private offices, the return cannot be read without also reading the commission under which it was taken; unless, as it seems, the inquisition be old. 12 Vin. Ab. Ev. (A. b. 42). In cases of more general concern, such as the return to the commission, *temp.* Hen. 8, to inquire of the value of livings, the commission is said to require no proof. B. N. P. 228. So an ancient extent of Crown lands found in the proper office, purporting to have been taken by a steward of the king's lands, and following in its form the direction of the statute 4 E. 1, stat. 1, will be presumed to have been taken under competent authority, though the commission cannot be found. *Rowe v. Brenton*, 3 M. & Ry. 164; S. C. 8 B. & C. 747. And there are many cases to show that an old commission may be presumed: see references, S. C. 3 M. & Ry. 171, 349. The book called *Domesday* is an inquest of this kind. An inquisition is admissible though it has become illegible in material parts. *Anderton v. Magawley*, 3 Bro. P. C. 208. A lost inquisition *post mortem* may be proved by a recital of it in ancient proceedings, as on a petition of right in the *Coram Rege* roll, where it was incidentally certified *verbatim* to the Court of K. B. and set forth on the record. *Rowe v. Brenton*, 3 M. & Ry. 141, 142.

Proof of Rules or Orders of Court, and Judges' Orders.

An order (in the common law courts formerly called a rule) of a superior court, is proved by an office copy thereof, for such a copy is the order itself. *Per Cur.*, *Streeter v. Bartlett*, 5 C. B. 564; *Selby v. Harris*, 1 Ld. Raym. 745; *Ludlow v. Charlton*, 9 C. & P. 242. Where a court prints and circulates copies of its general rules for the guidance of its officers, one of such copies is evidence of the rules, without showing it to have been examined with the original. *Dance v. Robson*, M. & M. 294. But the rules must be shown to have been sanctioned by the court in order to support an indictment for perjury on an affidavit required by them. *R. v. Koops*, 6 L. J. K. B. 114; 6 Ad. & E. 198.

A judge's order may be proved either by producing the order itself signed by the judge, and delivered out in the usual way, or by proof of the rule or order, if any, making it a rule or order of court. *Still v. Halford*, 4 Camp. 17. An order of court, however, is not matter of record in the strict sense of the word. *R. v. Bingham*, 3 Y. & J. 101. The statute 8 & 9 V. c. 113, s. 2, enacts that all courts are to take judicial notice of the signature of the superior judges of equity and common law attached to an official or judicial document; and by the Bankruptcy Act, 1914 (4 & 5 Geo. 5, c. 59), s. 142, this provision extends to the signatures of judges and registrars of courts having jurisdiction in bankruptcy.

As to proof of orders made in chambers in the Chancery Division, and drawn up by the chief clerk (now called "master"), see Rules O. lv. rr. 74, 74a (Dec. 1885), and J. Act, 1875, s. 20.

Proof of Decrees and Answers in Chancery.

A decree in Chancery may be proved by an exemplification; or by an examined copy; or by production of a decretal order on paper, together with proof of the bill and answer, where such proof may be necessary. *Trowel v. Castle*, 1 Keb. 21; B. N. P. 244. The bill and answer need not be proved if they are recited (as they formerly were) in the decree. *Id.*; Com. Dig. Testm. (C. 1); *Accord. Wharton Peerage*, 12 Cl. & F. 295. Where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral act (as that a decree was made by the court), he ought regularly to give in evidence the proceedings on which the decree was founded. 1 Phill. & Arn. Ev. 10th ed. 207. And see Peake, Ev. 74; *Hewitt v. Piggott*, 5 C. & P. 75. Still, if the decree or order itself contain all the facts required, it has been held unnecessary to produce the bill and answer, though it is otherwise where it is material to show the particular issue raised. Thus, in an action against the sheriff for an escape under an attachment issued out of Chancery for non-payment of costs, the order for an attachment is *prima facie* proof of the pendency of a suit in Chancery without proof of bill and answer; and for this purpose a decree, even without a recital, or other evidence of bill and answer, would be admissible. *Blower v. Hollis*, 2 L. J. Ex. 176; 1 Cr. & M. 396. This case was doubted at N. P. by Ld. Abinger, C.B., in *Attwood v. Taylor*, 1 M. & Gr. 289, 290, where the vendor of an estate sued the vendee for interest due on the contract of sale, and the plaintiff, in order to account for the laches in suing, offered in evidence an injunction in a suit of Equity by the defendant against him, restraining him from suing at law; the L. C. B. refused to admit the order until the bill and answer were produced. The case seems to be reconcilable with *Blower v. Hollis*, *supra*, and it is possible that Lord Abinger only dissented from the marginal note of the case in the above report of it. It might be that the injunction was obtained on grounds which did not relieve the plaintiff from his imputed laches.

An answer in Chancery is proved by the production of the bill and answer, or by examined, or Record Office, copies of them; but on proof by the proper officer that the bill has been searched for in the proper office and not found the answer may be read without the bill. Gilb. Ev. 6th ed., 49, 50. A distinction was sought to be drawn between proof of answers filed in Chancery, and affidavits, but the distinction is untenable. Some proof of the identity of the parties is requisite. *Rees d. Howell v. Bowen*, M'Cl. & Y. 383, 391, 392. This may be given by a witness, who has seen the handwriting of the defendant to the original answer, though it is not produced in court. *Dartnall v. Howard*, Ry. & M. 169. Identity may also be inferred from the intrinsic evidence; as if the name, description, and character of the party to the action agree with the name and description of the party answering in equity, it is *prima facie* evidence of identity. *Hennell v. Lyon*, 1 B. & A. 182. See also *Garvin v. Carroll*, 10 Ir. L. R. 330, and the case of

Hubbard v. Lees, L. R. 35 L. J. Ex. 169; 1 Ex. 255, 257, whence it seems that such evidence is sufficient for the jury, and where the jury are satisfied with the identity the court will not interfere. See, however, *Rees d. Howell v. Bowen*, *supra*; *Burnand v. Nerot*, 1 C. & P. 578.

An answer, offered in evidence as an admission of the party on oath, is sufficiently proved by an examined copy of it without proof of a decree, or of the party's handwriting. *Dartmouth v. Roberts*, 16 East, 334. See *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536. So when it is used to contradict the party making it; or to cross-examine him on it. A letter written by the plaintiff's agent, referred to by the plaintiff in his answer to a bill in Chancery filed by a third person, and deposited by consent of parties with a clerk in court, was evidence against the plaintiff in an action at law, without reading the answer in Chancery. *Long v. Chapman*, 9 L. J. (O. S.) K. B. 248; 2 B. & Ad. 284. But *quære*, whether—where A. had obtained sight of a letter or document of B. by means of a bill of discovery, to which B. had put in an answer with the document annexed—A. could read it in evidence without also reading the whole answer? See S. C. The mere fact that the document was obtained by a bill of discovery is not enough to exclude it, or to oblige the party who uses it to put in the bill and answer. *Sturge v. Buchanan*, *per Cur.*, 8 L. J. Q. B. 272; 10 Ad. & E. 598, 605.

Where an answer was read as a mere admission by the defendant, he was formerly entitled to require that the bill as well as the interrogatories should be read as part of the plaintiff's case. *Pennell v. Meyer*, 2 M. & Rob. 98. The principle being, that the questions as well as answers should be read, and that in equity a defendant was bound to answer not only the interrogatory part, but also the narrative part of the bill. S. C. But defendants in equity were relieved by the Gen. Order, 26 Aug. 1841, and by the Act 15 & 16 V. c. 86, s. 12, from answering except to interrogatories. This might perhaps dispense with the reading of anything but the interrogatories; but as the answer was not necessarily confined to the interrogatories (see sect. 14), it is still a question how far the reading of the bill, if required by the defendant, may be necessary? See *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536; 38 L. J. Q. B. 257; L. R. 4 Q. B. 500. Where a bill, answer, and decree are put in evidence to prove a fact which appears on the face of those documents to have been in issue, the party producing them is not bound also to put in the depositions as part of his own case. *Laybourn v. Crisp*, 8 L. J. Ex. 118; 4 M. & W. 320.

Proof of Depositions and Affidavits.

A deposition used by a party to a suit in Chancery, for the purpose of proving certain facts, is primary evidence of the same facts against the same party in an action by a stranger. *Richards v. Morgan*, 4 B. & S. 641; 33 L. J. Q. B. 114. But such depositions are not, in general, admissible without proof of the bill and answer; B. N. P. 240; Gilb. Ev. 6th ed., 56, n.; unless no bill or answer can be found; *Rowe v. Brenton*, 8 B. & C. 765; *Byam v. Booth*, 2 Price, 234, n.; *Bayley v. Wylie*, 6 Esp. 85; 1 Phillipps, Ev. 7th ed., 395; or unless the depositions are offered in evidence as containing an admission merely, or for the purpose of contradicting a witness. *Id.* The bill and answer are only required to satisfy the judge that the depositions are admissible by enabling him to see what was in issue; and the opposite counsel therefore has no right to have them read, or to comment upon them to the jury. *Chappell v. Purday*, 14 L. J. Ex. 258; 14 M. & W. 303.

In general, depositions taken in *perpetuam rei memoriam* were not evidence at law unless an answer had been put in and proved; but if the defendant in equity were in contempt, or had neglected to take advantage of an opportunity to cross-examine, the deposition might be read on proof of the bill without the answer; B. N. P. 240; *Lancaster v. Lancaster*, 6 Sim. 439; so in case

of a bill filed for a commission to examine witnesses *de bene esse*; *Cazenove v. Vaughan*, 1 M. & S. 4. Whether the deposition was taken on a bill to perpetuate testimony, or a bill to examine *de bene esse* (which are distinct proceedings), it was not evidence without proof of the death or inability of the witness to attend; but a court of equity might have made a special order to read it without such proof, and without proof of the bill, answer, or other proceedings. See Jeremy's Equity Jurisdiction, 271, 280. As to suit for perpetuation of testimony, see *West v. Sackville*, 72 L. J. Ch. 649; [1903] 2 Ch. 378; *Beresford v. Att.-Gen.*, 87 L. J. P. 40; [1918] P. 33; *Shanahan v. Shanahan*, [1917] 1 I. R. 57; and *Kelly v. Kelly*, [1917] 1 I. R. 51.

Affidavits taken by the standing commissioners of the superior courts may be proved without producing the commission. The acting as such is *primâ facie* sufficient proof of it. *R. v. Howard*, 1 M. & Rob. 187. The handwriting of the commissioner must be proved, and that of the deponent, if the original is produced. But if the affidavit be filed in a superior court of law or equity, an examined copy, or (in the same court and cause) an office copy of it, is in civil cases evidence against the party by whom it has been used or acted on, without proof of the handwriting of the person making it. *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536; B. N. P. 229. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies. It has even been held that an examined copy of the affidavit of a defendant, used by him in a cause and filed, was sufficient evidence of the affidavit on an indictment for perjury; *R. v. James*, 1 Show, 397; and see 3 Doug. 78, n.; although the present practice seems to require that the original affidavit should in such a case be produced. 2 Taylor, Evid., 10th ed. § 1535. Where an examined copy was offered in evidence of an affidavit filed in Chancery in another cause, and alleged to have been made by the defendant, but not shown to have been used or acted on by him, it was held inadmissible without proof of the deponent's identity with the defendant. *Rees d. Howell v. Bowen*, M'Cl. & Y. 383. In this case a distinction was taken by the court between answers which formed part of the records, and were not allowed to be removed from the files of the court, and affidavits which could be removed. But no such distinction in fact exists, for the affidavits form as much part of the proceedings as the answer. *Garvin v. Carroll*, 10 Ir. L. R. 300, *per* Crampton, J. And on the ground that examined copies are good evidence in civil cases at law, the Court of Chancery will not allow its documents to be removed except in aid of criminal prosecutions. *Att.-Gen. v. Ray*, 6 Beav. 335; 1 Daniell's Chan. Prac. 6th ed. 601. It seems, therefore, that a deposition or affidavit filed in the course of Chancery proceedings is to be proved in the same way as an answer.

By Rules, 1883, O. xxxi. rr. 1, 4, 8, either party may, by leave of a judge, deliver interrogatories to the opposite party, which he is bound to answer by affidavit within ten days. Where relief is sought on the ground of fraud or breach of trust, no such leave is required. An office copy of the answer to the interrogatories will, as against the party making it, be sufficient evidence of the answer at the trial; see *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536, although the answering party may, if he think fit, put in evidence the interrogatories to which the answer is made. S. C. If the answer is not in the same court and cause, an examined copy of the answer will be sufficient evidence. S. C. And now see Rules, 1883, O. xxxvii. r. 4, as to office copies. It seems that such examined or office copy will be admissible for the purpose of cross-examination or contradiction of the deponent. In case of an insufficient answer, the party interrogated may, by r. 11, be ordered to be examined orally. A party may be examined as to a lost document; but the loss must be proved at the trial. *Wolverhampton Waterworks Co. v. Hawksford*, 5 C. B. (N. S.) 703; 28 L. J. C. P. 198. By O. xxxi. r. 24, "Any party may at the trial of a cause, matter, or issue, use in evidence any one or more of the answers, or any part of an answer, of the opposite party to interrogatories without putting in the others, or the whole of such answer; provided always, that in such case the judge may look at

the whole of the answers," and order answers connected with those put in, also to be put in.

By O. lxx. r. 54, the copy of an affidavit of discovery of documents, "delivered by the party filing it, may be used as against such party."

The stat. 52 & 53 V. c. 10, ss. 3, 6, now determines before what persons an affidavit may be sworn abroad, and provides that judicial notice shall be taken of their seal, signature, &c., except in the case of persons having authority to administer an oath under the law of a foreign country only. As to the proof by certificate of the authority to administer an oath in this excepted case, see *Cooper v. Moon*, W. N. (1884), 78, *cor.* Field, J.

Proof of Oral Testimony on a Former Trial.

What a witness, since dead, has sworn on a trial between the same parties, may be given in evidence, either from the judge's notes, or from notes that have been taken by any other person who will swear to their accuracy; or it may be proved by any person who can swear from memory. *Per Mansfield, C.J., Duncaster (Mayor) v. Day*, 3 Taunt. 262; *Strutt v. Bovingdon*, 5 Esp. 56. The witness must, it has been held, be prepared to prove the words of the former witness, and not merely the supposed substance or effect of them. *Lord Palmerston's Case*, cited *per* Ld. Kenyon, C.J., 4 T. R. 290; *Ennis v. Donisthorpe*, 1 Phil. & Arn. Ev. 10th ed., 307. See, however, observations thereon. *Id.* If the judge's notes are used, their accuracy must, it seems, be proved by a witness who heard the evidence given. *Griffin's Divorce Bill*. [1896] A. C. 133.

Proof of Proceedings in the Ecclesiastical and Admiralty Courts.

The minute book of the Consistory Court is said to have been admitted as evidence of a decree for alimony. *Houlston v. Smyth*, 2 C. & P. 25; *semb. acc. Leake v. Westmeath*, 2 M. & Rob. 396. And a sentence of separation *à mensâ, &c.*, was admitted by Lord Kenyon *dubitanter* without proof of the libel. *Stedman v. Gooch*, 1 Esp. 3. So the sentence of an admiralty court was held evidence of a condemnation without producing the libel and answer, at least if not found, or not unusually filed with it. *Per Trevor, J.* in *Wheeler v. Louth*, Com. Dig. Testm. (C. 1). But it seems questionable whether a sentence in either of these courts is generally admissible without proof of the previous proceedings in the suit. In *Kingston's (Duchess) Case*, 20 How. Sta. Tri. 377, on objection taken to the reading of a sentence in a jactitation suit without the libel, allegations, and all other proceedings in it, they were all put in evidence. In *Cleeve v. Att.-Gen.*, Somerset Sum. As. 1841, where defendant put in a suit for subtraction of title in order to disprove a modus, Rolfe, B., required that the depositions, which had been found and were produced with the rest of the proceedings by the registrar, should also be read. In *Leake v. Westmeath*, 2 M. & Rob. 394, Tindal, C.J., refused to admit a decree for alimony to be given in evidence without proof of all the prior proceedings—namely, the libel, answer, and defensive allegations,—and where a decree was affirmed on appeal to the Arches, his lordship required that the process of appeal should be duly proved by a transcript of the proceedings below, in order to make the decree of the Arches court admissible; but he expressed an opinion that the depositions filed need not be produced. The action there was by the attorney of the defendant's wife, who had acted for her in the various proceedings in the matter of her divorce *à mensâ, &c.*, and her claim of alimony; and the evidence of the divorce was put in by the plaintiff in order to show that she was living apart justifiably, and so to fix defendant with liability. The plaintiff recovered a verdict subject to a case. This holding seems to be, in part at least, at variance with *Stedman v. Gooch, supra*, and perhaps neither case can, under the circumstances, be taken as an authoritative decision. Tindal, C.J.,

treated the judgment of the ecclesiastical court on the same footing as a decree in Chancery in respect of the evidence of it. See *Phillips v. Crawly*, Freem., 83, 84; *Laybourn v. Crisp*, 8 L. J. Ex. 118; 4 M. & W. 320.

By 20 & 21 V. c. 85, the Court for Divorce and Matrimonial Causes was established, in which all jurisdiction in such cases was vested, and that of the Ecclesiastical Courts abolished, except as to granting marriage licences. By sect. 13, this court had a seal, and all decrees and orders, or copies thereof, sealed with it "shall be received in evidence." The language of this section differs from that of the Probate Court Act (20 & 21 V. c. 77), s. 22, and does not expressly make the seal prove itself, though the courts are bound to notice that the court has a seal. But the 8 & 9 V. c. 113, s. 1, seems to render any proof of the seal unnecessary. The proceedings in this court were by petition, citation, and answer; and the decree was recorded in the court book, and may be proved either under the above clause, and, *ut semble*, by the usual proofs of entries in public books. The jurisdiction of this court has been transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division, but the old forms and proceedings are retained. J. Act, 1875, s. 18.

The jurisdiction of the High Court of Admiralty has also been transferred to the High Court of Justice, and is assigned to the same division. J. Act, 1873, ss. 16, 34.

Proof of Judgments in Inferior Courts.

The judgment of courts of inferior jurisdiction may be proved by the production of the book or rolls, containing the proceedings of the court from the proper custody; and if not made up in form, the minutes of the proceedings will be evidence or an examined copy of them. *R. v. Hains*, Comb. 337; 12 Vin. Ab. (A. b. 267); *Hennell v. Lyon*, 1 B. & A. 182; *Rex v. Smith*, (1828) 6 L. J. (O. S.) M. C. 99; 8 B. & C. 341; *Dawson v. Gregory*, 14 L. J. Q. B. 286; 7 Q. B. 756. But this rule does not extend to proceedings of the court of quarter sessions, on the crown side, which is a court of oyer and terminer, and is not an inferior court. *R. v. Smith*, *supra*. In proving the judgment of an inferior court, as the old county court, evidence should also be given of the proceedings previous to judgment. Com. Dig. Testm. (C. 1). See *Fisher v. Lane*, 2 W. Bl. 834; *Thompson v. Blackhurst*, 1 Nev. & M. 266.

By the County Courts Act, 1888 (51 & 52 V. c. 43), s. 28, the registrar's book kept under the Act, or copies of entries in it, bearing the seal of the court, and purporting to be signed and certified as true copies by him, are made evidence of the entries and proceedings and of the regularity of the proceedings, without any further proof.

Proof of Proceedings in Courts of Summary Jurisdiction.

By the Summary Jurisdiction Act, 1879 (42 & 43 V. c. 49), s. 41, "In a proceeding within the jurisdiction of a court of summary jurisdiction, without prejudice to any other mode of proof, service on a person of any summons, notice, process, or document required or authorized to be served, and the handwriting and seal of any justice of the peace or other officer or person on any warrant, summons, notice, process, or document may be proved by a solemn declaration taken before a justice of the peace, or before a commissioner to administer oaths in the Supreme Court of Judicature, or before a clerk of the peace, or a registrar of a county court; and any declaration purporting to be so taken shall, until the contrary is shown, be sufficient proof of the statements contained therein, and shall be received in evidence in any court or legal proceeding, without proof of the signature or of the official character of the person or persons taking or signing the same."

A conviction before a court of summary jurisdiction may be proved by a copy of the minute or memorandum entered in the register required to be kept by s. 22 of the S. J. Act, 1879, purporting to be signed by the clerk of the court by whom the register is kept: Criminal Justice Administration Act, 1914, s. 28 (1).

Proof of Probates and Letters of Administration.

Where the title to personal property under a will is in question, the original will cannot, in general, be read in evidence; but the probate must be produced. *Pinney v. Pinney*, 6 L. J. (O. S.) K. B. 353; 8 B. & C. 335; *Pinney v. Hunt*, 6 Ch. D. 98. And this rule is now extended to freehold estate belonging to a person dying after Dec. 31st, 1897. Probate from a court in the United Kingdom is not necessary to establish the right to receive money payable on a policy of life assurance effected by a person who has died domiciled elsewhere. See 47 & 48 V. c. 62, s. 11, amended by 52 & 53 V. c. 42, s. 19. *Haas v. Atlas Assurance Co.*, 82 L. J. K. B. 506; [1913] 2 K. B. 209. The probate is sealed with the seal of the court. But the probate is not the only evidence of the will: for the probate itself, as also letters of administration *cum testamento*, &c., are only certificates that the will has been proved, and other evidence of equal authority can always be obtained; thus the Act Book of the Ecclesiastical Court, containing an entry of the will having been proved and of probate granted to the executors therein named, is admissible evidence of executorship, without accounting for the non-production of the probate. *Cox v. Allingham*, Jacob, 514. An examined copy of the Act Book is also evidence since 14 & 15 V. c. 99, s. 14; *Dorret v. Meux*, 23 L. J. C. P. 221; 15 C. B. 142; and it was so before that Act. See *Davis v. Williams*, 13 East, 232. And the original will with an indorsement or note at the foot of it by the surrogate and deputy registrar is primary evidence of probate, when no other record of it is kept. *Doe d. Bassett v. Mew*, 7 Ad. & E. 240. See also *Gorton v. Dyson*, 1 B. & B. 219, and *Waite v. Gale*, 14 L. J. Q. B. 212; 2 D. & L. 925.

These cases are put on the ground that the record in the Ecclesiastical Court is primary evidence of the will, and so it would seem that no secondary evidence would be admissible until both the non-production of the probate and the non-production of any other record of the Ecclesiastical Court had been accounted for.

It was said by Holt, C.J., in *Hoe v. Nelthorpe*, 3 Salk. 154; S. C. *sub nom. Hoe v. Nathorp*, 1 Ld. Raym. 154, that the copy (of course, examined) of a probate of a will is good evidence, because the probate is an original taken by authority; but this view has not generally been adopted, though it is not altogether inconsistent with principle. Where the probate of a will is admissible in evidence under 20 & 21 V. c. 77, s. 64, in proof of a devise of real estate, a copy stamped with any seal of the Probate Div. of the High Ct., is rendered equally admissible by the section.

If the probate be lost, it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. *Shepherd v. Shorthose*, Stra. 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Courts is good evidence where no other record is kept. *Ramsbottom's Case*, 1 Leach, C. C. 4th ed., 25, n. (b).

Administration is proved by the production of the letters of administration, or of a certificate of exemplification thereof, granted by the Ecclesiastical Court; *Kempton v. Cross*, Cas. t. Hardw. 108; B. N. P. 246; or, without producing the letters of administration, by the original book of acts recording the grant of the letters. *Id.*; *Elden v. Keddell*, 8 East, 187. An examined copy of the Act book, stating the grant of letters of administration to the defendant, is proof of his being administrator, without notice to produce the letters. *Davis v. Williams*, 13 East, 232. See further, Wms. Exors., 10th ed., 1532.

By 20 & 21 V. c. 77, s. 22, seals were provided for the Probate Court : i.e., for the principal and district registries, " and all probates, letters of administration, orders, and other instruments, and exemplifications and copies thereof respectively, purporting to be sealed with any seal of the Court of Probate, shall in all parts of the United Kingdom be received in evidence without further proof thereof." The court was a court of record (sect. 23); and its jurisdiction has been transferred to the High Court of Justice by the J. Act, 1873, s. 16, and is assigned by sect. 34 to the Probate, Divorce, and Admiralty Division. See *Pinney v. Hunt*, 6 Ch. D. 98.

Proof of Court Rolls.

To prove the title of a copyholder, the court rolls may be produced without producing the stamped copy; *Doe d. Bennington v. Hall*, 16 East, 208; or they may be proved by examined copies; *Doe d. Cawthorn v. Mee*, 2 L. J. K. B. 104; 4 B. & Ad. 617; *Breeze v. Hawker*, 14 Sim. 350; but by the Stamp Act, 1891, s. 65 (3), the entry on the court rolls of a surrender or grant is not available as evidence thereof, unless the surrender or grant, if made out of court, or the memorandum thereof, or the copy of court roll, if made in court, is duly stamped; but this is sufficiently proved by a certificate of the steward on the margin of the entry. The title may also be proved by the stamped copy delivered and signed by the steward. Co. Litt. s. 75; Scriven, Copyh., 7th ed., 487; Peake, Evid. 94. Where an admittance is more than 30 years old, proof of the signature of the steward is unnecessary. *Ely (Dean and Chapter) v. Stewart*, 2 Atk. 44; *Rowe v. Brenton*, 3 M. & Ry. 296; but see *Somerset (Duke) v. France*, Fortescue, 43. Whether court rolls of a manor may be proved by a copy certified by the steward having them in his custody, under stat. 14 & 15 V. c. 99, s. 14, is open to question. The rolls need not be signed by the steward. *Bridger v. Huett*, 2 F. & F. 35. A surrender and presentment may be proved by the draft of an entry, produced from the muniments of the manor, and the oral testimony of the foreman of the homage jury who made the presentment. *Doe d. Priestley v. Calloway*, 5 L. J. (O. S.) K. B. 188; 6 B. & C. 484. And such a draft is admissible though there may have been a subsequent regular enrolment. *Id.* 495. And if the original roll be put in, it may be shown to be incorrect by producing the minute of the steward, or by other evidence. *Id.* 494; Scriven, Copyh., 7th ed., 111, 112, 467, 468. Where a surrender was made in 1774, and there was no record of it on the court rolls, the books of the manor containing a record of the admission, which recited the surrender, were received as evidence of the surrender. *R. v. Thruscross*, 1 Ad. & E. 126. As to proof of a recovery in a manor of ancient demesne, see *Green v. Proude*, 1 Ventr. 257. A presentment in a manor book will not be rejected because part of it has been cut off, there being no ground for supposing the mutilation to be fraudulent. *Evans v. Rees*, 9 L. J. M. C. 83; 10 Ad. & E. 151.

Proof of Foreign Law.

The courts cannot take cognizance of the laws of foreign states : they must be proved as facts. *Mostyn v. Fabrigas*, Cowp. 174; *Sussex Peerage Case*, 11 Cl. & F. 114—117. The laws of Scotland—*Male v. Roberts*, 3 Esp. 163; *Woodham v. Edwardes*, 6 L. J. K. B. 38; 5 Ad. & E. 771; *R. v. Povey*, 22 L. J. M. C. 19; *Dears*, 32; of the Channel Islands; *In re Brennan*, 16 L. J. Q. B. 289; 10 Q. B. 492; and of the colonies; *Astley v. Fisher*, 18 L. J. C. P. 59; 6 C. B. 572; *Wey v. Yally*, 6 Mod. 194; *The Peerless*, Lush. 103; 29 L. J. P. 49—fall within this rule; though in an appeal to the House of Lords, that tribunal will take judicial notice of the laws prevailing in each of the three kingdoms; *Cooper v. Cooper*, 13 App. Cas. 88; *Lyell v. Kennedy*, 14 App. Cas. 437; and in colonial appeals the judicial committee of privy

council takes judicial cognizance of the laws of the colonies. As the laws of Ireland are substantially the same as those of England they would probably now be noticed. See *Reynolds v. Fenton*, 16 L. J. C. P. 15; 3 C. B. 187, 191, *per Maule, J.*, explaining *Ferguson v. Mahon*, 11 Ad. & E. 179. By stat. 41 G. 3, c. 90, s. 9, the copy of the statutes of the Kingdom of Ireland, made by the parliament there, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the parliament of Ireland, prior to the union, in any court of civil or criminal jurisdiction in Great Britain. As to the manner of proving the ancient Welsh laws, see *Att.-Gen. v. Jones*, 2 H. & C. 347, 354, n.; 33 L. J. Ex. 249, 257, n.

By 28 & 29 V. c. 63, s. 6, a copy certified by the clerk or other proper officer of a legislative body in any colony, of any colonial law assented to by the Governor of the colony or reserved by him for the signification of her Majesty's pleasure shall be *prima facie* evidence that the law has been duly passed, or the bill passed, and presented to the Governor; and the assent or dissent of her Majesty to the bill may be proved *prima facie* by a proclamation purporting to be published by the authority of the Governor in any newspaper in the colony; and by the Evidence (Colonial Statutes) Act, 1907 (7 Ed. 7, c. 16), colonial Acts, ordinances and statutes may be proved by production of copies purporting to be printed by the Government printer.

It was formerly laid down that the written law of a foreign state should be proved by a copy duly authenticated. *Clegg v. Levy*, 3 Camp. 166; *Picton's Case*, 30 How. St. Tr. 491. But this doctrine has been overruled on a trial at bar, in which oral evidence of a foreign advocate was admitted to prove a decree of the National Assembly of France, 1789. *De Bode's Case*, 8 Q. B. 208. And in the *Sussex Peerage Case*, *supra*, it was held that the law is properly receivable *only* from such oral evidence, although a witness may refresh his own memory from the written law. If he state that any text-book, decision, code, or other legal document truly represents the foreign law, the court may regard such legal document as part of his testimony, and give effect to it accordingly. *Concha v. Murrieta*, 40 Ch. D. 543, 551, 554, following *Bremer v. Freeman*, 10 Moo. P. C. 306. See *De Hart v. Campania, &c.* "Aurora," 72 L. J. K. B. 818; [1903] 2 K. B. 503, 506, *per Vaughan Williams, L.J.* A French vice-consul has been admitted to prove the French written law of marriage by referring to a printed edition of the Cinq Codes, and by his own testimony; *Lacon v. Higgins*, 3 Stark. 178; Dowl. & Ry. N. P. 38; and a practising advocate attached to the consulate was admitted to prove the French law of bills of exchange. *Trimbey v. Vignier*, 1 Bing. N. C. 151.

Foreign law should be proved by witnesses of competent skill. A tobaccoist was rejected as a witness of the law of Scotland respecting marriage, cited in *R. v. Brampton*, 10 East, 287. See also *R. v. Povey*, Dears. 32; 22 L. J. M. C. 19. Expert evidence to establish a marriage in the Channel Islands is only required when it is celebrated otherwise than in accordance with the form of the Church of England. *Westlake v. Westlake*, 79 L. J. P. 36; [1910] P. 167; *Boughey v. Boughey*, 86 L. J. P. 89. As to marriage by special licence in the Isle of Man, see *Rohmann v. Rohmann*, 25 T. L. R. 78. The Jewish marriage law has been allowed *ex necessitate* to be proved by persons in trade, and of inferior station. *Lindo v. Belisario*, 1 Hag. Cons. 216. And it has since been held that experience as a legal practitioner was in certain cases not necessary, and that a witness who was formerly a merchant and stockbroker in Belgium might be received as competent to inform the court on the law or custom of bills of exchange there; this was decided on the ground that the witness, from the course of his business, had necessarily become acquainted with the Belgian law of bills of exchange. *Vander Donckt v. Thellusson*, 19 L. J. C. P. 12; 8 C. B. 812. A notary public who has had experience in the law of Chili has been allowed to prove that law as to representation on death. *Whitelegg, In the goods of*, 68 L. J. P. 97; [1899] P. 267. In *Barford v. Barford*, 87 L. J. P. 68; [1918] P. 140, an expert in the laws of South America was allowed to

prove the marriage law of Uruguay, although he had not been called to the Uruguayan Bar. Similarly, in *Brailey v. Rhodesia Consolidated*, 79 L. J. Ch. 494; [1910] 2 Ch. 95, the evidence of an expert in Roman-Dutch law was admitted, although he had not practised in Rhodesia. But a juris-consult, attached to the Prussian consulate, who had no other qualification than having studied law at Leipsic, was held incompetent to prove the stamp law of Cologne on the ground that he had had no practical acquaintance with the law in question. *Bristow v. Sequeville*, 19 L. J. Ex. 289; 5 Ex. 275; *In re Turner*, [1906] W. N. 27, Kekewich, J. So the evidence of an English lawyer who has studied the foreign law here was rejected. *Bonelli, In the goods of*, 45 L. J. P. 42; 1 P. D. 69; but see *Brailey v. Rhodesia Consolidated, supra*. An instrument purporting to be a divorce under the seal of the synagogue at Leghorn, is not admissible without previous proof of the law of the country; *Ganer v. Lanesborough (Lady)*, Peake, 17; but Ld. Kenyon permitted the party divorced to give oral evidence of her divorce at Leghorn, according to the ceremony and custom of the Jews there. *S. C. In R. v. Naguib*, 86 L. J. K. B. 709; [1917] 1 K. B. 359, however, it was decided that a person relying upon a marriage in Egypt according to the rites and ceremonies of that country could not establish the marriage by tendering his own evidence of the performance of a ceremony and leaving the court to presume its effect. He must adduce the evidence of some one conversant with Egyptian law. A Roman Catholic vicar-apostolic in England has been admitted to prove the modern marriage law of the Church of Rome in Italy, *Sussex Peerage Case*, 11 Cl. & F. 114, 117 *et seq.* The competency of the witness to prove foreign law is a question for the court, and the only general rule that can be collected from the reported cases is that the witness must from his profession or business have had peculiar means of becoming acquainted with that branch of law which he is called to prove; see *Vander Donckt v. Thellusson, supra*; *Wilson v. Wilson*, 72 L. J. P. 53; [1903] P. 157 (Maltese marriage). The evidence of an ex-colonial governor has been admitted to prove the validity of a marriage entered into in the colony. *Cooper-King v. Cooper-King*, 69 L. J. P. 33; [1900] P. 65. So that of the Attorney-General of the Isle of Man as to a marriage there. *Roberts v. Brennan*, 71 L. J. P. 74; [1902] P. 143. So that of a Persian Ambassador to prove the Persian law of inheritance. *In re Dost Aly*, 6 P. D. 6. And the certificate of a foreign ambassador under the seal of the legation was held sufficient evidence of the law of the country by which he was accredited. *In re Klingemann*, 3 Sw. & T. 18; 32 L. J. P. M. & A. 16; *Oldenburg (Prince), In the goods of*, 53 L. J. P. 46; 9 P. D. 234.

By 24 & 25 V. c. 11, the High Court (see J. Act, 1873, s. 16) may remit a case for the opinion of a court in any foreign state with which her Majesty may have made a convention for that purpose; it does not, however, appear that any such convention has yet been made. By 22 & 23 V. c. 63, a case may be stated for the opinion of the superior court of any part of her Majesty's dominions, in order to ascertain the law of that part. A case may be stated thereunder for the opinion of the Court of Session in Scotland. *De Thoren v. Att.-Gen.*, 1 App. Cas. 686.

Proof of Foreign Judgments.

A judgment duly verified by a seal proved to be that of the foreign court was presumed to be regular and agreeable to the foreign law until the contrary is shown. *Alivon v. Furnival*, 3 L. J. Ex. 241; 1 C. M. & R. 277. And now 14 & 15 V. c. 99, s. 7, provides for the proof of a foreign or colonial judgment, &c., by means of a copy under the seal of the court, or signed by a judge thereof, with a certificate by him that the court has no seal, and proof of the seal or signature of the judge is unnecessary.

By the Judgments Extension Act, 1868 (31 & 32 V. c. 54), s. 1, certi-

ificates of Irish judgments for the payment of debt, damages, or costs may be registered in the Central Office of the High Court; see J. Act, 1873, s. 16, and J. (Officers) Act, 1879, s. 5; and the certificate "shall from the date of such registration be of the same force and effect, and all proceedings shall and may be had and taken on such certificate as if the judgment of which it is a certificate had been a judgment originally obtained or entered up on the date of such registration" in the High Court. Sect. 3 makes a similar provision with respect to a Scotch decret, except (sect. 8) one "pronounced in absence in an action proceeding on an arrestment used to found jurisdiction." See *Low, In re; Bland v. Low*, 63 L. J. Ch. 60; [1894] 1 Ch. 147; and Administration of Justice Act, 1920, ss. 9-14.

The report of an Irish judge to the Irish court, to be used on an application to set aside the verdict, is evidence in an action between the same parties of what took place at the trial before him and of his decision. *Houstoun v. Sligo (Marquis)*, 29 Ch. D. 448. And a shorthand note of the judgment, sworn to by the writer, is admissible to prove the grounds of the judgment. S. C.

Proof of Entries in Public Books, Postmarks, &c.

Whenever an original is of a public nature and admissible in evidence as such, an examined copy is, on grounds of public convenience, also admissible. *Lynch v. Clerke*, 3 Salk. 154. Examined copies of the entries in the council book; or of a licence preserved in the Secretary of State's office; *Eyre v. Palsgrave*, 2 Camp. 606; so of a record deposited in the Land Revenue Office, under 2 W. 4, c. 1, though it be only a rental of a crown grantee, and not a judicial record; *Doe d. William IV. v. Roberts*, 14 L. J. Ex. 274; 13 M. & W. 520; of entries in the bank books; *Mortimer v. M'Callan*, 6 M. & W. 58; of a bank-note filed at the bank; *Man v. Carey*, 3 Salk. 155; of entries in the books of the East India Company; *R. v. Gordon*, 2 Doug. 593; or in the books of the commissioners of land-tax; *R. v. King*, 2 T. R. 234; or of excise; *Fuller v. Fotch*, Car. 346; or in a poll-book at an election; *Mead v. Robinson*, Willes, 424; *Reed v. Lamb*, 6 H. & N. 75; 29 L. J. Ex. 452; or the register of voters; S. C.; or an old book kept in the chapter-house of a dean and chapter, purporting to contain copies of leases; *Coombs v. Coether*, M. & M. 398; *Wakeman v. West*, 7 C. & P. 479, are all good evidence of the originals. The rules of savings banks under 26 & 27 V. c. 87, may be proved by an examined copy, sect. 4. A copy of an old deed contained in one of the books of the Bodleian Library (which the statutes of the university forbid to be removed) was admitted in evidence under the special circumstances (but query if the original would itself have been admissible?). *Downes v. Mooreman*, Bunn. 189. A collection of treaties, published by the direction of the American government, is not sufficient to prove a treaty; an examined (or authenticated) copy should be produced. *Richardson v. Anderson*, 1 Camp. 65, n. Early treaties were enrolled in Chancery; more recent treaties are deposited at the State Paper Office.

The *postmark* on a letter is usually taken as genuine without proof; but, if disputed, it has been doubted whether the person who made it must be called; or whether it may be proved by any postmaster; or by any one in the habit of receiving letters through the same post-office. *Abbey v. Lill*, 7 L. J. (O. S.) C. P. 96; 5 Bing. 299; *Kent v. Lowen*, 1 Camp. 177; *Arcangelo v. Thompson*, 2 Camp. 620; *Fletcher v. Braddyll*, 3 Stark. 64; *R. v. Plumer*, R. & Ry. 264; *Woodcock v. Houldsworth*, 16 L. J. Ex. 49; 16 M. & W. 124. Probably it may be verified in any of those ways; and the person who stamped the letter is not likely to recollect that he did so, or to be better qualified to speak of it than any one who happens to be acquainted with the particular post-office mark. The documents kept by the post-office showing the times of receipt and delivery of telegrams are not admissible as public records. *Heyne v. Fischel*, 110 L. T. 264.

Proof of Entries in Bankers' Books.

By sect. 3 of the Bankers' Books Evidence Act, 1879, 42 & 43 V. c. 11 : " Subject to the provisions of this Act, a copy of any entry in a bankers' book shall in all legal proceedings be received as *primâ facie* evidence of such entry, and of the matters, transactions, and accounts therein recorded." The expression " legal proceeding " " includes an arbitration ; " sect. 10.

Sect. 3 makes copies of entries in bankers' books evidence of the matters therein recorded even *inter alios*. *Harding v. Williams*, 49 L. J. Ch. 661; 14 Ch. D. 197.

Sect. 4. " A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank. Such proof may be given by a partner or officer of the bank, and may be given orally or by an affidavit sworn before any commissioner or person authorised to take affidavits."

Sect. 5. " A copy of an entry in a banker's book shall not be received in evidence under this Act unless it be further proved that the copy has been examined with the original entry and is correct. Such proof shall be given by some person who has examined the copy with the original entry, and may be given either orally or by an affidavit sworn before any commissioner or person authorised to take affidavits." The words " some person " are not limited to a partner or officer of the bank, but include any person who has examined the copy. *R. v. Albutt*, 75 J. P. 112.

Sect. 7. " On the application of any party to a legal proceeding a court or judge may order that such party be at liberty to inspect and take copies of any entries in a banker's book for any of the purposes of such proceedings. An order under this section may be made either with or without summoning the bank or any other party, and shall be served on the bank three clear days before the same is to be obeyed, unless the court or judge otherwise directs." An order under this section will not, as a general rule, be made for inspection before the trial of the banking account of third persons not parties to or concerned in the litigation. *Pollock v. Garle*, 66 L. J. Ch. 788; [1898] 1 Ch. 1. Notice must as a rule be given to the person whose account is sought to be inspected, and to his banker; and the application should be supported by an affidavit showing good grounds for believing that the entries are material to some issue in the action and would be evidence at the trial for the party making the application. *L'Amie v. Wilson* [1907] 2 Ir. R. 130. A magistrate has power to make an order under the section that the prosecutor inspect and take copies of the defendant's bank account. *R. v. Kinghorn*, 78 L. J. K. B. 33; [1908] 2 K. B. 949. An application by defendants in proceedings for criminal libel to inspect the banking account of the person they were alleged to have libelled was refused in *R. v. Bono*, 29 T. L. R. 635.

Sect. 9. " In this Act the expressions ' bank ' and ' banker ' mean any person, persons, partnership, or company carrying on the business of bankers, and having duly made a return to the Commissioners of Inland Revenue, and also any savings bank certified under the Acts relating to savings banks, and also any post-office savings bank.

" The fact of any such bank having duly made a return to the Commissioners of Inland Revenue may be proved in any legal proceeding by production of a copy of its return verified by the affidavit of a partner or officer of the bank, or by the production of a copy of a newspaper purporting to contain a copy of such return published by the Commissioners of Inland Revenue; the fact that any such savings bank is certified under the Acts relating to savings banks may be proved by an office or examined copy of its certificate; the fact that any such bank is a post-office savings

bank may be proved by a certificate purporting to be under the hand of Her Majesty's Postmaster-General or one of the secretaries" [or the controller or assistant controller, 56 & 57 V. c. 69, s. 6] "of the Post Office."

"Expressions in this Act relating to 'bankers' books' include ledgers, day books, cash books, account books, and all other books used in the ordinary business of the bank."

By 45 & 46 V. c. 72, s. 11 (2), the expressions "bank" and "bankers" in the above Act, include any company carrying on the business of bankers to which the provisions of the Companies Acts are applicable.

The Acts apply to a bank L. which has taken over the business and books of the bank H. in which books the entries have been made. *Asylum for Idiots v. Handysides*, 22 T. L. R. 573. So also to a bank in Scotland. *Kissam v. Link*, 65 L. J. Q. B. 433; [1896] 1 Q. B. 574.

Proof of Entries in Corporation Books.

The official acts of a municipal corporation, registered in books, may be proved by production of them. *Thetford Case*, 12 Vin. Ab. 90. To make the books evidence, it must appear that they come from the proper custody; as from a chest which has always been in the custody of the clerk of the corporation. S. C.; *Shrewsbury, Mercers of, v. Hart*, 1 C. & P. 114. When the entries in the books are admissible as being of a public nature, examined copies are evidence. *Brocas v. London (Mayor)*, Stra. 307. And where, in order to prove the defendant a freeman, a copy upon stamped paper was produced of a loose paper upon a file, which the witness said was also on a stamp, and was kept with other similar stamped entries on a file among the corporation papers, and it appeared that there was also a book in which the acts of the corporation were kept, and wherein there was an entry more at large of the freeman's admission made when he was originally admitted, but there was no stamp in the book; it was held that the loose paper being the only effectual act, as having the proper stamp, must be looked upon as the proper and original act of the corporation, and that a copy of that was good evidence. *Per Noel, J., R. v. Head, Peake*, Ev. 84, n. This case seems to turn on the necessity of a stamp. Entries of a private nature, which do not relate to corporate acts, must, if admissible, be produced; and copies of them are not evidence, though long kept among the corporate muniments. *R. v. Gwyn*, 1 Stra. 401. An erasure in the entry in the minute book of a corporation must be presumed to have been made before the entry was signed. *Steeven's Hospital v. Dyer*, 15 Ir. Ch. R. 405. Where entries made in the books of a college were usually attested by the registrar who was a notary public, and signed by him as such, entries not so attested were held inadmissible as evidence of reputation. *Fox v. Bearblock*, 50 L. J. Ch. 489; 17 Ch. D. 429.

Proof of Registers of Births, Baptisms, Marriages, Deaths, and Burials.

Parish registers of baptisms, marriages, and burials may be proved by production of the register itself, or by examined copies. B. N. P. 247. If a copy be produced, it should be shown that the original was in its proper custody; this is regulated by 52 G. 3, c. 146, s. 5, *infra*; it is not sufficient to show that the register was in the custody of the parish clerk. *Doe d. Ld. Arundel v. Fowler*, 14 Q. B. 700. In order to prove the register of a marriage it is not necessary to call the attesting witnesses; but, as the register affords no proof of the identity of the parties, some evidence of that fact must be given, as by calling minister, clerk, or attesting witnesses, or others present; or the handwriting of the parties may be proved. *Birt v. Barlow*, 1 Doug. 172. But whatever is sufficient to satisfy the jury as to the identity is good evidence; *Id.* 174; *Hubbard v. Lees*, 35 L. J. Ex. 169;

L. R. 1 Ex. 255; and it seems from the last case that the mere similarity of names is sufficient evidence for the jury, and where the jury are satisfied as to the identity the court will not interfere. See also *La Cloche v. La Cloche*, 41 L. J. P. C. 51; L. R. 4 P. C. 325, 333, and *R. v. Weaver*, 43 L. J. M. C. 13; L. R. 2 C. C. R. 85. To prove the handwriting of the parties in the register it is not necessary to produce the original register for that purpose, but the witness may speak to the handwriting in it without producing it. *Sayer v. Glossop*, 17 L. J. Ex. 300; 2 Ex. 409. A photographic likeness may often be used for the purpose of identification; this has been constantly done in actions for divorce (see, however, *Frith v. Frith* 65 L. J. P. 53; [1896] P. 74), and even in criminal trials. Thus where a woman was tried for bigamy, a photograph of her first husband was allowed by Willes, J., to be shown to witnesses present at the first marriage, in order to prove his identity with the person mentioned in the certificate of that marriage. *R. v. Tolson*, 4 F. & F. 103. If a marriage be proved by a person who was present, it is not necessary to prove the registration, or licence, or banns. *Allison's Case*, R. & Ry. 109. The register is admissible evidence, although it be shown that the incumbent was accustomed to cause the entries to be made from the information of others, and not from personal knowledge. *Doe d. France v. Andrews*, 15 Q. B. 756.

The Act still in force for the registration of *baptisms* and *burials* by clergy of the Church of England is 52 G. 3, c. 146. By it the parish register is to be kept by the clergyman at his residence or in the church (sect 5), and provides that verified copies shall be annually sent to the registrar of the diocese (sect. 7). It seems that the latter, being public documents, are evidence as well as the former, and may be proved by examined copies. *Walker v. Beauchamp*, 6 C. & P. 552; and see *Att.-Gen. v. Oldham*, cited in Burn on Parish Registers, 209. But *quære* whether the bishop's transcripts, made before that Act, can be used except as secondary evidence? See *Walker v. Beauchamp*, *supra*.

The registration of *marriages* by clergy of the Church of England is now regulated by 6 & 7 W. 4, c. 86. By sect. 31 and schedule, the minister, after solemnizing a marriage, is to register, in two register books, in the prescribed form, the date, names, age, condition, and rank of the parties, their residence at the time of the marriage, and the names and rank of their fathers; and the entries are to be signed by the minister, the parties married, and two witnesses; by sect. 33, one of these books, when filled, is to be sent to the superintendent registrar, and the other to be kept by the minister with the registers of baptisms and burials.

By 27 & 28 V. c. 97, all burials in any burial ground in England are to be registered. By sect. 5 these registers and copies thereof may be used in evidence of the burials entered therein. By the Cremation Act, 1902, 2 Ed. 7, c. 8, s. 7, registers and copies thereof may in like manner be used in evidence.

A burial under the Burial Laws Amendment Act, 1880 (43 & 44 V. c. 41), is by sect. 10 to be certified by the person in charge thereof, to the person who is bound to keep the register, and the latter is to enter the burial therein.

By 3 & 4 V. c. 92, certain non-parochial registers of births, baptisms, deaths, burials, and marriages, transferred to the custody of the Registrar-General, are made admissible in evidence, either by producing them, or by certified extracts from them, after previous notice to the opposite party of the intention to use them. And by 21 & 22 V. c. 25, numerous other non-parochial registers and records of births, deaths, baptisms, burials, and marriages have been since certified to be faithful, and deposited with the Registrar-General and have become admissible in evidence. But only registers deposited under the Acts are admissible. *In re Woodward*, 82 L. J. Ch. 230; [1913] 1 Ch. 392.

By 42 & 43 V. c. 8, s. 3, where by lawful authority documents such as

registers, muster-rolls, and pay lists have been kept, showing deaths, births, and marriages, among officers and soldiers, and these or certified extracts thereof have been transmitted to the Registrar-General, they and certified copies thereof shall be admissible in evidence; but (sects. 4, 5) in respect of births, deaths, and marriages in the United Kingdom, only as to those which occurred prior to 1st July, 1879.

The general registration of births, marriages, and deaths is regulated by the 6 & 7 W. 4, c. 86, explained and amended by the 1 V. c. 22. By these Acts district registrars are appointed, whose duties are independent of those belonging to the parochial clergy, who are directed to register the particulars required to be registered according to the forms in the schedules to the first Act. These particulars comprise in the case of births, the time of birth, name (if any), and sex, the names of the parents, and the condition of the father, and in the case of deaths, the age, sex, and condition of the deceased; and by 1 V. c. 22, the Registrar-General may direct the *place* of birth or death to be added to the register of those facts, and the addition, when so made, shall be taken, to all intents, to be part of the entry in the register.

The stat. 6 & 7 W. 4, c. 86, regulates the registration of marriages by clergymen of the Church of England, and it also regulates those by Quakers and Jews.

The Act 6 & 7 W. 4, c. 85, for amending the law of marriage, provides for the registration of marriages *solemnized under that Act*, and is also incorporated with the above Act, c. 86, and it, by sect. 44, enacts that the provisions of the Act, c. 86, relating to the register of marriages, or certified copies thereof, shall extend to marriages under the Act, c. 85. The Marriage Act, 1898, 61 & 62 V. c. 58, ss. 7, 11, provides for the registration of marriages solemnized in registered buildings under that Act.

By 6 & 7 W. 4, c. 86, s. 38, it is provided that certified copies of entries, purporting to be sealed with the seal of the Registrar-General's office, shall be "evidence of the *birth, death, or marriage* to which the same relates, without any further or other proof of such entry, and no certified copy purporting to be given in the said office shall be of any force or effect, which is not sealed or stamped as aforesaid." The identity of the party must, of course, be proved. *Parkinson v. Francis*, 15 Sim. 160. By sect. 35 the registrars, as also all rectors, curates, &c., are bound to give certified copies: it is not expressly provided that these latter certificates shall be evidence without further verification. It has, however, been held that under 14 & 15 V. c. 99, s. 14, certified copies of parish registers, purporting to be signed by A. B., "incumbent," or "rector," or "vicar," or "curate," without specifying the parish over against the name, or adding, "of the above parish," are admissible without verification; for it will be intended that the incumbent, &c., is incumbent of the parish named in the certificate, and is the officer intrusted with the custody of the original register. *In re Hall's Estate*. 22 L. J. Ch. 177. So, a certificate of birth purporting to be signed by the registrar having the custody of the original register is admissible on its mere production. *R. v. Weaver*, 43 L. J. M. C. 13; L. R. 2 C. C. R. 85, and is evidence of the *date* of the birth. S. C.; *R. v. Cox*, 18 Cox, C. C. 675; *In re Goodrich*, 73 L. J. P. 33; [1904] P. 138, and *Brierley v. Brierley*, 87 L. J. P. 153; [1918] P. 257, disapproving *In re Wintle*, L. R. 9 Eq. 373, where Romilly, M.R., had held the certificate evidence of the *fact*, *i.e.*, that the birth was prior to the entry, but not of its *date*. And it would seem that these certificates are evidence of all the facts which the registrar is required to enter therein; see *Huntley v. Donovan*, 15 Q. B. 96, 101, 102; *Doe d. France v. Andrews*, 15 Q. B. 756, 759, *per Erle, J.*, and *Wigley v. Treasury Solicitor*, 71 L. J. P. 115; [1902] P. 233. Under this section the entries of other registrars besides the Registrar-General may be evidence under certain limitations. Thus the district registrar's certificate is evidence of death. See *Trail v. Kibblewhite*, 10 Jur. 107, Shadwell, V.-C., 1847. Evidence of identity is, however, essential. *R. v. Rogers*, 111 L. T. 1115; 24 Cox, C. C. 465. The right given by sect. 35 to search registers and

bespeak copies is not cut down by sect. 44 of the Births and Deaths Registration Act, 1874. *Best v. Best*, 89 L. J. P. 93; [1920] P. 75.

The Births and Deaths Registration Act, 1874 (37 & 38 V. c. 88), which is to be read with the earlier Acts, by sect. 38, provides that an entry in these registers or a certified copy thereof, "shall not be evidence of such birth or death unless such entry either purports to be signed by some person professing to be the informant, and to be such a person as is *required by law* at the date of such entry to give to the registrar information concerning such birth or death, or purports to be made on a certificate from the coroner, or in pursuance of the provisions" for the registration of births and deaths at sea. The persons required to give notice under these Acts are defined as to births in 37 & 38 V. c. 88, ss. 1—8; and as to deaths in *Id.* ss. 9—13. A person "required by law" here includes a person *entitled* to give information under 6 & 7 W. 4, c. 86, ss. 19, 20, 25. *In re Goodrich*, *supra*.

The registration of a building under 6 & 7 W. 4, c. 85, for the solemnization of marriages under that Act may be proved either by a certified copy under 14 & 15 V. c. 99, s. 14, or by an examined copy of the register. *R. v. Manwaring*, 1 Dears. & B. 132; 26 L. J. M. C. 10. By 19 & 20 V. c. 119, s. 24, every certified copy or extract sealed or stamped with the seal of the General Register Office shall be received as evidence of the place of meeting therein mentioned having been, at the time therein stated, duly certified and registered or recorded as by law required, without any further or other proof of the same.

By 10 Ed. 7 & 1 G. 5, c. 32, extracts of entries of births, deaths, and marriages in Scotland purported to be sealed or stamped with the seal of the General Registry Office are to be deemed duly authenticated, and to be admissible in evidence, as if they were signed by the Registrar-General.

Baptisms and marriages in Scotland and Ireland.] Scotch parochial registers of baptism are admissible in evidence. *Lyell v. Kennedy*, 59 L. J. Q. B. 268; 14 App. Cas. 437.

The Act 19 & 20 V. c. 96, s. 1, invalidates every irregular marriage in Scotland contracted after 31st December, 1856, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for 21 days next preceding such marriage. By sect. 2, the registrar of the parish or burgh in which an irregular marriage has been contracted after the said day is, upon receiving a certain warrant from the sheriff, &c., granted on the joint petition of the parties (accompanied by the schedule of particulars required to be filled up under 6 G. 5, c. 7, s. 1), to enter the marriage in a register, and a certified copy of such entry signed by the registrar is to be received in evidence of such marriage, and of such residence or of such previous living 21 days in Scotland, in all courts in the U. K. and dominions thereunto belonging. Production of a copy of the entry of an irregular marriage in the register duly signed by the registrar is sufficient in an English court without expert evidence of the law of Scotland being called. *Drew v. Drew*, 81 L. J. P. 85; [1912] P. 175. Similarly, as to a regular marriage. *Daniels v. Daniels*, 33 T. L. R. 149. Such evidence appears, however, *prima facie* only and may be rebutted. *Pheysey v. Pheysey*, July 9th, 1906; *Times*, July 10th, 1906.

The Irish Marriage Act (7 & 8 V. c. 81), amended by and incorporated with 26 & 27 V. c. 27; 33 & 34 V. c. 110, Part II.; and 36 & 37 V. c. 16, provides for the registration of all marriages in Ireland. By 7 & 8 V. c. 81, s. 71, certified copies of entries are given at the register office in Dublin, and these, if purporting to be sealed or stamped with the seal of the office, are made evidence of the marriage to which they relate without any further proof of such entry or of the seal. A marriage in a church of the Protestant Episcopal Church of Ireland may be proved by a copy of the marriage register, duly certified by the curate of the church, *Whitton v. Whitton*, [1900] P. 178.

Births, deaths, and marriages in India and the Colonies.] Books kept among the archives of the East India Co. before the transfer of their supreme powers to the crown, being copies of marriage registers kept at each presidency, and transmitted officially to the company, are evidence of marriages in India, when produced from the proper custody. *Ratcliff v. Ratcliff*, 1 Sw. & Tr. 467; 29 L. J. P. 171. So where copies of registers of marriages solemnized since the transfer have been deposited in the India Office, an entry therein may be proved by a certified copy, *Westmacott v. Westmacott*, 68 L. J. P. 63; [1899] P. 183. Similar copies of registers of baptism in India are admissible in evidence. *Queen's Proctor v. Fry*, 48 L. J. P. 68; 4 P. D. 230. These registers are deposited at the offices of the Secretary of State for India. As to proof of marriage in Hong Kong, see *Smith v. Smith*, 109 L. T. 744; and in the Gold Coast, see *Brown v. Brown*, 116 L. T. 702.

By 14 & 15 V. c. 40, s. 11, provision was made for the registration of the marriages of persons professing the Christian religion in India, solemnized under that Act before a registrar, and, by sect. 12, duplicates of the register were directed to be transmitted to the secretary to the government in the presidency or place, or place of residence of the registrar, to be kept by him; and in certain instances these duplicates were to be transmitted to the Registrar-General of Births, &c., in England. Sect. 21 enacted that the Act was not to affect marriages solemnized in India by persons in holy orders, nor Scotch marriages there legalized by stat. 58 G. 3, c. 84, nor other legal marriages there; and the Governor-General was empowered to make laws for the registration of such marriages; and to provide for the transmission of duplicates to the Registrar-General of Births, &c., in England. Sect. 22 provided that certified copies of the certificates delivered under this Act to the Registrar-General, purporting to be sealed or stamped with the seal of the General Register Office, should be received as evidence of the marriage to which they relate, without further proof of such certificate, or of any entry therein. This Act was repealed by the Stat. Law Rev. Act, 1875, with the proviso that such repeal shall not affect "the proof of any past act or thing." These marriages are now regulated by Indian Acts. See Indian Act, No. xv., 1872, ss. 27—37, 54, 55, 59, 62, 80, 81, and *Martin v. Martin*, Times, Dec. 7th, 1898.

In Australia, Canada, Nova Scotia, the West Indies, and other of the British colonies, Acts of Parliament are in force for the registration of births, marriages, and deaths, and where such is the case the registers may be used in evidence.

Births, deaths, and marriages at sea.] By the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 254 (1), masters of ships are required to record in the log-book, or otherwise, the births and deaths taking place on board, and, by sub-sect. 2, a return is to be made of such record to the Registrar-General of Shipping and Seamen, who (sub-sect. 4) is to send a certified copy of such return to the Registrar-General of Births and Deaths, and this copy is to be filed or copied in "a marine register-book," which is to be deemed to be a certified copy of a register-book within the meaning of the Registration Acts. By sect. 339 these provisions apply to a ship, not British, carrying passengers to or from the United Kingdom. The Births and Deaths Registration Act, 1874 (37 & 38 V. c. 88), s. 37, contains similar provisions for the record of births and deaths happening on board H.M.'s ships.

By 57 & 58 V. c. 60, s. 240, the master of a ship for which an official log-book is required shall enter therein (6) "every marriage taking place on board."

By the Foreign Marriage Act, 1892 (55 & 56 V. c. 23), s. 12, marriages under that Act may be solemnized on board one of H.M.'s ships on a foreign station, and with respect thereto (a) the commanding officer of the ship may

be authorized to be a marriage officer, and (b) the provisions of the Act *vide infra* shall apply.

Births, deaths, and marriages abroad.] Foreign registers of births, baptisms, marriages, and deaths would seem to be admissible as to those matters properly and regularly recorded in them, if proved to have been prepared under official authority. See *Lyell v. Kennedy*, 59 L. J. Q. B. 268; 14 App. Cas. 437, 448, 449, *per* Lord Selborne. In *Abbott v. Abbott*, 29 L. J. P. 57, a certificate, duly attested, copied from a register of marriages kept by the *curé* of a parish in Chili, under public authority, was received. In *Brinkley v. Att.-Gen.*, 59 L. J. P. 51; 15 P. D. 76, a certificate of a marriage in Japan given by the chief secretary, and verified by the Vice-Minister of State, was received, evidence being given that they occupied those offices, and as to the law of marriage there. Registers of births, baptisms, marriages, and burials of British subjects beyond seas, which have been transmitted from different British embassies and factories on the continent of Europe and elsewhere, are now placed in the registry of the Consistory Court of London.

By 42 & 43 V. c. 8, registers kept under the King's regulations of births, deaths, and marriages occurring out of the United Kingdom, among British officers and soldiers, are to be transmitted to the Registrar-General, and filed or copied in the "Army Register Books," which is to be deemed a certified copy of the register book within the meaning of the Registration Acts. See *Adams v. Adams*, [1900] W. N. 32.

By the Foreign Marriage Act, 1892 (55 & 56 V. c. 23), s. 1, marriages between parties, of whom one at least is a British subject, may be solemnized abroad by or before a marriage officer (see sect. 11) at his official house (sect. 8 (2)) in accordance with marriage regulations made by an Order in Council under sect. 21: and he is directed by sect. 9 to make entries of these marriages in duplicate in two register books, and, by sect. 10, to forward a certified copy thereof, and the duplicate register book, when filled, to the Secretary of State, to be by him forwarded to the Registrar-General. By sect. 16 (1) "Any book, notice, or document directed by this act to be kept by the marriage officer or in the archives of his office, shall be of such a public nature as to be admissible in evidence on its mere production from the custody of the officer. (2) A certificate of a Secretary of State as to any house, office, chapel, or other place being, or being part of, the official house of a British ambassador or consul shall be conclusive." By sect. 17 all the provisions and penalties of stat. 6 & 7 W. 4, c. 86, and the Acts amending the same (*vide* sect. 24) "relating to any registrar, or register of marriages or certified copies thereof, shall extend to every marriage officer, and to the registers of marriages under this act, and to the certified copies thereof (so far as the same are applicable thereto), as if herein re-enacted and in terms made applicable to this act, and as if every marriage officer were a registrar under the said acts." By sect. 18, "Subject to the marriage regulations a British consul, or person authorized to act as British consul, on being satisfied by personal attendance that a marriage between parties, of whom one at least is a British subject, has been duly solemnized in a foreign country, in accordance with the local law of the country, and on payment of the proper fee, may register the marriage in accordance with the marriage regulations as having been so solemnized, and thereupon this act shall apply as if the marriage had been registered in pursuance of this act, except that nothing in this act shall affect the validity of the marriage so solemnized." An Order in Council of Oct. 28th, 1892, has been made under sect. 21; see London Gazette, Nov. 4th, 1892, p. 6161.

Proof of Merchant Shipping Documents.

By sect. 64 (2) of the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), certain documents are admissible in evidence in manner provided by the act, namely, "(a) any register book under this part of this act on its

production from the custody of the registrar or other person having the lawful custody thereof; (b) A certificate of registry under this act purporting to be signed by the registrar or other proper officer; (c) An indorsement on a certificate of registry purporting to be signed by the registrar or other proper officer; (d) Every declaration made in pursuance of this part of this act in respect of a British ship. (3) A copy or transcript of the register of British ships kept by the Registrar-General of Shipping and Seamen under the direction of the Board of Trade shall be admissible in evidence in manner provided by this act, and have the same effect to all intents as the original register of which it is a copy or transcript."

Sect. 239 requires official log-books to be kept in a prescribed form, and the entries to be authenticated as therein provided, and by sub-sect. 6 "every entry made in an official log-book in manner provided in this act shall be admissible in evidence." Sect. 240 enacts what events shall be entered therein: these (sub-sect. 6) include marriages, but the record of births and deaths is provided for by sect. 254. By sects. 242, 256, the official log-book is to be sent "to the Registrar-General of Shipping and Seamen, and he shall record and preserve them, and they shall be admissible in evidence in manner provided by this act."

Sect. 310 provides special evidence of the bond given by the master of an emigrant ship. Sect. 694 provides for the proof of documents which the Act requires to be attested. Sect. 695 (1) "Where a document is by this act declared to be admissible in evidence, such document shall, on its production from the proper custody, be admissible in evidence . . . and, subject to all just exceptions, shall be evidence of the matters stated therein in pursuance of this Act, or by any officer in pursuance of his duties as such officer. (2) A copy of any such document or extract therefrom shall also be so admissible in evidence if proved to be an examined copy or extract, or if it purports to be signed and certified as a true copy or extract by the officer to whose custody the original document was intrusted."

By sect. 719, all documents purporting to be issued or written by direction of the Board of Trade, and to be sealed with the seal of the Board or signed by their secretary or one of their assistant secretaries, or, if a certificate, by one of the officers of the marine department, shall be received in evidence and deemed to be so issued or written without further proof, unless the contrary be shown.

Under sect. 720 the Board issues forms of books, instruments, and papers required by the Act and sealed with its seal or some other distinguishing mark, and (sub-sect. 4) unless so made in such form "shall not be admissible in evidence in any civil proceeding on the part of any owner or master of any ship." By sub-sect. 5 a form purporting to have been so issued, and bearing the seal or mark, is to be taken *primâ facie* as in the form required.

In *R. v. Castro*, Q. B. trial at bar, Shorthand Notes, pp. 3033—4, Nov. 28, 1873, crew lists of vessels which had cleared from the custom-house at New York were allowed to be proved by examined copies, without accounting for the non-production of the originals.

Proof of Corporation Deeds.

Fixing the common seal is tantamount to delivery. Com. Dig. Fait (A. 3). But if the seal be affixed without the intent that the deed should take effect presently, a subsequent delivery is necessary. *Derby Canal Co. v. Wilmot*, 9 East, 360; *Mowatt v. Castle Steel and Iron Works Co.*, 34 Ch. D. 58. See *Merchants of the Staple of England v. Bank of England*, 57 L. J. Q. B. 418; 21 Q. B. D. 165, 166, *per Wills, J.* The seal must be proved by some one who knows it, but it is not necessary to call a witness who saw it affixed. *Moises v. Thornton*, 8 T. R. 307; *Brounker v. Atkyns*, Skinn. 2. Some corporation seals, as that of London, require no proof. *Doe d. Woodmass v. Mason*, 1 Esp. 53. Not so the seal of the Bank of England; *semb.*

Doe d. Bank of England v. Chambers, 5 L. J. K. B. 123; 4 Ad. & E. 410; nor the seal of any other corporation, unless it be made to prove itself by some statute, or he made admissible by 8 & 9 V. c. 113, s. 1.

If the seal of a corporation be attached to an instrument, it will be presumed, as against them, to have been regularly attached, and it lies on them to give strict proof to the contrary, so as to exclude such presumption. *Clarke v. Imperial Gas Co.*, 4 B. & Ad. 315. The presumption may, however, be rebutted by evidence. *Anon.*, 12 Mod. 423; *Merchants of the Staple of England v. Bank of England*, 57 L. J. Q. B. 418; 21 Q. B. D. 160. The irregularity, when a defence, might formerly have been shown under *non est factum*. *Hill v. Manchester Waterworks Co.*, 3 L. J. K. B. 19; 5 B. & Ad. 866; *Royal British Bank v. Turquand*, 5 E. & B. 256; *D'Arcy v. Tamar & Callington Ry.*, 36 L. J. Ex. 37; L. R. 2 Ex. 158. But it would now seem necessary to plead it specially, as the objection would be likely to take the plaintiff by surprise. See Rules, 1883, O. xix. r. 15. A person who manages the affairs of a trading corporation must of necessity have power to use the corporate seal for those acts he is authorized to perform. *Ex pte. Contract Corporation; In re BARNED'S Banking Co.*, 37 L. J. Ch. 81; L. R. 3 Ch. 105, 116. As to the power of *de facto* directors to bind their company, see *In re County Life Assurance Co.*, 39 L. J. Ch. 471; L. R. 5 Ch. 288. See further on this subject, *post*, *Actions by and against Companies, &c.* It is not settled whether such a deed proves itself after thirty years. *R. v. Bathwick (Inhabitants)*, 9 L. J. (O. S.) M. C. 103; 2 B. & Ad. 639. Lapse of time does not increase the difficulty of proving a corporation seal, which is one, but not the only, reason for dispensing with proof.

The name of a corporation as stated in a deed must be the same in substance with the true name, but need not be the same in words or syllables. *R. v. Haughley (Inhabitants)*, 2 L. J. M. C. 56; 4 B. & Ad. 650, citing *Lynne's (Mayor) Case*, 10 Co. Rep. 124; *Croydon Hospital v. Farley*, 6 Taunt. 467. Where a municipal corporation which, under 21 & 22 V. c. 98, s. 24, was also the local board of health, entered into a contract under seal as such local board, the corporation was held to be bound. *Andrews v. Ryde Corporation*, 43 L. J. Ex. 174; L. R. 9 Ex. 302.

Where a question arises as to the effect of two deeds relating to the same subject-matter, both executed on the same day, it must be proved which was in fact executed first; but if there is anything in the deeds themselves to show an intention either that they shall take effect *pari passu*, or even that the later deed shall take effect in priority to the earlier, then the court will presume that the deeds were executed in such order as to give effect to that intention. *Gartside v. Silkstone and Dodworth Coal Co.*, 51 L. J. Ch. 828; 21 Ch. D. 762.

Proof of Private Deeds and Writings.

Attesting witness, when to be called.] It was long a settled rule that wherever a deed or other instrument is subscribed by attesting witnesses one of them at least must be called to prove the execution; and it was held that such testimony could not be dispensed with, though the defendant had admitted the execution in his answer to a bill in Chancery. *Call v. Dunning*, 4 East, 53. Now by the Criminal Procedure Act, 1865* (28 & 29 V. c. 18), ss. 1, 7 (replacing C. L. P. Act, 1854, s. 26), it is enacted that "it shall not be necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite; and such instrument may be proved as if there had been no attesting witness thereto." But as there are many instruments to which attestation is essential, as wills, instruments under powers, bills of sale, &c., it is still necessary to retain many of the old decisions on the subject, although even in these cases the necessity for

* Cited for brevity as Crim. P. Act, 1865.

calling the attesting witnesses only arises where it is necessary to *prove* the instrument, for the parties against whom any of these instruments requiring attestation are sought to be used may waive the necessity for calling the attesting witness by admissions. Thus, if, in the course of the proceedings, the party voluntarily admit the execution, or if by his pleadings he do not require the execution to be proved, there is no necessity for calling the attesting witness. But where *proof* has to be given of attestation, the necessity for calling the attesting witness cannot be avoided by putting the party to the deed, against whom it is sought to be used, into the witness-box, and extracting an admission of the execution from him. *Whyman v. Garth*, 22 L. J. Ex. 316; 8 Ex. 803.

Where the attesting witness is dead (*Anon.*, 12 Mod. 607), or insane (*Currie v. Child*, 3 Camp. 283), or infamous (*Jones v. Mason*, Stra. 833), or absent in a foreign country, or not amenable to the process of the superior courts (*Princc v. Blackburn*, 2 East, 252), although he might have been examined on interrogatories (*Glubb v. Edwards*, 2 M. & Rob. 300), or where he cannot be found after diligent inquiry (*Spooner v. Payne*, 16 L. J. C. P. 225; 4 C. B. 328; *Cunliffe v. Sefton*, 2 East, 183);—evidence of the witness's handwriting has always been admissible. A subscribing witness, who has become blind, ought nevertheless to be called in order to learn from him anything material that passed at the execution. *Crank v. Frith*, 2 M. & Rob. 262, *per* Lord Abinger, C.B. *Accord. Rees v. Williams*, 1 De G. & Sm. 314. In *Pedler v. Paige*, 1 M. & Rob. 258, Park, J., admitted proof of the handwriting of a blind witness (but with some expression of doubt), on the authority of *Wood v. Drury*, 1 Ld. Raym. 734. It is not sufficient ground for admitting evidence of the witness's handwriting that he is unable to attend from illness, and lies without hope of recovery. *Harrison v. Blades*, 3 Camp. 457. The party interested in his testimony must, in such a case, get a judge's order to examine him out of court.

With regard to the *inquiry* necessary to let in such evidence, it has been held that an inquiry after an attesting witness to a bond at the residence of the obligor and obligee is sufficient. *Cunliffe v. Sefton*, *supra*. So, diligent inquiry at the witness's usual place of residence, and information there and from the witness's father that he had absconded to avoid his creditors. *Crosby v. Percy*, 1 Taunt. 364; *accord. Falmouth (Earl) v. Roberts*, 11 L. J. Ex. 180; 9 M. & W. 469. So, inquiry after the witness at the Admiralty, where it appeared by the last report that he was serving on board a ship in the navy; *Parker v. Hoskins*, 2 Taunt. 223; or proof that the witness went abroad twenty years ago, and has not been heard of since. *Doe d. Johnson v. Johnson*, 1 Phillipp's Ev., 7th ed. 474, n. A witness who was defendant's clerk, being subpoenaed, said he would not attend, and the trial was twice put off in consequence of his absence; search was then made at the defendant's house, and in the neighbourhood, and upon information at the defendant's that the witness was gone to Margate, inquiry was made there without success: held that, under these circumstances, evidence of his handwriting was admissible. *Burt v. Walker*, 4 B. & A. 697; *Spooner v. Payne*, *supra*. Where diligent inquiry had been made without success for a witness, proof of his handwriting was admitted, although it appeared that a letter from him, concealing his retreat, had been received before the trial. *Morgan v. Morgan*, 2 L. J. C. P. 27; 9 Bing. 359. So, where an attorney's clerk was witness, and the attorney could give no account of him, although afterwards at the trial he recollected where he might perhaps be heard of. *Miller v. Miller*, 4 L. J. C. P. 259; 2 Bing. N. C. 76.

The sufficiency of the inquiry is for the determination of the judge, who will found his opinion on the nature and circumstance of each case. When the court is satisfied that due diligence has been used to find the witness, then it is sufficient to prove his handwriting without proving the handwriting of the party, unless with a view to establish his identity. *Nelson v. Whittall*, 1 B. & A. 19; *Gough v. Cecil*, C. B., T. T. 24 G. 3; M. S., cited Selw. N. P., 13th ed. 494.

Where the name of a fictitious person is inserted as witness; *Fasset v. Brown*, Peake, 23; or where the subscribing witness denies any knowledge of the execution; *Talbot v. Hodson*, 7 Taunt. 251 (overruling *Phipps v. Parker*, 1 Camp. 412); *Fitzgerald v. Elsee*, 2 Camp. 635; *Boxer v. Rabeth*, Gow, 175; or gives evidence that the document was not duly executed; *Bowman v. Hodgson*, 36 L. J. C. P. 124; L. R. 1 P. & D. 362; or where the attesting witness subscribes his name without the knowledge or consent of the parties; *M'Crow v. Gentry*, 3 Camp. 232;—in these cases it becomes necessary to prove the instrument by calling some one acquainted with the handwriting of the person executing it, or who was present at the time of execution; or by the admission of the party.

Where there are two attesting witnesses, and one of them is incompetent or his evidence cannot be obtained, the other witness must be called; and evidence of the handwriting of the absent witness will not be sufficient. *Adm. in Cunliffe v. Setton*, 2 East, 183. But where a bond is attested by two witnesses, and one of them is dead, and the other beyond the reach of the process of the court, proof of the handwriting of either seems to be sufficient. *Adam v. Kerr*, 1 B. & P. 360.

It will not be assumed that a name subscribed to an instrument is necessarily that of an attesting witness; thus, where a deed purported to be "sealed by order of the Governor and Company of the bank, J. Knight, Secretary"—it was held unnecessary to call J. Knight; *Doe v. Bank of England v. Chambers*, 5 L. J. K. B. 123; 4 Ad. & E. 410; and where the seal of a company was affixed to a deed, and two directors signed their names in the following form:—"Seal of the said Company affixed at the board meeting this [date], in the presence of O., Chairman, C., Director. (Countersigned) D., Sec. pro tem."—it was held that the signatures of O. and C. formed part of the execution of the deed, and that they were not attesting witnesses. *Deffell v. White*, 36 L. J. C. P. 25; L. R. 2 C. P. 144; following *Shears v. Jacob*, 35 L. J. C. P. 241; L. R. 1 C. P. 513; see also *Dunn v. Dunn*, L. R. 1 P. & D. 277. In *Bailey v. Bidwell*, 13 M. & W. 73, it was considered that, where a mere rule of practice of the court required an attesting witness, he need not be called. *Streeter v. Barlett*, 5 C. B. 562, is *contra* on this point. It will therefore still be a question whether, in such a case, the Crim. P. Act, 1865, s. 7, dispenses with calling the attesting witness. Non-compliance with the rule may make the instrument irregular without making it "invalid." The witness must still be called if attestation is requisite to its "validity."

Where an attested agreement was indorsed with subsequent variations, and the plaintiff sued on it as altered, it was held enough to prove the execution of the indorsement, for it formed a new agreement incorporating the old one and dispensing with the necessity of any other proof of it. *Fishmongers' Co. v. Dimsdale*, 6 C. B. 896; 12 C. B. 557; 22 L. J. C. P. 44.

The Merchant Shipping Act, 1894 (57 & 58 V. c. 60), s. 694, provides that in the case of documents required by that Act to be attested they "may be proved by the evidence of any person who is able to bear witness to the requisite facts without calling the attesting witness."

Execution, how proved.] Where attestation is necessary to the validity of a writing, the form and nature of it must depend on the provision of the law or other authority which has made it necessary. Unless it be otherwise provided, in attesting a deed, it is not necessary that the witness should see the party sign or seal; if he see him deliver it already signed and sealed, or sealed only where signature is unnecessary, it will be sufficient. Thus proof by the witness that he was not present when the deed was executed, but was afterwards requested by one of several parties to sign the attestation, is sufficient evidence of the execution by such party; *Grellier v. Neale*, Peake, 146; and witnesses may be called to prove the handwriting of the remaining parties, as to whom the deed must be considered as unattested; and sealing and delivery may be presumed. S. C. A general form of attestation must

be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the deed. *Buller v. Birt*, cor. Leach, M.R., cited 4 Ad. & E. 15. It is not necessary for the attesting witness to be able to say whether certain blanks in the deed were filled up at the time of execution, for this will be presumed; and the witness generally sees nothing but the delivery. *England v. Roper*, 1 Stark. 304. See *Doe d. Tatum v. Catmore*, 16 Q. B. 745; 20 L. J. Q. B. 364. Where a bond was executed by the defendant, and attested by a witness in one room, and was then taken into an adjoining room, and at the request of the defendant's attorney, and in the defendant's hearing, was attested by another witness who knew the defendant's handwriting, it was held that the execution might be proved by the latter witness, the whole being considered as one transaction. *Parke v. Mears*, 2 B. & P. 217; and see *Anon.*, Arch. Pl. & Ev., 1st ed. 378. In proving the execution of a deed, the attesting witness frequently states that he does not recollect the fact of the deed being executed in his presence, but that, seeing his own signature to it, he has no doubt that he saw it executed; this has always been received as sufficient proof of the execution. *Per Bayley, J.*, *Maugham v. Hubbard*, 6 L. J. (O. S.) K. B. 229; 8 B. & C. 14; *per Taunton, J.*, *Re v. St. Martin's, Leicester*, 4 L. J. M. C. 25; 2 Ad. & E. 210, 213. See *Wright v. Sanderson*, 53 L. J. P. 49; 9 P. D. 149. As to qualified execution, see *Yarmouth Exchange Bank v. Blethen*, 54 L. J. P. C. 27; 10 App. Cas. 293. As to the priority of two deeds executed on the same day, see *Gartside v. Silkstone & Dodworth Coal Co.*, 51 L. J. Ch. 828; 21 Ch. D. 762. The grantee under a deed is not competent to attest the execution thereof by the grantor. *Seal v. Claridge*, 50 L. J. Q. B. 316; 7 Q. B. D. 516. See *Cullen, Ex parte*; *Parrott, In re*, 60 L. J. Q. B. 567; [1891] 2 Q. B. 151.

Identity of persons signing, &c.] Some evidence of the identity of the party to the instrument must be given, though very slight evidence will be sufficient. Where the proof of the acceptance of a bill was simply the handwriting of the attesting witness on an acceptance, some evidence of the identity of the defendant and the person whose acceptance is thus proved, was held necessary; *Whitelocke v. Musgrove*, 2 L. J. Ex. 210; 1 Cr. & M. 511; and it has been thought not sufficient merely to prove that a person calling himself by the same name (which was common in the neighbourhood where the witness saw the signature put) accepted the bill. *Jones v. Jones*, 11 L. J. Ex. 265; 9 M. & W. 75. Where the witness to a bond stated that he saw it executed by a person who was introduced under the name of *Hawkshaw* (the name of the defendant), but could not identify him, the plaintiff was non-suited. *Parkins v. Hawkshaw*, 2 Stark. 239; *Middleton v. Sandford*, 4 Camp. 34. But where the attestation states the residence of the party, proof that the party sued resided there would be *prima facie* evidence of identity. See *Whitelocke v. Musgrove*, and *Jones v. Jones, supra*. Where the acceptor was described as "C. B. Crawford, East India House," proof that the signature was that of a person of the same name, a clerk of the East India House, was held to be *prima facie* evidence of identity; *Greenshields v. Crawford*, 11 L. J. Ex. 372; 9 M. & W. 314; and in *Roden v. Ryde*, and *Sewell v. Evans*, 4 Q. B. 626, it was held that, unless the name is so common as to neutralize the inference of identity, or other facts appear to raise a doubt, identity of name is *prima facie* enough to charge the defendant. *Accord. Hamber v. Roberts*, 18 L. J. C. P. 250; 7 C. B. 861. That the defendant had spoken of the contents of the deed is evidence of identity. *Doe d. Wheeldon v. Paul*, 3 C. & P. 613. Where a note was made payable to J. H. and indorsed by a person so named, and there were two persons, father and son, named J. H., it will be presumed that the son was the payee, if the son indorsed it. *Stebbing v. Spicer*, 8 C. B. 827. In an action by an indorsee against the acceptor of a bill, whereof S. was the payee, the plaintiff proved that a person calling himself S. came to the plaintiff's residence with the bill in question and a letter of introduction,

proved to be genuine, which was expressed to be given to a person introduced to the writer as S., and also another bill drawn by the writer of that letter. The bearer of these documents, after remaining some days at the plaintiff's residence, indorsed to him the bill in question. This was held to be *primâ facie* evidence of the identity of this person with S. *Bulkeley v. Butler*, 2 B. & C. 434.

Sealing and Delivery.] The sealing of the deed need not take place in the presence of the witness; it is sufficient if the party acknowledge an impression already made. Where one party in the presence of his co-partner executed a deed for both, but there was only one seal, and it did not appear whether the seal had been put twice upon the wax, it was held sufficient; for that no particular mode of delivery was requisite, and it was enough if a party executing a deed treated it as his own. *Ball v. Dunsterville*, 4 T. R. 313. But where a deed is executed under the authority of a power requiring it to be under the *hands and seals* of the parties, the parties must use separate seals. Thus, by 8 & 9 W. 3, c. 30, certificates were required to be under the hands and seals of the overseers and churchwardens; it was held that a certificate signed by two churchwardens and one overseer, but bearing two seals only, was not a valid certificate. *R. v. Austrey*, 6 M. & S. 319. The circumstance of a party writing his name opposite to the seal on an instrument which purports to be sealed and delivered by him, is evidence of a sealing and delivery to go to a jury. *Talbot v. Hodson*, 7 Taunt. 251. So, where the defendant delivers to the plaintiff a deed signed and sealed and expressed to be signed, sealed, and delivered, it will be taken as against the defendant that it has been also delivered. *Xenos v. Whickham*, 36 L. J. C. P. 313; L. R. 2 H. L. 296. Where a party, A., executes a deed with a blank in it, which is afterwards filled up with his assent in his presence, and he subsequently recognizes the deed as valid, the filling up of the blank will not void it; for, till the blank is duly supplied, it is incomplete and *in fieri*. *Hudson v. Revett*, 5 L. J. (O. S.) C. P. 145; 5 Bing. 368; *Hall v. Chandless*, 4 Bing. 123. See also *Crediton (Bishop) v. Exeter (Bishop)*, 74 L. J. Ch. 697; [1905] 2 Ch. 455. It is essential, however, that the instrument, in its complete state, should have been seen by A., or that he should have known the state in which it was when he is taken to have re-delivered it. *Société Générale de Paris v. Tramways Union Co. (or Walker)*, 54 L. J. Q. B. 177; 14 Q. B. D. 424, 11 App. Cas. 20; *Powell v. London & Provincial Bank*, [1893] 1 Ch. 610; 2 Ch. 555; 62 L. J. Ch. 795. For generally a deed executed in blank and left to be filled by another, who has no authority under seal, is void at law; S. C.; *Hibblewhite v. M'Morine*, 9 L. J. Ex. 217; 6 M. & W. 200; *Taylor v. Gt. Indian Peninsular Ry.*, 4 De G. & J. 559; 28 L. J. Ch. 709; but if given for good consideration, it may be valid in equity. *In re Queensland Land & Coal Co.*, 63 L. J. Ch. 810; [1894] 3 Ch. 181. See *Marchant v. Morton Down & Co.*, *infra*. While the deed is still in the hands of the party executing it, another name may be inserted, and it may be re-executed, without avoiding it as to the first parties, or requiring a new stamp. *Spicer v. Burgess*, 3 L. J. Ex. 285; 1 C. M. & R. 129; and in similar circumstances a clause may be struck out; *Jones v. Jones*, 2 L. J. Ex. 249; 1 Cr. & M. 721. A deed was executed by a son of the defendant, T. F., thus: "J. W. F. for T. F.;" and the defendant, when subsequently shown the deed so executed, said his son had authority to execute it for him, and that he adopted his son's act; this was held to be a re-delivery by the defendant. *Tupper v. Foulkes*, 9 C. B. (N. S.) 797; 30 L. J. C. P. 214. See also *In re Seymour*, 82 L. J. Ch. 233; [1913] 1 Ch. 475, where it was said that to establish re-delivery of a deed by acknowledgment it is not necessary to show that the party making the acknowledgment is aware that without the acknowledgment the deed would be invalid. A deed executed by a marksman may be proved by a person who has seen the party make his mark, and can speak as to its peculiarities. *George v. Surrey*, M. & M. 516.

When a subscribing witness is dead, proof of the handwriting of such witness is evidence of everything on the face of the paper which imports to be sealed by the party. *Per* Buller, J., *Adams v. Kerr*, 1 B. & P. 361. And where the "signing and sealing" are alone noticed, in the attestation, yet this is evidence of the delivery also. *Semb. Hall v. Bainbridge*, 17 L. J. Q. B. 317; 12 Q. B. 699. Where the party named has acted under the deed, it will be presumed as against him to have been executed by him, although the seal has no signature annexed, nor any attestation; *Cherry v. Heming*, 19 L. J. Ex. 63; 4 Ex. 631; for signature is not necessary to the execution of a deed, unless it be under a power which requires it; and it also seems that neither wax nor wafer are necessary, and that if a stamped impression be made on the paper in place of a seal as commonly used, it is a sufficient sealing, even under a power which requires a seal. *Sprange v. Barnard*, 2 Bro. C. C. 585. And it has been held that "to constitute a sealing neither wax nor wafer, nor a piece of paper, nor even an impression is necessary." *Sandilands, In re*, 40 L. J. C. P. 201; L. R. 6 C. P. 411. See also Sugden on Powers, 8th ed. 232. But there must in such case be circumstances from which it may be inferred that the document was in fact sealed. See *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1.

In the delivery of a deed no particular form is necessary. Throwing it upon a table with the intent that the other party shall take it up, is sufficient. Com. Dig. Fait (A. 3). See *Tupper v. Foulkes, supra*.

If the deed after sealing be tendered to the covenantee, and he expressly reject it, and refuse to take any benefit from it, the execution is incomplete. This defence was formerly admissible in evidence under *non est factum*. *Whelpdale's Case*, 5 Co. Rep. 119 a; *Xenos v. Wickham*, 13 C. B. (N. S.) 435; 33 L. J. C. P. 13; reversed on another ground; L. R. 2 H. L. 296. It must now, however, be pleaded specially. Rules, 1883, O. xix. r. 15.

Execution under power of attorney or order of court.] Where a deed is executed by virtue of a power of attorney, the power should be produced; *Johnson v. Mason*, 1 Esp. 89; and proved; 1 Phillipps' Ev., 7th ed. 104, 466. See *In re Airey*, 66 L. J. Ch. 152; [1897] 1 Ch. 164. In some instances a general agent has been presumed to have such authority. *Doe d. Macleod v. East London Waterworks, M. & D.* 149. See *Tupper v. Foulkes, supra*. But, in general, the agent must be authorized by deed. *Berkeley v. Hardy*, 4 L. J. (O. S.) K. B. 184; 8 D. & Ry. 102; *Hibblewhite v. M'Morine*; *Powell v. London and Provincial Bank, ante*, p. 122. So must a partner in order to bind his co-partner by deed. *Marchant v. Morton Down & Co.*, 70 L. J. K. B. 820; [1901] 2 K. B. 829, 832.

By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 40, a married woman, whether an infant or not, may, as if she were unmarried and of full age, by deed, appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do. By sect. 46, the donee of a power of attorney, whenever granted, may execute any instrument thereunder with his own signature and seal. Sect. 47 (1) protects the attorney in respect of acts done by him under the power, notwithstanding its revocation, without his knowledge. By sect. 48 (1, 6), an instrument creating a power of attorney (whenever executed) may, with an affidavit of verification, be deposited in the central office, and (4) "an office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument, and of the deposit thereof in the central office." Sufficient evidence is probably equivalent to *prima facie* evidence. See *Barraclough v. Greenhough*, 36 L. J. Q. B. 251; L. R. 2 Q. B. 612.

A power of attorney is in general revocable by the grantor, *Bromley v. Holland*, 7 Ves. 28; unless executed for valuable consideration, S. C.; or coupled with an interest, *Gaussen v. Morton*, 8 L. J. (O. S.) K. B. 313; 10 B. & C. 731; but even in this case it is revoked by the death of the

grantor. *Watson v. King*, 4 Camp. 272. See further *Frith v. Frith*, 75 L. J. P. C. 50; [1906] A. C. 254. Now by the Conveyancing Act, 1882 (45 & 46 V. c. 39), s. 8, if a power of attorney given after Dec. 31st, 1882, for valuable consideration is therein expressed to be irrevocable, then, in favour of a purchaser, (i.) the power shall not be revoked by the donor, or by his death, &c.; (ii.) any act done by the donee of the power shall not be prejudiced by any act done by the donor, or by his death, &c.; (iii.) neither the donee of the power nor the purchaser shall be affected by notice of anything done by the donor, or by his death, &c. By sect. 9, if such power, given for valuable consideration or not, is therein expressed to be irrevocable for a fixed period not exceeding one year, then, in favour of a purchaser, *during that period*, the above results shall take effect. As to a deed being binding on an agent who executed it as such, as well as on his principal, see *Young v. Schuler*, 11 Q. B. D. 651.

By the J. Act, 1884, s. 14, when a person neglects or refuses to execute any document, or to indorse a negotiable instrument, the court may order it to be executed or indorsed by a person nominated by the court, and when so executed or indorsed it "shall operate and be for all purposes available as if it had been executed or indorsed by the person originally directed to execute or indorse it." See *Howarth v. Howarth*, 55 L. J. P. 49; 11 P. D. 95. Before making such an order the court ought first to be satisfied that the person originally ordered to execute the document has neglected or refused to do so; in general an anticipatory order will not be made. *Savage v. Norton*, 77 L. J. Ch. 198; [1908] 1 Ch. 290. When once an order has been made under the section, and acted upon, the document executed by the appointed person has the same effect as if it had been executed by the person refusing or neglecting to execute it. *Ib.* In order to prove a deed so executed, it would seem necessary, in an action by or against a third party, to prove the original judgment or order, the neglect or refusal to comply therewith, the order authorizing execution, and the execution by the nominee of the court. But proof only of the last-mentioned order, and of the execution, would probably be sufficient in an action against the person who failed to execute the deed, brought by the person who obtained that order.

Signature, whether necessary.—Indenture.] Signature forms no part of the execution of a deed, but as the Stat. of Frauds, by sects. 1, 3, and 4, requires interests in land to be created, surrendered, or assigned by instrument in writing, and certain contracts to be evidenced by writing, *signed*, the question has arisen whether an unsigned deed satisfies this statute or not. The better opinion now is that the statute operates on parol contracts only, and does not affect deeds; *Shep. Touchst. by Preston*, c. 4, p. 56 (24); *Averline v. Whisson*, 12 L. J. C. P. 58; 4 M. & Gr. 801; *Cherry v. Heming*, 19 L. J. Ex. 64; 4 Ex. 631, and that therefore an unsigned deed will be good notwithstanding the statute. The opinion of Blackstone was the other way. 2 Bl. Com. 307. A similar question arises under the Sale of Goods Act, 1893, s. 4. By stat. 8 & 9 V. c. 106, s. 5, a deed executed after Oct. 1st, 1845, "purporting to be an indenture, shall have the effect of an indenture, although not actually indented."

Escrow.] "Where by express declaration, or from the circumstances, it appears that the delivery of a deed was not intended to be absolute, but that the deed was not to take effect until some contemplated event should have happened, the deed is not a complete deed and perfect deed until that event has happened." *Kidner v. Keith*, 15 C. B. (N. S.) 35, 43, *per* Williams, J.; *Bowker v. Burdekin*, 12 L. J. Ex. 329; 11 M. & W. 128, 147, *per* Parke, B.; *Foundling Hospital Governors v. Crane*, 80 L. J. K. B. 853; [1911] 2 K. B. 367, *per* Vaughan Williams, L.J. A condition previously expressed, though not introduced into the act of delivery, is sufficient to make it a delivery as an escrow. *Per* Abbott, C.J., *Johnson v. Baker*, 4 B. & A. 441;

and see *Murray v. Stair (Earl)*, 2 B. & C. 82. Where a person delivers a deed in the presence of a witness, but retains it in his own possession, there being nothing to show that it was not intended to operate immediately, it will take effect as a deed and not as an escrow; *Doe d. Garnons v. Knight*, 4 L. J. (O. S.) K. B. 161; 5 B. & C. 471; *Xenos v. Wickham*, 36 L. J. C. P. 313; L. R. 2 H. L. 296; see also *Roberts v. Security Co.*, 66 L. J. Q. B. 119; [1897] 1 Q. B. 111. The delivery of a deed to a third person for the use of the party in whose favour the deed is executed has the same effect. *Doe d. Garnons v. Knight, supra*. But the delivery by the grantor of a grant executed by him, to the solicitor of the grantee, may be shown to have been conditional only; *Watkins v. Nash*, 44 L. J. Ch. 505; L. R. 20 Eq. 262; even although the solicitor be one of several grantees. See *London Freehold, &c., Co. v. Suffield (Lord)*, 66 L. J. Ch. 790; [1897] 2 Ch. 608. Where a debtor executed a mortgage to his creditor unknown to the latter, and kept it 12 years in his own custody till he died, the deed was held valid from the date, in the absence of evidence to show that it was an escrow. *Exton v. Scott*, 6 Sim. 31. Where A. executes an instrument and delivers it to B. as an escrow to be delivered to C. on a certain event, possession by C. is *prima facie* evidence against A. of the performance of the condition. *Hare v. Horton*, 3 L. J. K. B. 41; 5 B. & Ad. 715. And delivery to a third person is not essential to a delivery as an escrow. *Gudgen v. Besset*, 26 L. J. Q. B. 36; 6 E. & B. 986. Where the delivery as an escrow is proved by a letter sent with the instrument, it is for the court to construe its effect; *aliter* if proved by oral evidence of extrinsic facts. *Furness v. Meek*, 27 L. J. Ex. 34. A document which purported to be a conveyance by A. of his own property, and was delivered by him on a condition that it should only become operative upon his death, was held to be a testamentary instrument and not an escrow. *Foundling Hospital Governors v. Crane*, 80 L. J. K. B. 853; [1911] 2 K. B. 367. The defence that the alleged deed was delivered as an escrow only, on a condition which has not been performed, was formerly raised by the plea of *non est factum*; *Millership v. Brookes*, 5 H. & N. 797; 29 L. J. Ex. 369; but it would now require to be specially pleaded. See Rules, 1883, O. xix. r. 15.

Proof of attested deed by secondary evidence.] It has been sometimes contended that, if the original document has been attested, the attesting witnesses must be called. But where the plaintiff declared on a deed which he averred to be in the possession of the defendant, who pleaded *non est factum*, and at the trial the deed was proved to be in the hands of the defendant, who had been served with notice to produce, it was held that, on the non-production of the deed, the plaintiff might give oral evidence of the contents without calling the subscribing witness, although his name was known to the plaintiff, and he was actually in court. *Cooke v. Tanswell*, 8 Taunt. 450. So in debt by landlord for double value; plea "no demand"; the plaintiff, having given notice to produce, offered to prove the original demand by a copy in which an attestation had been also copied, and to show that the original was signed by him: held, that the production of the attesting witness (though known to the plaintiff) was unnecessary. *Poole v. Warren*, 8 Ad. & E. 583. So where notice was given to produce a deed in the defendant's possession, and the defendant at the trial refused to do so, the plaintiff was allowed to prove it by a copy without calling any attesting witness, and it was held that the defendant could not put the plaintiff to a strict proof by afterwards producing the attested original. *Jackson v. Allen*, 3 Stark. 74; *Edmonds v. Challis*, 7 C. B. 413. Where the plaintiff declared on a lost deed, and a witness stated that there were subscribing witnesses, but he did not know their names, it was ruled by Ld. Kenyon that the plaintiff might recover without calling them. *Keeling v. Ball, Peake, Ev.*, App. 82. But he said that "had it appeared who they were, the plaintiff must certainly have called them." If in such a case the witnesses are dead, and the execution by the party to the instrument is proved, it is questionable

whether proof of the handwriting of the witnesses is in any case necessary; at all events, if the attesting witness can be identified with a deceased person, this will dispense with further proof of his handwriting; for the only object of such last-mentioned proof is to establish his identity. *R. v. St. Giles's, Camberwell*, 1 E. & B. 642; 22 L. J. M. C. 54.

Proof and comparison of handwriting.] In *Doe d. Mudd v. Suckermore*, 5 Ad. & E. 730, 731, where references to all the authorities will be found, Patteson, J., said: "That knowledge" [i.e., of handwriting] "may have been acquired either by seeing the party write, in which case it will be stronger or weaker according to the number of times and the periods and other circumstances under which the witness has seen the party write, but it will be sufficient knowledge to admit the evidence of the witness (however little weight may be attached to it in such case), even if he has seen him write but once, and then merely signing his surname; or the knowledge may have been acquired by the witness having seen letters or other documents professing to be the handwriting of the party, and having afterwards communicated personally with the party upon the contents of those letters or documents, or having otherwise acted upon them by written answers producing further correspondence or acquiescence by the party in some matter to which they relate, or by the witness transacting with the party some business to which they relate, or by any other mode of communication between the party and the witness, which, in the ordinary course of the transactions of life, induces a reasonable presumption that the letters or documents were the handwriting of the party; evidence of the identity of the party being of course added *aliunde*, if the witness be not personally acquainted with him."

Where an attorney acted on a written retainer, purporting to be signed by A., B., and C., being acquainted with the handwriting of A. and B. only, his testimony to that effect is insufficient to prove the signature of C. *Drew v. Prior*, 5 M. & Gr. 264. A witness cannot be permitted to give his opinion of the handwriting from extrinsic circumstances, such as his knowledge of the party's character and habits. *Da Costa v. Pym*, Peake, Ev. App. 85.

In the case of ancient documents, where it is impossible for any witness to swear that he has seen the party write, it is sufficient if the witness has acquired his knowledge of the handwriting by the inspection of other ancient writings bearing the same signature, and preserved as authentic documents. *B. N. P.* 236; *Taylor v. Cook*, 8 Price, 652; and see other cases cited, *Doe d. Mudd v. Suckermore*, *supra*; also *Fitzwalter Peerage Case*, 10 Cl. & F. 193; *Crawford & Lindsay Peerages*, 2 H. L. C. 557. Ancient writings (as a receiver's account 100 years old) may be laid before a witness at the trial for his inspection; and upon his judgment of their character, so formed, his belief as to the handwriting of the document in question may be inquired into. *Doe d. Tilman v. Tarver*, Ry. & M. 143; and see *Roe d. Brune v. Rawlings*, 7 East, 282. A copy of a parish register purporting to be signed by the curate eighty years ago, may be received with no other proof of handwriting than the evidence of the present parish clerk, who speaks from his having seen the same handwriting attached to other entries in the register. *Doe d. Jenkins v. Davies*, 16 L. J. Q. B. 218; 10 Q. B. 314. In these cases the question often becomes one of skill; the character of the writing varying with the age, and the discrimination of it being assisted by antiquarian study. *Per Coleridge, J., Doe d. Mudd v. Suckermore*, 7 L. J. Q. B. 33; 5 Ad. & E. 703.

The Crim. P. Act, 1865, ss. 1, 8 (replacing the C. L. P. Act, 1854, s. 27), provides that "Comparison of a disputed writing with any writing proved to the satisfaction of the judge to be genuine shall be permitted to be made by witnesses; and such writings, and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness, or otherwise, of the writing in dispute."

This section allows documents proved to be genuine, but not relevant to the issue, to be put in for the purpose of comparison. *Birch v. Ridgway*, 1 F. & F. 270; *Cresswell v. Jackson*, 2 F. & F. 24. For this purpose the disputed writing must be produced in court; and the section does not therefore apply to documents which are not produced, and of which it is sought to give secondary evidence. *Arbon v. Fussell*, 3 F. & F. 152. Where the question is as to the handwriting of a witness, and the witness in cross-examination was induced to write on a piece of paper, this writing may be used for comparison under the section. *Cobbett v. Kilminster*, 4 F. & F. 490. It may, of course, be a question how far writing so obtained is a fair test of the ordinary handwriting of the witness. If the genuineness of the document sought to be put in is disputed, a collateral question is raised which must first be decided (*Cooper v. Dawson*, 1 F. & F. 550), like all other collateral issues, by the judge. *Bartlett v. Smith*, 12 L. J. Ex. 287; 11 M. & W. 483; *Boyle v. Wiseman*, 24 L. J. Ex. 284. A person may be a witness under this section, although he has not acquired his skill in the comparison of handwriting in the course of his business. *R. v. Silverlock*, 63 L. J. M. C. 233; [1894] 2 Q. B. 766; *In re Clarence Hotel, Ilfracombe*, 54 S. J. 117. The evidence of a solicitor who had given study and attention to handwriting, and "had on several occasions professionally compared evidence in handwriting" was admitted. *R. v. Silverlock*, *supra*.

Proof of execution, when dispensed with.] A deed thirty years old proves itself, and no evidence of execution is necessary. B. N. P. 255. So, with regard to a steward's books of receipts, without proof of his handwriting, if they come from the proper custody. *Wynne v. Tywhitt*, 4 B. & A. 376; private letters, *Doe d. Thomas v. Beynon*, 12 Ad. & E. 431; a will produced by the officer of the Ecclesiastical Court, *Doe d. Howell v. Lloyd*, Peake, Ev., App. 41; a bond, *Chelsea Waterworks Co. v. Cowper*, 1 Esp. 275; and other old writings, *Fry v. Wood*, 1 Selw. N. P., 13th ed. 495, n. Even in cases in which attestation is requisite, and it appears that the attesting witness is alive and able to attend, it is unnecessary to call him where the instrument is thirty years old. *Doe d. Oldham v. Wolley*, 6 L. J. (O. S.) K. B. 286; 8 B. & C. 22.

But where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody; B. N. P. 255; or it should be shown that possession has accompanied it, at least where it purports to convey something which is the subject-matter of possession. See Gilb. Ev., 6th ed. 89. Whether the custody is suspicious is a question for the judge. *Doe d. Shrewsbury (Earl) v. Keeling*, 17 L. J. Q. B. 199; 11 Q. B. 884. It has, indeed, been held sufficient, on an appeal against a removal, for the respondent parish to produce a certificate thirty years old, without showing that it had been kept in the parish chest; *R. v. Ryton*, 5 T. R. 259; and see *R. v. Netherthong*, 2 M. & S. 337; but see on this point, *Evans v. Rees*, 9 L. J. M. C. 83; 10 Ad. & E. 151. It was formerly considered that, if there were any erasure or interlineation in an old deed, it ought to be proved in a regular manner by the witness, if living, or by proof of his handwriting and that of the party, if dead, in order to obviate the presumption which otherwise arises against the instrument. B. N. P. 255. In documents of remote antiquity it is evidently impossible to supply such proof; and, accordingly, in such documents defects of this kind are, in practice, treated only as matter of observation to the jury, unless they are of sufficient importance to warrant the judge in excluding them altogether. *Accord. Roe d. Trimblestown (Lord) v. Kemmis*, 9 Cl. & F. 774; and *Evans v. Rees*, *supra*. The rule now is that interlineations, &c., in a deed are presumed to have been made before execution. *Doe d. Tatum v. Catmore*, 16 Q. B. 745; 20 L. J. Q. B. 364. It is otherwise in the case of wills. S. C., 16 Q. B. 747.

Where a party, producing a deed upon a notice, claims a beneficial interest under it, it is not necessary for the party calling for the deed to prove the

execution of it; for in such a case the defendant, by claiming under it, accredits it as against him, though not to the extent of estopping him. *Pearce v. Hooper*, 3 Taunt. 60. Thus proof was unnecessary where assignees produced the assignment of the bankrupt's effects. *Orr v. Morice*, 3 B. & B. 139. So, in an action by a lessee against the assignee of the lease for breach of a covenant in the original lease, the plaintiff having proved a counterpart of the lease and the defendant having put in the original, it was held unnecessary for the plaintiff to prove the execution of it, though the defendant had assigned over the lease before action. *Burnett v. Lynch*, 4 L. J. (O. S.) K. B. 274; 5 B. & C. 589. So in an action against the vendor of an estate to recover a deposit on a contract for the purchase, if the defendant on notice produce the contract, the plaintiff need not prove its execution. *Bradshaw v. Bennett*, 1 M. & Rob. 143. And where, in ejectment, the attorney for the lessor of the plaintiff obtained from one of the defendants a subsisting lease of the premises to prevent its being set up by the defendants, it was held that this was a recognition of the lease as a valid instrument; and that, when produced in pursuance of notice from the defendants, it might be read by them without proof of execution, though the attorney had furnished them with the names of the attesting witnesses, and though the plaintiff's title was independent of the lease. *Doe d. Tyndale v. Heming*, 6 B. & C. 28. It is immaterial that the party calling for it denies its validity: as where the defendant produces an assignment of a bankrupt's goods which the plaintiff (trustee of the bankrupt) impugns as fraudulent. *Carr v. Burdiss*, 4 L. J. Ex. 60; 1 C. M. & R. 443, 782. Where notice was given to defendant to produce a feoffment under which he was in possession of land, the plaintiff proved by secondary evidence (the feoffment not being produced) that it had livery indorsed, and was witnessed; held, that it was unnecessary, as against defendant, to call the witness, or to prove livery. *Doe d. Rowlandson v. Wainwright*, 6 L. J. K. B. 35; 5 Ad. & E. 520. In an action against a sheriff for taking insufficient pledges in replevin, the replevin bond, produced by the defendant, is admissible in evidence against him, without proof of execution. *Scott v. Waithman*, 3 Stark. 169. So, where the sheriff has assigned it to the plaintiff. *Barnes v. Lucas*, Ry. & M. 264; *Plumer v. Brisco*, 17 L. J. Q. B. 158; 11 Q. B. 46.

Where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. *Gordon v. Secretan*, 8 East, 548; *Doe d. Wilkins v. Cleveland (Marquis)*, 8 L. J. (O. S.) K. B. 74; 9 B. & C. 864. So, if the party producing it claim an interest in it, but an interest *unconnected with the cause*; as where the action is for commission for procuring an apprentice for defendant, and the instrument produced is the deed of apprenticeship; *Rearden v. Minter*, 12 L. J. C. P. 139; 5 M. & Gr. 204. A party producing at the trial of a cause a deed which has been some months in his possession is not excused from proving the execution, merely because he received such deed from the adverse party who formerly claimed a beneficial interest in it. *Vacher v. Cocks*, 8 L. J. (O. S.) K. B. 341; 1 B. & Ad. 145. As the principle of the cases is that the party who claims an estate or interest under the instrument in his possession impliedly affirms its due execution, the rule is inapplicable to instruments that merely testify contracts under which no permanent interest passed. Therefore, where defendant wished to show himself to be a partner with A., under whom plaintiff sued, it was held that a contract in the plaintiff's possession to do some works for the firm, produced on notice by the plaintiff, must be proved by the defendant. *Collins v. Bayntum*, 10 L. J. Q. B. 98; 1 Q. B. 117; *Rearden v. Minter*, *supra*.

It seems that, when an executor showed payment of a bond under *plene administravit*, he must have proved the bond in the regular way, except, perhaps, in an action on a simple contract. B. N. P. 143.

A deed may be given in evidence without proof of execution, if its execution or the handwriting of the witness be one of the admissions in the cause, or admitted on the pleadings, or if the party be estopped to dispute

it, as by recital, &c. But the estoppel is confined to the part recited; and if the party wishes to prove more, he must prove it in the usual way. *Gillett v. Abbott*, 7 L. J. Q. B. 61; 7 Ad. & E. 783.

Deeds enrolled or registered.] Where a deed, to the efficacy of which enrolment is essential (as a bargain and sale under 27 H. 8, c. 16), is accordingly enrolled, proof of the enrolment by an examined copy will dispense with evidence of the execution by any of the parties to the original deed. *Thurle v. Madison*, Styles, 462; *Smartle v. Williams*, 1 Salk. 280. And this is also provided in the case of deeds of bargain and sale, enrolled and pleaded, by stat. 10 An. c. 28, s. 3. So where a deed, to which enrolment is not essential, is enrolled on the acknowledgment of one of the parties, it is evidence of execution *against that party*. B. N. P. 255, 256. But it should seem that, unless such enrolment be rendered evidence by force of an Act of Parliament, it will not dispense with proof by a subscribing witness (where a subscribing witness is necessary), or otherwise as the case may be. *Gomersall v. Serle*, 2 Y. & J. 5; *Giles v. Smith*, 4 L. J. Ex. 17; 1 C. M. & R. 462.

The enrolments in the chancery of Crown grants and the enrolments in the duchy office of leases, &c., of the possessions of the Duchy of Cornwall (and *ut semb.* of the Duchy of Lancaster), are primary evidence of the grants, and may be proved by examined copies, or copies otherwise authenticated. See *Rowe v. Brenton*, 3 M. & Ry. 218. An enrolment of a lease in the Land Revenue Office was indeed rejected as evidence of the lease in *Jenkins v. Biddulph*, Ry. & M. 339; but this seems to have turned on the wording of an Act of Parliament. Several statutes have since facilitated the proof of deeds and grants of Crown lands and those of the Royal Duchies; as 2 W. 4, c. 1, s. 26, in respect of lands in the survey of the Office of Woods, &c.; so 11 & 12 V. c. 83, s. 6, as to the proof of enrolments in the Duchies of Lancaster and Cornwall.

The official indorsement of enrolment or registration on deeds which are by statute required to be enrolled or registered is of itself *prima facie* evidence of the enrolment or registration. *Kinnersley v. Orpe*, 1 Doug. 56; *Doe d. Williams v. Lloyd*, 10 L. J. C. P. 128; 1 M. & Gr. 670; *Grindell v. Brendon*, 6 C. B. (N. S.) 698; 28 L. J. C. P. 333; *Waddington v. Roberts*, 37 L. J. Q. B. 253; L. R. 3 Q. B. 579. See *Mason v. Wood*, 45 L. J. C. P. 76; 1 C. P. D. 63. The date of enrolment indorsed by the clerk of enrolments is conclusive evidence of the date. *R. v. Hopper*, 3 Price, 495. The memorial of a conveyance registered in a county register is presumed to be correct against those who claim through a person who registered the deed; *Wollaston v. Hakewill*, 10 L. J. C. P. 303; 3 M. & Gr. 297; but not against other persons; *Hare v. Waring*, 7 L. J. Ex. 118; 3 M. & W. 362, 379; *per Parke*, B.

Proof of Wills of Personalty.

A will relating to personalty is scarcely ever used in evidence in a court of law, and, therefore, it is rarely necessary to prove it. The probate granted by the proper court is the proper evidence of such a will. But for the purpose of construing a will, the court will look at the original will, as well as the probate copy. *In re Harrison*; *Turner v. Hellard*, 55 L. J. Ch. 799; 30 Ch. D. 390, *per* Ld. Esher, M.R., and Baggallay, L.J.

Proof of Wills of Land.

Production of the Will.] At common law in order to prove a devise of lands, the will itself must be produced, for probate of the will is not even secondary evidence; as the Spiritual Court had no power to authenticate a will *quoad* anything but personalty. *Doe d. Ash v. Calvert*, 2 Camp. 389;

B. N. P. 246. But where the will is lost, the register or ledger-book of the Ecclesiastical Court, or an examined copy of it, has been admitted as secondary evidence. B. N. P. 246. It is presumed that in such case the will must have been of personal as well as real estate, otherwise the court would then have had no jurisdiction to register the will. The same principle applied to the jurisdiction of the Probate Division. *In re Bootle*, 43 L. J. P. 41; L. R. 3 P. & D. 177.

Now, by the Land Transfer Act, 1897 (60 & 61. V. c. 65), ss. 1, 2 (1, 2), 25, real estate (other than copyholds and customary freeholds where admission, &c., is required) in the case of a person dying after December 31, 1897, vests in his executor or administrator as if it were a chattel real; in such case, therefore, the probate, &c., will be the only evidence admissible to prove the will. The remainder of this heading as to proof of wills of land applies, therefore, to ordinary freeholds, only in the case of a person dying before January 1, 1898, and to copyholds and customary freeholds.

A lost will may be proved by a copy otherwise authenticated; *Sly v. Sly*, 46 L. J. P. 63; 2 P. D. 91; or by oral evidence; *Brown v. Brown*, 8 E. & B. 876; 27 L. J. Q. B. 173; see also 2 Camp, 390, n.; even though given by an interested witness; *Sugden v. S. Leonards (Lord)*, 45 L. J. P. 49; 1 P. D. 154. It may also be proved by written or oral declarations of the testator made before or after the execution of his will. S. C. Effect has been given to a lost will so far as its contents were proved. S. C. See, however, the observations in *Woodward v. Goulstone*, 56 L. J. P. 1; 11 App. Cas. 469. Such declarations have been held admissible to show what papers constitute the will. *Gould v. Lakes*, 49 L. J. P. 59; 6 P. D. 1. The execution of the will, whether singly or in duplicate, cannot be proved by subsequent declarations of the testator; *Atkinson v. Morris*, 66 L. J. P. 17; [1897] P. 40; *Eyre v. Eyre*, 72 L. J. P. 45; [1903] P. 131. An interlineation or alteration in a will is presumed to have been made after the execution of it; *Cooper v. Bockett*, 4 Moore, P. C. 419; *Doe d. Tatum v. Catmore*, 20 L. J. Q. B. 364; 16 Q. B. 745; *Doe d. Shallcross v. Palmer*, 20 L. J. Q. B. 367; 16 Q. B. 47; declarations made after execution cannot be used to rebut this presumption. S. C. *Secus* as to declarations made before execution. S. C., *In re Sykes*, 42 L. J. P. 17; L. R. 3 P. & D. 26; *Dench v. Dench*, 46 L. J. P. 13; 2 P. D. 60. In the case of the interlineation of mere words required to complete the sense of the will, if they are written apparently at the same time with the same ink, the presumption that they were inserted after execution is not a necessary one. *In re Cadge*, 37 L. J. P. 15; L. R. 1 P. & D. 543. The testator's declarations made before execution are admissible to support his will, if disputed on the ground of fraud, circumvention, or forgery. *Doe d. Ellis v. Hardy*, 1 M. & Rob. 525; *Doe v. Stevens*, Q. B. E. T., 1849, MS. So they are admissible to impeach the will by proving such fraud; *Doe d. Small v. Allen*, 8 Term R. 147.

Proof of Execution—Statutes.] The following are the statutory provisions relating to the execution of wills before Jan. 1st, 1838, and on and since that date.

By the Stat. of Wills (32 H. 8, c. 1), s. 1, a will of lands was required to be in writing. By the Stat. of Frauds (29 C. 2, c. 3), s. 5, all devises and bequests of any lands or tenements, "shall be in writing and signed by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the presence of the said devisor by three or four credible witnesses, or else they shall be utterly void and of none effect." This section is still in force as to wills made before Jan. 1st, 1838.

By the Wills Act (1 V. c. 26), s. 9, "no will shall be valid unless it shall be in writing, and executed in manner hereinafter mentioned (that is to say), it shall be signed at the foot or end thereof by the testator or by some other person in his presence, and by his direction; and such signature shall be made or acknowledged by the testator in the presence

of two or more witnesses present at the same time; and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." By sect. 13, "every will executed in manner hereinbefore required shall be valid without any other publication thereof." This Act, by sects. 1, 34, applies to any will, codicil or appointment in exercise of a power made or re-executed, or re-published or revived by any codicil on or after Jan. 1st, 1838.

By 15 & 16 V. c. 24, s. 1, it is provided that the will shall be valid if the signature be so placed at, or after, or following, or under, or beside, or opposite to the end of the will that it shall be apparent that the testator intended to give assent by such signature to the writing signed as his will. No signature under the Act is to give effect to any disposition which is underneath it, or follows it, or is written after the signature shall be made. By sect. 2, these provisions are in general retroactive.

Signing.] If the will be written on several sheets, and the testator sign some and intend to sign the rest, but do not, this is not a sufficient execution; *Right v. Price*, 1 Doug. 241; *Sweetland v. Sweetland*, 4 Sw. & Tr. 6; 34 L. J. P. & M. 42; *In re Gee*, 78 L. T. 843; *Millward v. Buswell*, 20 T. L. R. 714; but where a will, written on three sides of a sheet of paper, concluded by stating that the testator had signed his name to the first two sides and had put his hand and seal to the last, and in fact he had put his hand and seal to the last, but had omitted to sign the two other sides, the execution was held good, the signing of the last sheet showing that the former intention had been abandoned. *Winsor v. Pratt*, 2 B. & B. 650. The question which portions of a testamentary document have been duly executed is a matter for parol evidence provided it be clear that the several portions were produced to the attesting witnesses at the time of execution or acknowledgment, and are identified. The pieces need not necessarily be mechanically attached to each other. *Lewis v. Lewis*, 77 L. J. P. 7; [1908] P. 1.

A codicil whereby the testator confirms his will, gives validity to an unattested alteration in a devise made after the execution of the will; *Tyler v. Merchant Taylors' Co.*, 60 L. J. P. 86; 15 P. D. 216; and to a testamentary paper purporting to be a devise unattested and unannexed to the will, if distinctly referred to by such codicil. 1 Wms. Exors. 10th ed., pp. 74, 141. See *In re Smith*, 60 L. J. Ch. 57; 45 Ch. D. 632, and *In re Hay*, 73 L. J. Ch. 33; [1904] 1 Ch. 317. The existence and identity of such paper must be proved by parol evidence. *In re Heathcote*, 50 L. J. P. 42; 6 P. D. 30. But a codicil may operate as a partial republication only. *Monypenny v. Bristow*, 1 L. J. Ch. 88; 2 Russ. & M. 117. Where the testator is blind, it is not necessary to read over to him the will in the presence of the attesting witnesses previously to execution. *Longchamp d. Goodfellow v. Fish*, 2 B. & P. N. R. 415. A signature by mark or initials is sufficient. *Baker v. Dening*, 7 L. J. Q. B. 137; 8 Ad. & E. 94; see *In re Blewitt*, 49 L. J. P. 31; 5 P. D. 116. Where a testator requested another person to sign his will for him, which the other did in his own name, that is sufficient. *In re Clark*, 2 Curt. 329. Where the signature is in the middle of the will, it does not give effect even to the part which precedes it. *Sweetland v. Sweetland*, 34 L. J. P. 42; 4 Sw. & Tr. 6; *Margary v. Robinson*, 56 L. J. P. 42; 12 P. D. 8.

Attestation.] Making a mark is a sufficient subscription. *In re Ashmore*, 3 Curt. 756; *In re Amiss*, 2 Rob. Ecc. 116. The attesting witnesses may subscribe their names in any part of the will, and not exclusively at the end of it; nor is any *testimonium* clause, or form of attestation necessary. *Roberts v. Phillips*, 4 E. & B. 450; 24 L. J. Q. B. 171. It seems, however, that where there is no such clause to show whether they sign as attesting witnesses there must be extrinsic proof of it. S. C. *per Cur.* And this decision has been applied to the Wills Act. *In re Streatley*, 60 L. J. P. 56; [1891] P. 172; see also *In re Ellison*, [1907] 2 I. R. 480.

Under the Wills Act (1 V. c. 26), s. 9, the witnesses must both be present at the same time when the signature is made or acknowledged by the testator. And they must attest in the presence of the testator, but not necessarily of each other. *Cooper v. Bockett*, 3 Curt. 659, per Sir H. Jenner Fust; assumed per Cur. on appeal, 4 Moore P. C. 419; *Faulds v. Jackson*, 6 Notes of Cas. Suppl. i. (14th June, 1845). In *Casement v. Fulton*, 5 Moore P. C. C. 130, it was held on the construction of a similar clause in the corresponding section of the Indian Wills Act (which however omits the words "shall attest and"), that the witnesses must also subscribe in the presence of each other. This decision, which was based on the words "such witnesses," has not been followed; see 1 Wms. Exors., 10th ed. 68, n. (s); *Ld. St. Leonards' Handy Book of Property Law*, 8th ed. 244. "In the presence of" means actual visual presence. *Brown v. Skirrow*, 71 L. J. P. 19; [1902] P. 3; *Carter v. Seaton*, 85 L. T. 76. The testator must sign or acknowledge his signature to both witnesses present together, before either of them attests. *Cooper v. Bockett*, 3 Curt. 659; *Wyatt v. Berry*, 62 L. J. P. 28; [1893] P. 5; *Hindmarsh v. Charlton*, 8 H. L. C. 160. If a witness sign before the testator an acknowledgment by him of his signature after execution by the testator is insufficient. S. C.; *Moore v. King*, 3 Curt. 243. It is sufficient if the witnesses sign with their initials. *In re Blewitt*, 49 L. J. P. 31; 5 P. D. 116. As no form of attestation is necessary, the mere subscription of two names, without calling themselves witnesses, will be *prima facie* sufficient. *Bryan v. White*, 2 Rob. Ecc. 315. In the absence of an attestation clause and of conclusive evidence as to execution of a testamentary paper, the court is entitled to have regard to the surrounding circumstances in connection with or *dehors* the document, the doctrine *omnia presumuntur rite esse acta* notwithstanding. *Strong v. Hadden*, 84 L. J. P. 188; [1915] P. 211. An acknowledgment by a testator of his signature previously affixed is sufficient, if the will bearing his signature, visibly apparent on the face of it, be produced to two witnesses present together, and they are asked by him, or in his presence to subscribe the same. *Gaze v. Gaze*, 3 Curt. 451; *In re Ashmore*, *Id.* 756; *Inglesant v. Inglesant*, 43 L. J. P. 43; L. R. 3 P. & D. 172; *Daintree v. Fasulo*, 57 L. J. P. 76; 15 P. D. 67, 102. But where the witnesses neither see nor have the opportunity of seeing the signature, the acknowledgment is insufficient, even although the testator declares the paper to be his will. *Blake v. Blake*, 51 L. J. P. 36; 7 P. D. 102.

Where after a will has been duly executed S. signed his name under those of the attesting witnesses, it may be proved that he did not sign for the purpose of attestation. *In re Sharman*, 38 L. J. P. 47; L. R. 1 P. & D. 661; *In re Smith*, 59 L. J. P. 5; 15 P. D. 2.

A soldier on actual military service may dispose of his property by an unattested writing and even by word of mouth: s. 11 of the Wills Act, 1837.

What witness must be called.] To prove a will of land it is sufficient to call one of the witnesses, if he can speak to all the requisites of attestation. B. N. P. 264; *Longford v. Eyre*, 1 P. Wms. 741; *Belbin v. Skeates*, 1 Sw. & Tr. 148; 27 L. J. P. & M. 56; following *Wright v. Doe d. Tatham*, 3 L. J. Ex. 366; 1 Ad. & E. 3.

It was held that on an issue of Chancery all the witnesses ought to be called. *Boote v. Blundell*, 19 Ves. 494. Though this was the general rule in cases where the suit was instituted by the devisee to establish the will, yet where the suit was by the heir against the devisee for the purpose of setting aside the will, the devisee was not required to produce all the witnesses. *Tatham v. Wright*, 9 L. J. (O. S.) Ch. 265; 2 Russ. & Myl. 1. Upon the trial of an ejectment brought by the heir for the recovery of the same lands as those mentioned in the last case, one of the attesting witnesses who proved the will on the issue out of Chancery, having died, the defendant proved his testimony from the shorthand writer's notes, which were held to be sufficient evidence of the execution of the will, though another attesting witness was present at the trial. But the previous proceedings in the Court

of Chancery upon which an issue had been found for the devisee, were held not to be evidence of the execution. *Wright v. Doe d. Tatham*, 3 L. J. Ex. 366; 1 Ad. & E. 3.

Proof where the witnesses are dead, or deny their attestation.] Where the witnesses are dead, this fact and their handwriting should be proved. "Where the attestation clause recites a compliance with all the requisite ceremonies in respect of all the witnesses, it is enough, in order to make a *prima facie* case, to prove the death of all, and the handwriting of one of them; because it will be presumed that everything the witness thus declared by his attestation to have been done, was really done." *Andrew v. Motley*, 12 C. B. (N. S.) 527, 532; 32 L. J. C. P. 128, 130, *per Williams, J.* Though the attestation does not express that the witnesses subscribed the will in the presence of the testator, yet a jury may presume that fact in favour of the will. *Croft v. Pawlett*, Stra. 1109; *Hands v. James*, 2 Comyn, 531; *Doe d. Davies v. Davies*, *Vinnicombe v. Butler*, *infra*. And it seems that a general form of attestation must be taken as affirming that all has been done in the presence of the witnesses which is stated in the body of the instrument. *Buller v. Burt*, cited 4 Ad. & E. 15. The principle of these decisions seems to be fully recognized in *Doe d. Spilsbury v. Burdett*, 6 L. J. K. B. 73; 4 Ad. & E. 1; and S. C. in H. L., 6 M. & Gr. 386; 10 Cl. & F. 340 (see this case *infra*). And in *In re Peverett*, 71 L. J. P. 114; [1902] P. 205, the principle was further extended to an informal holograph will to which there was no attestation clause. But see *Strong v. Hadden*, 84 L. J. P. 188; [1915] P. 211.

Even although the witnesses to a will should swear that the will was not duly executed, evidence may be adduced in support of the will. *Lowe v. Jolliffe*, 1 W. Bl. 365; *Bowman v. Hodgson*, 36 L. J. P. 124; L. R. 1 P. & D. 362; see *Wright v. Rogers*, 38 L. J. P. 67; L. R. 1 P. & D. 678. Where one witness gives evidence against due execution, the party supporting the will must call the other witness; *Owen v. Williams*, 32 L. J. P. 159; *Coles v. Coles*, 35 L. J. P. 40; L. R. 1 P. & D. 70; or account for his absence. See *Pilkington v. Gray*, 68 L. J. P. C. 63; [1899] A. C. 401. A will was attested by three witnesses, one (standing second) being a marksman and the other two being dead, the handwriting of these two was proved, but the marksman being produced, recollected nothing of his signature; he was very old, and had known the testator; the will was uncontested for 16 years; held, that the jury might presume the due execution of the will under the circumstances. *Doe d. Davis v. Davis*, 16 L. J. Q. B. 97; 9 Q. B. 648. So although neither of the two witnesses can remember when the testator signed, it may be inferred from the circumstances that he signed before them. *Vinnicombe v. Butler*, 3 Sw. & Tr. 580; 34 L. J. P. 18; *Wright v. Sanderson*, 53 L. J. P. 49; 9 P. D. 149, C. A. And in the case of a lost will acted on for 8 years, where no attestation clause was proved, but the names of C. D. and E. F. followed the signature of the testator A. B., due execution was presumed on proof of the deaths of C. D. and E. F., and the handwriting of A. B. and C. D. *Harris v. Knight*, 15 P. D. 170.

Where two of the witnesses are dead, and the surviving witness charges them with fraud in the attestation of the will, evidence of their good character is admissible. *Doe d. Stephenson v. Walker*, 4 Esp. 50; *Provis v. Reed*, 1 L. J. C. P. 163; 5 Bing. 435.

When a party is compelled to call the attesting witnesses he may cross-examine them, as they are not the witnesses of either party, but of the court. *Jones v. Jones*, 24 T. L. R. 839.

Proof of wills thirty years old.] A will 30 years old, coming from the proper custody, will be presumed to have been duly executed, although it bear some marks of cancellation. *Andrew v. Motley*, 32 L. J. C. P. 128; 12 C. B. (N. S.) 527.

In *Doe d. Spilsbury v. Burdett*, the Q. B. considered that, where the instrument creating a power requiring it to be executed by

will, to be "signed, sealed, and published in the presence of, and attested by three or more credible witnesses," the will, although 30 years old, must bear an attestation that it was regularly executed according to the power (see 4 Ad. & E. 19). But this strictness as to the attestation clause applied only to wills executed under powers; in other cases of wills, as in the case of deeds, the attestation clause was by no means conclusive as to what was done. Even the oral testimony of the attesting witnesses is not so; *Love v. Jolliffe*, and *Bowman v. Hodgson*, *supra*; and the decision in *Andrew v. Motley*, *supra*, would be strong to show that the admissibility of a will 30 years old without proof of execution was not affected by such a defect in the clause of attestation. The execution of powers by will on and since Jan. 1st, 1838, has been much simplified by 1 V. c. 26, s. 10.

Under the old law it was held that 30 years' were to be reckoned from the date of the will being executed. *Doe d. Oldham v. Wolley*, 6 L. J. (O. S.) K. B. 286; 8 B. & C. 22. The fact that under sect. 24, a will, *with reference to the estate comprised therein*, now speaks from the death of the testator would not seem to alter this principle.

Interested attesting witness.] By the Wills Act (1 V. c. 26), s. 14, if the attesting witness to a will be incompetent to prove it at the time of execution or afterwards, the will shall not be invalid on that account; and by sect. 15, if the attesting witness, or the wife or husband of the witness, be a beneficial devisee, &c., the devise shall be void, and the witness competent; and by sect. 16, in the case of a will charging real or personal estate with debts, a creditor, or the wife or husband of one, may attest the will, and prove its execution; and by sect. 17, the executor is admissible to prove the execution, or the validity or invalidity of a will. This Act, by sects. 1, 34, applies to all wills made or re-executed on or after Jan. 1st, 1838.

A devise to an attesting witness is void though there are three other attesting witnesses. *Doe d. Taylor v. Mills*, 1 M. & Rob. 288. Where a will attested by A. contains a devise to A. and is confirmed by a codicil not attested by A., the devise is good, for the codicil incorporates the will, and they form one instrument. *Anderson v. Anderson*, 41 L. J. Ch. 247; L. R. 13 Eq. 381. And the benefit is not lost by A. having attested a second codicil which confirmed the will and first codicil. *In re Trotter*, 68 L. J. Ch. 363; [1899] 1 Ch. 764. The marriage, after attestation, of the attesting witness to a devisee does not affect the devise. *Thorpe v. Bestwick*, 50 L. J. Q. B. 320; 6 Q. B. D. 311.

The Act for making interested witnesses competent (6 & 7 V. c. 85), provides that it shall not affect the new Wills Act; but the Statute of Frauds is not referred to in it.

Proof by probate.] Under the Land Transfer Act, 1897, the probate is the evidence by which the will of a person dying after Dec. 31st, 1897, is proved in the case of freeholds. In the case of persons dying before Jan. 1st, 1898, and in the case of copyhold and customary freeholds, it is also admissible in evidence under the Probate Court Act, (20 & 21 V. c. 77), which after providing by sect. 61, that where a will affecting real estate is proved in solemn form, or is the subject of any contentious proceeding, the heir and persons interested in the real estate shall be cited, enacts by sect. 62, that "where probate of such will is granted after such proof in solemn form, or where the validity of the will is otherwise declared by the decree or order in such contentious cause or matter as aforesaid, the probate, decree, or order respectively shall enure for the benefit of all persons interested in the real estate affected by such will, and the probate copy of such will, or the letters of administration with such will annexed, or a copy thereof respectively, stamped with the seal of her Majesty's Court of Probate shall in all courts, and in all suits and proceedings affecting real estate of whatever tenure (save proceedings by way of appeal under this Act, or for the revocation of such probate or administration), be received as conclusive

evidence of the validity and contents of such will, in like manner as a probate is received in evidence in matters relating to the personal estate; and where probate is refused or revoked on the ground of the invalidity of the will, or the invalidity of the will is otherwise declared by decree or order under this Act, such decree or order shall enure for the benefit of the heir-at-law, or other persons against whose interest in real estate such will might operate, and such will shall not be received in evidence in any suit or proceeding in relation to real estate, save in any proceeding by way of appeal from such decrees or orders." Sect. 63 provides, "that the probate, decree, or order of the court shall not in any case affect the heir or any person in respect of his interest in real estate, unless such heir or person has been cited or made party to the proceedings, or derives title under or through a person so cited or made party." The heir B. is bound by the judgment in a probate action in which the will was established, though B. was a party as next-of-kin only. *Beardsley v. Beardsley*, 68 L. J. Q. B. 270; [1899] 1 Q. B. 746.

By sect. 64, in any action "where, according to the existing law, it would be necessary to produce and prove an original will in order to establish a devise or other testamentary disposition of or affecting real estate, it shall be lawful for the party intending to establish in proof such devise or other testamentary disposition, to give to the opposite party, ten days at least before the trial or other proceeding in which the said proof shall be intended to be adduced, notice that he intends at the said trial or other proceeding to give in evidence, as proof of the devise or other testamentary disposition, the probate of the said will, or the letters of administration with the will annexed, or a copy thereof stamped with any seal of the Court of Probate; and in every such case such probate or letters of administration, or copy thereof respectively, stamped as aforesaid, shall be sufficient evidence of such will, and of its validity and contents, notwithstanding the same may not have been proved in solemn form, or have been otherwise declared valid in a contentious cause or matter, as herein provided, unless the party receiving such notice shall, within four days after such receipt, give notice that he disputes the validity of such devise or other testamentary disposition." By sect. 65, "In every case in which, in any such action or suit, the original will shall be produced and proved, it shall be lawful for the court or judge before whom such evidence shall be given, to direct by which of the parties the costs thereof shall be paid."

The jurisdiction of the Court of Probate is now transferred by the J. Act, 1873, s. 16, to the High Court of Justice, and is by sect. 34 assigned to the Probate, Divorce, and Admiralty Division. Probates are therefore now sealed with the seal of that division.

If the party receiving the ten days' notice under the above section give the four days' counter-notice that he disputes the validity of the devise, the probate will not be admissible in evidence; but if he do not give the counter-notice, he may nevertheless at the trial dispute the validity of the will, for "sufficient evidence" here means only *prima facie* evidence. *Barraclough v. Greenhough*, 36 L. J. Q. B. 251; L. R. 2 Q. B. 612. *Semble*, that the notice should be given to the solicitor of the opposite party. S. C. Where the notice has not been given under the Act the judge may adjourn the cause to allow of the notice being given or to allow proof of the will *per testes*. See *Hilliard v. Effe*, L. R. 7 H. L. 39, 49, *per* Ld. Cairns, C.

Proof of Execution of Powers.

As a general rule, all the circumstances required by the creator of a power, however otherwise unimportant, must be observed, and cannot be satisfied but by a strict and literal performance. *Per* Ld. Ellenborough, C.J., *Hawkins v. Kemp*, 3 East, 440. And when the power directs *attestation* and other formalities the attestation must notice the compliance with

the formalities. Thus where it was to be executed "by any deed or writing under the *hands* and seals of the parties, to be by them duly executed in the presence of, and *attested* by two or more witnesses;" it was held that as the attestation stated only a sealing and delivery, and omitted the *signing*, the power was not duly executed; *Doe d. Mansfield v. Peach*, 2 M. & S. 576; and a subsequent correct attestation, indorsed upon the instrument after the death of one of the parties, would not remedy the defect; S. C.; *Wright v. Wakeford*, 2 Taunt. 214. So if the power is to be executed by an appointment to be signed and *published* in the presence of, and attested by two witnesses, and the attestation omits to mention the publication. *Moodie v. Reid*, 7 Taunt. 355. But where the attestation mentioned "delivery," this has been held equivalent to publication. *Ward v. Swift*, 1 Cr. & M. 171.

The cases above referred to assume, however, rather than expressly decide, that, if the attestation be deficient, the deficiency cannot be supplied by evidence *aliunde* that the formalities were all gone through. But this is directly contrary to the law in the analogous case of formalities required by statute; and perhaps after the language of Ld. Lyndhurst, in *Doe d. Spilsbury v. Burdett*, 10 Cl. & F. 408; 6 M. & Gr. 461, and of Ld. Campbell, *Id.*, pp. 468 *et seq.*, it will be held, if the question should arise, that the attestation clause is not conclusive. Indeed, Ld. Campbell, in *Newton v. Ricketts*, 9 H. L. C. 262; 31 L. J. Ch. 247, says that the *ratio decidendi*, in *Burdett v. Doe d. Spilsbury*, *supra*, was that such extrinsic evidence might be given. This was certainly not so. But still this expression of opinion gives to the view under discussion the full weight of Ld. Campbell's authority. On the other hand we have, in *Doe d. Spilsbury v. Burdett*, see 6 M. & Gr. 465. Ld. Brougham's express refusal to overrule the cases which lay down the very strict rule requiring all the formalities to be noticed in the attestation.

When the instrument creating the power does not require attestation, an informal or imperfect one will not invalidate. Sugd. Pow. 8th ed., 235, 247. The defect of omitting to state in the attestation the signing of the instrument was cured by stat. 54 G. 3, c. 168, with regard to powers *theretofore* executed; but the Act was only retrospective. Leases defectively executed under powers may now be confirmed by acceptance of rent under the circumstances provided for in statutes 12 & 13 V. c. 26, and 13 & 14 V. c. 17.

The Wills Act, 1 V. c. 26, abrogated the necessity of following the formalities prescribed by the donor of a power to be exercised by a will or appointment in the nature of a will; for it provides (sect. 10) that "no appointment *made by will*, in exercise of any power, shall be valid, unless the same be executed in manner *hereinbefore required*; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity." Hence the execution of wills in virtue of powers must hereafter conform to the regulations pointed out in sect. 9. A will executed with only the formalities prescribed in this section will not satisfy the condition of a power to be exercised "by any instrument in writing to be by her signed, sealed and delivered in the presence of and attested by two or more credible witnesses." *Taylor v. Meads*, 4 De G. J. & S. 597; 34 L. J. Ch. 203. Such a power is, however, satisfied by a will expressed to be "signed, sealed, acknowledged, and declared" in the presence of the attesting witnesses. *Smith v. Adkins*, 41 L. J. Ch. 628; L. R. 14 Eq. 402.

The stat. 22 & 23 V. c. 35, provides a like remedy for the relief of donees of powers to be exercised otherwise than by will; for by sect. 12, a deed executed after Aug. 13th, 1859, in the presence of and attested by two or more witnesses in the ordinary manner, shall, so far as respects the execution

and attestation thereof, be a valid execution of a power of appointment by deed or instrument in writing not testamentary, although some other execution, attestation, or solemnity may have been prescribed by the donor; provided that this shall not dispense with any requirement prescribed by him other than the manner of execution or attestation, nor prevent the donee from executing the power in the manner prescribed by the donor.

There is, however, a notable difference between this and the Act relating to wills under powers, viz., that a will under a power *must* conform to the provisions of 1 V. c. 26, whereas an appointment made since 22 & 23 V. c. 35, may be executed in the manner prescribed either by that Act or by the donor of the power. The last Act is retrospective so far as regards the instrument creating the power.

Proof of Awards.

As to proof of awards generally, *vide Action on an award, post.*

As to proof of awards made by commissioners under Inclosure Acts, &c., it is provided by 3 & 4 W. 4, c. 87, s. 2, that the original award, or a copy of the enrolment signed by the proper officer of the court or the clerk of the peace or his deputy, and purporting to be a true copy, shall be admitted in all courts as legal evidence; see also sect. 4, as to the production of the award in evidence. In a collateral proceeding in which it may be necessary to give it in evidence, it will be presumed that the award has been regularly made, and that the commissioners were duly qualified, and had given the proper notices, &c.: but this presumption may be rebutted: *R. v. Haslingfield*, 2 M. & S. 559; *Doe d. Nanny v. Gore*, 2 M. & W. 320; *acc. Williams v. Eyton*, 2 H. & N. 771; 27 L. J. Ex. 176; 4 H. & N. 357; 28 L. J. Ex. 146; and excess of authority may be shown; *Wingfield v. Tharp*, 8 L. J. (O. S.) K. B. 318; 10 B. & C. 785. Awards made under 6 & 7 W. 4, c. 115, or 3 & 4 V. c. 31, are, by sect. 1 of the last Act, made conclusive evidence of a compliance with all the provisions of those Acts, and of all necessary consents, and no other evidence of title under the inclosure shall be requisite.

ORAL PROOF BY WITNESSES.

Attendance of Witnesses.

Subpœnâ, service of—Expenses.] The process to compel the attendance of witnesses is the writ of *subpœnâ ad testificandum*. *Edgell v. Curling*, 7 M. & Gr. 958. This writ will now, by stat. 17 & 18 V. c. 34, s. 1, issue out of the superior courts into any part of the United Kingdom on the special order of the court or judge. It is, however, provided by sects. 5 and 6, that this provision is not to affect the power of the court to issue commissions to examine, or to affect the admissibility of evidence heretofore admissible by reason of a witness being beyond the jurisdiction:—in other words, Scotland and Ireland are still, for these last-mentioned purposes, to be regarded as out of the jurisdiction of the superior courts of England. By 52 & 53 V. c. 49, s. 18, the power is extended to *subpœnâ* a witness to appear before a referee or arbitrator. Either the writ, or a copy of it, must be personally served on the witness; and where a copy only is delivered, the original must be shown whether the witness require it or not; otherwise he cannot be attached. *Wadsworth v. Marshall*, 2 L. J. Ex. 10; 1 Cr. & M. 87. It must be served so as to give witnesses "reasonable time to put their own affairs in such order that their attendance may be with as little prejudice to themselves as possible." *Hammond v. Stewart*, Stra. 510.

But urgent domestic business is no excuse for disobedience. *Goff v. Mills*, 13 L. J. Q. B. 227; 2 D. & L. 23. Notice to a witness in London at two in the afternoon, requiring him to attend the sittings at Westminster in the course of the same evening is too short. S. C. But where a person is present in or attending near the court, service on the day of trial may be sufficient under the circumstances. *Maunsell v. Ainsworth*, 8 Dowl. P. C. 869. Whether the service be sufficient is for the judge, not the jury. *Barber v. Wood*, 2 M. & Rob. 172. If the cause be made a *remanet*, the *subpœnâ* must be re-sealed and re-served. *Sydenham v. Rand*, 3 Doug. 429. Though the writ only requires attendance on the commission day, the witness must attend for the whole assizes till the cause comes on. *Scholes v. Hilton*, 11 L. J. Ex. 332; 10 M. & W. 15. Service of the writ at a time when to the knowledge of the parties the action cannot possibly be tried during the current sittings, may amount to an abuse of the process of the court, and the writ may be set aside. *London and Globe Finance Corporation v. Kaufman*, 69 L. J. Ch. 196.

A witness in a civil suit is not bound to attend unless his conduct money, *i.e.*, the reasonable expenses of going to and returning from the place of trial, and of his maintenance there during the trial, are tendered to him at the time of serving the *subpœnâ*, or within a reasonable time before the day named for his attendance; *Holme v. Smith*, 1 Marsh. 410; *Whiteland v. Grant*, 4 Jur. (O. S.) 1061; nor, if he appear, is he bound to give evidence before such expenses are paid or tendered. *Chapman v. Paynton*, 13 East, 16, n. See also *Hallet v. Mears*, 13 East, 15; 104 E. R. 271 n. The reasonableness depends on the situation and circumstances of the witness; *Dixon v. Lee*, 1 C. M. & R. 645; *Vice v. Anson (Lady)*, M. & M. 96; and where a witness has already been paid by one side, this may be taken into account when he is subpœnâed by the other side. *Bittleley v. M'Leod*, 3 Bing. N. C. 405. Where a witness has come to and stayed at the assizes on subpœna without requiring payment, he may refuse to appear till payment of the expense of returning. *Newton v. Harland*, 10 L. J. C. P. 11; 1 M. & Gr. 956. A witness subpœnâed to give evidence on a matter of personal opinion or professional skill, and not to depose to the facts of the case, may insist on being paid compensation for loss of time before he is examined. *Webb v. Page*, 1 Car. & K. 23. And it seems that any witness is now entitled to be paid for his expenses and loss of time before giving evidence. *In re Working Men's Mutual Society*, 51 L. J. Ch. 850; 21 Ch. D. 831.

A party who is a necessary or (*ut semb.*) a material witness in his own cause, and who attends the trial only for that reason, may be entitled to his expenses like any other witness; *Howes v. Barber*, 18 Q. B. 588; 21 L. J. Q. B. 254; *Dowdell v. Australian Mail Co.*, 3 E. & B. 902; 23 L. J. Q. B. 369; but if about to attend on his own account, he is not entitled to conduct money when subpœnâed by the other side. *Reed v. Fairless*, 3 F. & F. 958.

Before the jury is sworn, the counsel of the party may have an absent witness called on his subpœna; *Hopper v. Smith*, M. & M. 115. This course, when adopted by the plaintiff, avoids the additional expenses of an adverse verdict and judgment, and of an application for a new trial, if the judge will allow the plaintiff to withdraw the record; *Mullett v. Hunt*, 2 L. J. Ex. 287; 1 Cr. & M. 752. But it is not absolutely necessary to call a witness on his subpœna in order to entitle the party to proceed against him. *Lamont v. Crook*, 9 L. J. Ex. 253; 6 M. & W. 615; *Goff v. Mills*, 13 L. J. Q. B. 227; 2 D. & L. 23.

By the Bankers' Books Evidence Act, 1879 (42 & 43 V. c. 11), s. 6, a banker or officer of a bank is not, in any legal proceedings to which the bank is not a party, compellable to appear as a witness to prove the matters and accounts recorded in the banker's books, unless by order of a judge made for special cause.

Habeas corpus.] If the witness be in custody, his attendance must be

produced by a writ of *habeas corpus ad testificandum*; or by warrant or order under 16 & 17 V. c. 30, or 61 & 62 V. c. 41, *infra*. A judge may award a writ of *habeas corpus* to bring up a prisoner from any gaol or prison in which he is confined under civil process for the purpose of giving evidence at the trial. Tidd. Prac. 9th ed. 809. A *habeas corpus* also lies to bring a witness from a lunatic asylum, on an affidavit that he is fit for examination and not dangerous. *Fennell v. Tait*, 1 C. M. & R. 584. By 16 & 17 V. c. 30, s. 9, a judge may issue a warrant or order to bring up any prisoner, not confined on civil process, to be examined as a witness, and this shall have the same effect as a *hab. corp. ad test.* By 52 & 53 V. c. 49, s. 18 (2), the court or a judge may issue a *hab. corp. ad test.* to bring up a prisoner for examination before a referee or arbitrator. By 61 & 62 V. c. 41, s. 11, a secretary of state may, by writing under his hand, order a prisoner to be taken to any place required in the interest of justice, or for the purpose of any public enquiry.

Protection from arrest.] During the time consumed by a witness in going to the place of trial, in his attendance there, and in his return, he is protected from arrest on civil process; *Hoborn v. Fowler*, 62 L. J. Q. B. 49; even though he has consented to attend without a subpoena. *Arding v. Flower*, 8 T. R. 536. As to what is civil process against a solicitor, see *In re Freston*, 52 L. J. Q. B. 545; 11 Q. B. D. 545; *In re Dudley, ex parte Monet*, 53 L. J. Q. B. 16; 12 Q. B. D. 44; *Seldon v. Wilde*, 80 L. J. K. B. 282; [1911] 1 K. B. 701.

Absence of material witness.] In some cases an application on affidavit may be made to put off the trial on account of the absence of a material witness. Where, from the sudden indisposition of a witness who might be able to attend in the course of a day or two, or for other temporary reason, the plaintiff was prevented from trying his cause in its order in the paper, yet had ground to believe he should be able to try it before the sittings were over, a judge at N. P. would make an order for the trial to stand over till the witness was likely to attend. And a similar order was made if it appeared that the absence of the witness was owing to the conduct of the defendant's attorney. *Turquand v. Dawson*, 1 C. M. & R. 709. When a motion is about to be made to a judge at N. P. for putting off the trial on account of the absence of a witness, notice should first be given to the opposite solicitor, with a copy of the affidavit intended to be used in support thereof. Where expenses have been incurred by the other party in bringing up witnesses, the application will only be granted on the terms of paying them. No affidavit of merit is required. *Att.-Gen. v. Hull*, 2 Dowl. 111; *Hill v. Prosser*, 3 Dowl. 704. The affidavit may be made by the party, or by his solicitor; *Duberly v. Gunning*, Peake, 97; or by the solicitor's clerk, if he have the management of the cause. *Sullivan v. Magill*, 1 H. Bl. 637. A common form of affidavit for this purpose will be found in the APPENDIX.

Production of documents under subpoena duces tecum.] Documents brought into court by a witness served with a writ of *subpœnâ duces tecum* are produced by him to the court only, and he may insist that they should not be handed to the parties; the court may order the document to be read if it be relevant. *Burchard v. Macfarlane*, 60 L. J. Q. B. 587; [1891] 2 Q. B. 241, 247, 248, *per* Ld. Esher, M.R. The witness is bound to bring into court any document proved to be in his possession, though he may have a valid excuse for not showing it in evidence; and the validity of the excuse is matter for the judgment of the court, and not of the witness. *Amey v. Long*, 9 East, 473. A sealed packet may be a "document" and therefore liable to production upon a *subpœnâ duces tecum*. *R. v. Daye*, 77 L. J. K. B. 659; [1908] 2 K. B. 333; and it is no answer to the writ that the person with whom the packet was deposited undertook not to deliver it up except with the depositor's consent. S. C.

The court will excuse production if the disclosure would subject the party to a criminal charge or penalty; *Whitaker v. Izod*, 2 Taunt. 115; but not unless the party from whom disclosure is sought will pledge his oath that to the best of his belief the production would tend to criminate him. *Webb v. East*, 49 L. J. Ex. 250; 5 Ex. D. 108. It seems, however, that production will not be enforced in an action for penalties. *Hunnings v. Williamson*, 52 L. J. Q. B. 273; 10 Q. B. D. 459, 462. An action for liquidated sums, recoverable for infringement of dramatic copyright, is not within this exception. See *Adams v. Batley*; *Cole v. Francis*, 56 L. J. Q. B. 393; 18 Q. B. D. 625.

With the above exceptions, no document relevant to the issue, not being a title deed, is privileged from disclosure, unless it be a confidential communication professionally made between counsel or solicitor and client, or information obtained by the solicitor, or an agent employed by him, or by the client on his recommendation. *Bustros v. White*, 45 L. J. Q. B. 642; 1 Q. B. D. 423; *Anderson v. Bank of British Columbia*, 45 L. J. Ch. 449; 2 Ch. D. 664; *M'Corquodale v. Bell*, 45 L. J. C. P. 329; 1 C. P. D. 471; *Friend v. London, Chatham & Dover Ry.*, 46 L. J. Ex. 696; 2 Ex. D. 437; *Lyell v. Kennedy*, 51 L. J. Ch. 937; 27 Ch. D. 1; *Jones v. Great Central Ry.*, 79 L. J. K. B. 191; [1910] A. C. 4. Information voluntarily given by a third person to the solicitor is privileged. *In re Holloway*; *Young v. Holloway*, 56 L. J. P. 81; 12 D. P. 167. So it seems is the proof of a witness's evidence which the solicitor has prepared for insertion in counsel's brief. *Per Bovill, C.J. Tichborne v. Lushington*, 28 Feb., 1872, shorthand notes, pp. 5101, 5102, cited 1 Taylor Evid. 10th ed. § 932, p. 662, n. So, information obtained by the client for the purpose of obtaining the opinion of the solicitor thereon, and although the purpose was not carried out. *Southwark & Vauxhall Water Co. v. Quick*, 47 L. J. Q. B. 258; 3 Q. B. D. 315. See also *Bristol Corporation v. Cox*, 53 L. J. Ch. 1144; 26 Ch. D. 678, and *Learoyd v. Halifax Joint-Stock Banking Co.*, 62 L. J. Ch. 509; [1893] 1 Ch. 686. The privilege is not confined to the action in respect of which the communication was made. *Pearce v. Foster*, 54 L. J. Q. B. 432; 15 Q. B. D. 114; *Calcraft v. Guest*, 67 L. J. Q. B. 505; [1898] 1 Q. B. 759; and the privilege extends to a statement made by one party to the representative of the other made under a misapprehension as to the identity of the person to whom it is made, unless, indeed, the misapprehension has been induced by the latter. *Feverheerd v. London General Omnibus Co.*, [1918] 2 K. B. 565; 88 L. J. K. B. 15.

Professional communications of a confidential character between solicitor and client for the purpose of getting legal advice are privileged; *O'Shea v. Wood*, 60 L. J. P. 83; [1891] P. 286; *In re Cooper*; *Curtis v. Beaney*, 80 L. J. P. 87; [1911] P. 181; even though made before any litigation was in contemplation; *Minet v. Morgan*, 42 L. J. Ch. 627; L. R. 8 Ch. 361; *Lowden v. Blakey*, 58 L. J. Q. B. 617; 23 Q. B. D. 332; but communications obtained by the solicitor from third persons are not privileged unless prepared confidentially after a dispute had arisen for the purpose of obtaining information, evidence, or legal advice with reference to litigation existing or contemplated between the parties. *Wheeler v. Le Marchant*, 50 L. J. Ch. 793; 17 Ch. D. 675. The transcript of a shorthand note of evidence and arguments taken at a reference (*Rawstorne v. Preston Corporation*, 54 L. J. Ch. 1102; 30 Ch. D. 116) or of proceedings in open court (*Nicholl v. Jones*, 2 H. & M. 588; *In re Fletcher, Gillings v. Fletcher*, 57 L. J. Ch. 1032; 38 Ch. D. 373; *Lambert v. Home*, 83 L. J. K. B. 1091; [1914] 3 K. B. 86) is not privileged. The privilege as to documents is not lost by their being referred to in depositions which are not privileged. *Goldstone v. Williams, Deacon & Co.*, 68 L. J. Ch. 24; [1899] 1 Ch. 47.

A party will not be compelled to produce his title deeds. *Pickering v. Noyes*, 1 B. & C. 263. But he must pledge his oath that, to the best of his belief (*Minet v. Morgan, supra*), they relate solely to his own title and not to the case of the other party, nor do they tend to support it, or the deeds

will not be privileged. See *Budden v. Wilkinson*, 63 L. J. Q. B. 32; [1893] 2 Q. B. 432, following *Ind v. Emmerson*, 56 L. J. Ch. 989; 12 App. Cas. 300, 307, per Ld. Selborne; *Morris v. Edwards*, 60 L. J. Q. B. 292; 15 App. Cas. 309. It is not however necessary to state further that the deeds do not tend to impeach his own title. S. CC.; *Att.-Gen. v. Newcastle-upon-Tyne Corporation*, 66 L. J. Q. B. 593; [1897] 2 Q. B. 384. A solicitor will not be compelled to produce his client's title deed. *Harris v. Hill*, 3 Stark. 140. So a defendant cannot compel the production of deeds of the plaintiff by serving a subpoena on his steward in whose possession they are; for his possession is that of his employer; *Falmouth (Earl) v. Moss*, 11 Price, 455; and see *Crowther v. Appleby*, 43 L. J. C. P. 7; L. R. 9 C. P. 23; *Eccles v. Louisville, &c., Railroad Co.*, 81 L. J. K. B. 445; [1912] 1 K. B. 135; nor can a clerk in a public office be compelled to bring official papers without leave of the principal; *Austin v. Evans*, 2 M. & Gr. 430. An attorney was not obliged by subpoena to disclose a deed of the defendant, his client, though he had been improperly compelled by commissioners of bankrupt (under whom the plaintiff claimed) to undertake to produce it. *Nixon v. Mayoh*, 1 M. & Rob. 76.

The solicitor must produce the documents of a client in his possession which the client would himself be bound to produce. *Doe d. Courtail v. Thomas*, 7 L. J. (O. S.) K. B. 214; 9 B. & C. 288; *Bursill v. Tanner*, 55 L. J. Q. B. 53; 16 Q. B. D. 1, C. A. So in an action by a *cestui que trust* against her trustee, a communication made by the defendant to an attorney relating to the matter of the trust was, on the ground that the real interest was in the plaintiff, held to be not privileged. *Shean v. Philips*, 1 F. & F. 449, Erle, J. See also *In re Mason, Mason v. Cattley*, 52 L. J. Ch. 478; 22 Ch. D. 609; *In re Postlethwaite*, 56 L. J. Ch. 1077; 35 Ch. D. 722. Where an attorney had received from his client, a former rector (who was also patron), a book to collect tithes by and also a map of the glebe, with a view to a sale of the advowson: in an action by the succeeding incumbent (who was presentee of the purchaser of the advowson) for land claimed as glebe, it was held that the attorney might be called upon to produce both, as evidence against him. *Doe d. Marriott v. Hertford (Marquis)*, 19 L. J. Q. B. 526. Where an attorney, employed by a client, B., to negotiate an exchange of land with A., which went off, obtained an abstract of title from A., he might produce it in a suit by A., for recovery of the land from a defendant claiming under A.'s ancestor, as secondary evidence against the plaintiff of the original deeds, although he had not had B.'s permission. *Doe d. Egremont (Lord) v. Langdon*, 18 L. J. Q. B. 17; 12 Q. B. 711. The attorney and steward of the lord of a borough was held bound to produce certain presentments and precepts touching the appointment of officers in the borough, as being of a public nature. *R. v. Woodley*, 1 M. & Rob. 390. In an action by a reversioner to recover the land, the executor of the previous tenant for life is bound to produce a steward's book of his testator showing receipt of rent for the land, in order to prove the plaintiff's title; and it is immaterial that the witness is interested in defeating the action. *Doe d. Egremont (Earl) v. Date*, 3 Q. B. 609. A mortgagor could not, after the mortgage had become absolute, compel the production, by the mortgagee, of the title deeds of the mortgaged property, without payment of principal, interest, and costs. *Chichester v. Donegall (Marquis)*, 39 L. J. Ch. 694; L. R. 5 Ch. 497. But this rule is now altered as to mortgages made after Dec. 31st, 1881, by the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 16, which entitles a mortgagor to inspect and make copies of the deeds, so long as his right to redeem exists.

Where the witness declines to produce an instrument on the ground of professional confidence, the judge should not inspect it to see whether it was one which he ought to withhold; *Doe d. Carter v. James*, 2 M. & Rob. 47; *Volant v. Soyer*, 13 C. B. 231; 22 L. J. C. P. 83; the mere assertion on oath by the solicitor that it is a title deed or other privileged document, is apparently conclusive. S. C. If the document be brought into court by

a witness, who says that he is instructed by the owner to object to the production of it, this is enough to justify secondary proof without subpoenaing the owner himself to make the objection in person. *Phelps v. Prew*, 3 E. & B. 430; 23 L. J. Q. B. 140. It seems to be sufficient if one only of several interested parties object. *Per Maule, J., Newton v. Chaplin*, 19 L. J. C. P. 374. See also *Kearsley v. Philips*, 52 L. J. Q. B. 269; 10 Q. B. D. 465. When the production is excused, secondary evidence is admissible. *Marston v. Downes*, 3 L. J. K. B. 158; 1 Ad. & E. 31; *Doe d. Gilbert v. Ross*, 10 L. J. Ex. 201; 7 M. & W. 102. An attorney who was allowed to withhold a title deed of his client, was obliged to show another witness, who produced a copy of a deed which he believed to be the deed withheld, the indorsement on the outside of the original, so as to enable him to identify it with the one copied. *Phelps v. Prew, supra*. If the solicitor produce his client's deed without objection, the evidence is admissible; see *Hibberd v. Knight*, 17 L. J. Ex. 119; 2 Ex. 11. And the verdict will not, it seems, be endangered by the reception of it; for it is the privilege of the witness and not of the party in the action to withhold it. *Phelps v. Prew, supra*. The witness is not entitled to have his liability to produce argued by counsel. *Doe d. Rowcliffe v. Egremont (Earl)*, 2 M. & Rob. 386.

A person merely subpoenaed to produce, and not to testify, need not be sworn. *Perry v. Gibson*, 3 L. J. K. B. 158; 1 Ad. & E. 48. If sworn by mistake, he is not liable to cross-examination. *Rush v. Smith*, 3 L. J. Ex. 355; 1 C. M. & R. 94.

Obedience to a subpoena *duces tecum* may be enforced by attachment even where disobedience in the first instance has not been wilful. *R. v. Daye*, 77 L. J. K. B. 659; [1908] 2 K. B. 333.

EXAMINATION OF WITNESSES.

Ordering witnesses out of court.] During a trial the court will, on the application of either of the parties, order all the witnesses in the cause, except the one under examination, to go out of court. But if the solicitor in the cause be a witness, he will, in general, be suffered to remain, his assistance being necessary to the proper conduct of the cause. *Pomeroy v. Baddeley*, Ry. & M. 430. This, however, is a matter entirely for the discretion of the judge. If the witness remain after being ordered to withdraw, it will not necessarily prevent his being examined; *Parker v. M'William*, 8 L. J. (O. S.) C. P. 276; 6 Bing. 683; *R. v. Colley*, M. & M. 329; and the better opinion is that, although the witness may be fined for disobedience, the judge cannot refuse to hear him under such circumstances; *Chandler v. Horne*, 2 M. & Rob. 423; *Cobbett v. Hudson*, 22 L. J. Q. B. 11; 1 E. & B. 11, 14; except in Exchequer causes, where the witness is peremptorily excluded on trials between the Crown and a subject. *Att.-Gen. v. Bulpitt*, 9 Price 4; *Parker v. M'William, supra*. It is not the practice to order either of the parties out of court so long as their conduct there is unobjectionable. *Charnock v. Dewings*, 3 Car. & K. 378. But as a party can now be a witness, as such he is perhaps liable to be ordered out of court. See *Outram v. Outram*, (1877) W. N. 75, Malins, V.-C. As, however, a party may conduct his own cause in court, examine his witnesses, and give evidence as one himself (*Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J. Q. B. 11), it follows that the party in such a case has a right to remain in court.

Oath of witness.] By the common law of England every witness must be sworn according to some religious ceremony, and if it be dispensed with, it can only be by the authority of an Act of Parliament. *Maden v. Catanach*, 7 H. & N. 360; 31 L. J. Ex. 118, per Pollock, C.B. There is, however, no prescribed form of oath; it is to be that which the witness himself declares to be binding upon his conscience, and he is always allowed to adopt the ceremonies of his own religion. *Omichund v. Barker*, Willes, 547; 1 Smith's

L. C.; *Atcheson v. Everitt*, Cowp. 382; *Miller v. Salomons*, 7 Ex. 534, 558; 21 L. J. Ex. 186, 196.

A Christian witness has from time immemorial been sworn by "a corporall oath," so called "because he toucheth with his hand some part of the Holy Scripture"; 3 Inst. 165. The usual ceremony has long been as follows: he takes a copy of the Holy Gospels or of the whole of the New Testament into his *naked* right hand, and the officer of the court whose duty it is to administer the oath addresses him thus: "The evidence which you shall give between the parties shall be the truth, the whole truth, and nothing but the truth, so help you God"; and the witness then kisses the Book. By the Oaths Act, 1888 (51 & 52 V. c. 46), s. 5, "If any person to whom an oath is administered desires to swear with uplifted hand, in the form and manner in which an oath is usually administered in Scotland, he shall be permitted so to do, and the oath shall be administered to him in such form and manner without further question." The Scottish form of oath is for the witness to hold up his right hand and to repeat after the officer the words: "I swear by Almighty God that I will speak the truth, the whole truth, and nothing but the truth." No book is used. By the Oaths Act, 1909 (9 Ed. 7, c. 39), s. 2, any oath may be administered and taken by the witness holding the New Testament, or if a Jew, the Old Testament, in his uplifted hand, and saying or repeating after the officer these words: "I swear by Almighty God that . . ." The officer shall (unless the witness voluntarily objects thereto, or is physically incapable of taking the oath) administer the oath in the aforesaid manner without question, provided that in the case of a witness who is neither a Christian nor a Jew the oath is to be administered "in any manner which is now lawful." Where, before the last-cited Oaths Act, a witness refused to be sworn on the court copy of the New Testament, and desired to be sworn on his own copy of the New Testament, and this not being allowed by the county court judge, the evidence was not received, see *Rabey v. Birch*, 72 J. P. 106. There the Divisional Court thought that the judge might, if satisfied that the book produced by the witness was in fact the New Testament, have allowed the witness to be sworn thereon, but that he might have compelled the witness to be sworn by exercising his powers as to contempt of court. A witness who stated that he believed both the Old and New Testament to be the Word of God, yet, as the latter prohibited, and the former countenanced, swearing, he wished to be sworn on the former, was permitted to be so sworn. *Edmonds v. Rowe*, Ry. & M. 77. In Ireland it is the practice to swear a Roman Catholic witness upon a copy of the Douay Version of the New Testament, if he so request.

A Jew is sworn upon the Pentateuch, with his head covered; 2 Hale, P. C. 279; *Omichund v. Barker*, Willes, 543; the wording of the oath being changed from "God" to "Jehovah." But a Jew who stated that he professed Christianity, but had never been baptized, nor had even formally renounced Judaism, was allowed to be sworn on the New Testament. *R. v. Gilham*, 1 Esp. 285. A Mahomedan is sworn on the Koran. The form in *R. v. Morgan*, 1 Leach, C. C. 54, was as follows: the witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo (*i.e.*, Hindoo) has been received, who touched with his hand the foot of a Brahmin. *Omichund v. Barker*, 1 Atk. 21.

By 1 & 2 V. c. 105, s. 1, "in all cases in which an oath may lawfully be and shall have been administered to any person, either as a jurymen or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, . . . or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding." Under this Act, Buddhists have been sworn by

“the three Holy Existences—Buddha, Dhamma and Pro Sangha, and the Devotees of the twenty-two firmaments;” and a Parsee on the Zend-Avesta, or by binding a “Holy Cord” round his body. *Encycl. of the Laws of England, title, Oath.* A Chinaman on entering the box kneels down, and a china saucer having been placed in his hand, he breaks it; and the officer of the court then addresses him thus: “You shall tell the truth, and the whole truth; the saucer is cracked, and if you do not tell the truth, your soul will be cracked like the saucer.” *R. v. Entrehman, 1 Car. & M. 248.* If the witness do not understand the English language he must of course be addressed through an interpreter.

A witness may be asked whether he considers the form of administering the oath to be such as will be binding on his conscience. The proper time for asking him this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the objection is not, in such a case, to be precluded; but the witness may nevertheless be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answer in the affirmative, he cannot then be further asked whether there be any other mode of swearing more binding upon his conscience. *The Queen's Case, 2 B. & B. 284.* Where a Jew was sworn on the Gospels as a Christian, it was held that the oath, as taken, was binding on the witness, both as a religious and moral obligation. *Sells v. Hoare, 3 B. & B. 232; S. C., 7 B. Moore, 36.*

By the Oaths Act, 1888, s. 3, “where an oath has been duly administered and taken, the fact that the person to whom the same was administered had, at the time of taking such oath, no religious belief, shall not for any purpose effect the validity of such oath.”

Affirmation in lieu of oath.] By 3 & 4 W. 4, c. 49, s. 1 (extending the provisions of 9 G. 4, c. 32, s. 1), Quakers and Moravians are permitted, whenever an oath is required, instead of taking an oath, to make an affirmation or declaration in the words following:—“I, A. B., being one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), do solemnly, sincerely, and truly declare and affirm.” And by 1 & 2 V. c. 77, any person who has been a Quaker or a Moravian may affirm in lieu of taking an oath, as fully as if he still remained such, in the following form:—“I, A. B., having been one of the people called Quakers (or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, as the case may be), and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly declare and affirm.”

By the Oaths Act, 1888 (51 & 52 V. c. 46), s. 1 (replacing the C. L. P. Act, 1854, s. 20,) “every person upon objecting to being sworn, and stating as the ground of such objection, either that he has no religious belief, or that the taking of an oath is contrary to his religious belief, shall be permitted to make his solemn affirmation instead of taking an oath in all places and for all purposes where an oath is or shall be required by law, which affirmation shall be of the same force and effect as if he had taken the oath.” Sect. 2. “Every such affirmation shall be as follows:—‘I, A. B., do solemnly, sincerely, and truly declare and affirm,’ and then proceed with the words of the oath prescribed by law, omitting any words of imprecation or calling to witness.” The judge must before allowing a witness to affirm under these sections, ascertain whether he objects to take the oath because he has no religious belief, or because the taking of an oath is contrary to his religious belief. *R. v. Moore, 17 Cox C. C. 458; 61 L. J. M. C. 80.*

Incompetency.] The objection to witnesses on the ground of incompetency has been very much narrowed by recent enactments, and now all persons whose mental power of distinguishing and relating the truth can be relied on are competent, though not always compellable, witnesses.

The objection on the ground of defective understanding still remains, and this objection, and how and when it is to be decided, we will now consider.

Incompetency from defective understanding.] A person whose understanding is manifestly and egregiously defective will not be allowed to give evidence. This defect may arise from immaturity of intellect, or some species of insanity. Such a witness would not be competent, because his mental power of distinguishing and relating the truth could not be relied on.

As a general rule insane persons, idiots, and lunatics during their lunacy, are incompetent witnesses. But lunatics in their lucid intervals are competent. Com. Dig. Testm.—Witness (A. 1). It may be observed that here the question of competency will always turn solely on whether or no the witness will be likely to give truthful evidence, and if he is likely to do this he may be received, notwithstanding considerable defects of intellect, or even aberration of mind on certain subjects. *R. v. Hill*, 2 Den. C. C. 254; 20 L. J. M. C. 222. It makes no difference, whether the defect of understanding arises from imperfect education, from natural imbecility, or from failure of the mental powers. It is for the judge by examination of the lunatic on the *voir dire*, and of witnesses called for that purpose, to ascertain and decide on his competency, and if the judge allow him to give evidence the jury must decide on the credit to be attached to his testimony. *S. C. Id.*, following *R. v. Anon*, cited *per Parke, B.*, in *Att.-Gen. v. Hitchcock*, 16 L. J. Ex. 259; 1 Ex. 91, 95.

Deaf and dumb persons were formerly presumed to have understandings so defective as to be in all cases incompetent; a presumption entirely contrary to experience, and one not likely now to be made. See *Harrod v. Harrod*, 1 K. & J. 4, 9. The state of the intellect of such a witness might, of course, be reasonably inquired into before taking his testimony, as, the usual channels of information being cut off, the education of such persons is more than usually difficult. See 2 Taylor, *Evid.*, 10th ed., § 1376. A deaf and dumb person may give evidence through an interpreter by signs; *Ruston's Case*, 1 Leach, C. C., 4th ed., 408: or by writing. *Per Best, C.J.*, *Morrison v. Lennard*, 3 C. & P. 127. Where such a person has been examined on the *voir dire*, and pronounced to be a competent witness, and it afterwards appears during the examination in chief that the witness is incompetent, his evidence may be withdrawn from the jury. *R. v. Whitehead*, 35 L. J. M. C. 186; L. R. 1 C. C. R. 33.

Children not able to apprehend the obligation of an oath or promise cannot be examined; Com. Dig., *supra*; B. N. P. 293; but tender age alone is no objection. *Brazier's Case*, 1 East, P. C. 443. And a child who was wholly destitute of religious education has been allowed to be made a competent witness by being taught the nature of an oath before the trial, with a view to qualify him. *R. v. Murphy*, 1 Leach, 4th ed., 430, n. The ruling of Patteson, J., in *R. v. Williams*, 7 C. & P. 320, is too broadly expressed, though in that case the child was rightly rejected. Although the objection of the absence of religious knowledge as to the binding effect of an oath seems to be removed by sect. 1 of the Oaths Act, 1888, yet this would hardly make a child, who has no idea of the moral obligation to speak the truth, a competent witness. Where a child is tendered as a witness, the practice in criminal cases is for the judge to examine him with a view to ascertain his competency. Under certain statutes the unsworn evidence of a child of tender years may be received in prosecutions under those statutes, see, e.g., the Children Act, 1908, s. 30. Where the child cannot be admitted to give evidence, an account of the transaction which it has given to others is, of course, inadmissible. *R. v. Tucker*, 1 Phil. & Arn. Ev., 10th ed., 10.

It is evident that in any of the above cases, if a witness who has been examined by the judge on the *voir dire*, and pronounced competent, should afterwards manifestly appear to him to be in such a mental condition as

to be incompetent to give evidence, the evidence must be withdrawn from the jury : *vide R. v. Whitehead*, 35 L. J. M. C. 186; L. R. 1 C. C. R. 33.

Incompetency on the ground of interest.] Formerly all persons having an interest in the suit were on that ground disqualified, as were also their husbands and wives; but these qualifications have been entirely abolished, although with regard to certain matters the witness may refuse to give evidence, and in one case the uncorroborated evidence of the plaintiff will not suffice to obtain a verdict.

By 6 & 7 V. c. 85, s. 1, "no person offered as a witness shall hereafter be excluded by reason of incapacity from crime or interest from giving evidence either in person or by deposition, according to the practice of the court, on the trial of any issue joined, or of any matter or question, or on any inquiry arising in any suit, action, or proceeding, civil or criminal, in any court, or before any judge, jury, sheriff, coroner, magistrate, officer, or person having by law, or by consent of parties, authority to hear, receive, and examine evidence. . . ."

This section contained a provision that it should not render the actual parties to the suit, or any person for whose immediate benefit the action was brought or defended, or the husband or wife of any such person, competent as witnesses. But now, by the Evidence Amendment Act, 1853 (16 & 17 V. c. 83), s. 1, on the trial of any issue joined, or of any matter, &c., arising in any suit, action, &c., "the husbands and wives of the parties thereto, and of the persons in whose behalf any such suit," &c., may be brought or opposed, "shall, except as hereinafter excepted, be competent and compellable to give evidence," Sect. 2, "Nothing herein shall render any husband competent or compellable to give evidence for or against his wife, or any wife competent or compellable to give evidence for or against her husband," . . . "in any proceeding instituted in consequence of adultery." Sect. 3, "No husband shall be compellable to disclose any communication made to him by his wife during the marriage, and no wife shall be compellable to disclose any communication made to her by her husband during the marriage."

Under this Act the wife may prove her own adultery in an action against her husband for goods supplied to her. *Cooper v. Lloyd*, 6 C. B. (N. S.) 519.

As in a suit instituted by the wife for the dissolution of her marriage by reason of her husband's adultery coupled with wilful desertion, she was not, by reason of the exceptions in the above Acts, a competent witness to prove the desertion (*Pyne v. Pyne*, 1 Sw. & Tr. 178; 27 L. J. P. 54), it was enacted by 22 & 23 V. c. 61, s. 6, that on any petition presented by a wife in the Divorce Court for dissolution of marriage "by reason of her husband having been guilty of adultery coupled with cruelty, or of adultery coupled with desertion, the husband and wife respectively shall be competent and compellable to give evidence of or relating to such cruelty or desertion."

Where the suit was by the husband against his wife on the ground of her adultery, and the wife in her answer alleged the cruelty and desertion of the petitioner, the evidence of the parties was excluded; *Whittal v. Whittal*, 30 L. J. P. 43; even though the wife in her answer prayed relief under 29 & 30 V. c. 32, s. 2. *Bland v. Bland*, 37 L. J. Mat. 74; L. R. 1 P. & D. 513. If, however, the suit were instituted by the husband for the restitution of conjugal rights, and the wife in her answer alleged the husband's adultery, and prayed for a judicial separation, she was a competent witness. *Blackborne v. Blackborne*, 37 L. J. Mat. 73.

By the Evidence Further Amendment Act, 1869 (32 & 33 V. c. 68), s. 3, "the parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to show that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding, in disproof of his or her alleged adultery."

By sect. 2, "The parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise."

It seems that "any proceeding instituted in consequence of adultery" in sect. 3, includes only proceedings for divorce, judicial separation or nullity; *Nottingham Union v. Tomkinson*, 48 L. J. M. C. 171; 4 C. P. D. 343; *Burnaby v. Baillie*, 58 L. J. Ch. 842; 42 Ch. D. 282; *S. v. S.*, 76 L. J. P. 118; [1907] P. 224; not following *M. v. D.*, 10 P. D. 175; the section does not allow parents to prove non-access for the purpose of bastardizing their issue. S. CC. The proviso in sect. 3 seems to apply to such proceedings only. *Evans v. Evans* (No. 2), 73 L. J. P. 114; [1904] P. 378; *Hall v. Hall*, 25 T. L. R. 524; *S. v. S.*, *supra*. It does not apply when the essence of the petitioner's case is that the charge of adultery is false and he or she has given evidence in chief alleging that the charge is false. *Lewis v. Lewis*, 81 L. J. P. 24; [1912] P. 19.

Sect. 3 enables a person when called as a witness in such a cause, whether a party thereto or not, to refrain altogether from giving any evidence that may tend to show that he or she has been guilty of adultery; but does not exclude the evidence of the witness if he be willing to give it. *Hebblethwaite v. Hebblethwaite*, 39 L. J. Mat. 15; L. R. 2 P. & D. 29. A wife respondent who countercharged her husband with conduct conducing to her adultery, and connivance at it, was allowed to be cross-examined as to her relations with the co-respondent upon her electing to give evidence in support of her countercharges. *Ruck v. Ruck*, 80 L. J. P. 17; [1911] P. 90. If, however, the party deny the truth of some of the charges of adultery contained in the pleadings, and is asked no questions as to others, he is bound to answer questions in cross-examination respecting all the charges in the pleadings. *Brown v. Brown*, 43 L. J. P. 33; L. R. 3 P. & D. 198. A witness who has given evidence in disproof of his or her alleged adultery, cannot be questioned as to acts of adultery not alleged in the pleadings. *Brown v. Brown*, 84 L. J. P. 153; [1915] P. 83.

Incompetency from infamy.] This head of disqualification has been reduced within very narrow limits if not entirely abolished by 6 & 7 V. c. 85, s. 1. Before the passing of that Act conviction and judgment for felony, or any species of *crimen falsi*, rendered the party incompetent as a witness unless the competency were restored by a pardon, or by having undergone the punishment assigned to the offence. Whether the Act extends to the case of outlawry for felony is, perhaps, open to question. See 3 Inst. 212.

The offence and conviction may still be proved by the admission of the witness or otherwise, as before, for the purpose of impugning his credit. *R. v. Castell Careinion*, 8 East, 78.

Judges, jurors, arbitrators, counsel, &c.] A person, whose name is in the commission of assize, may be examined as a witness; so may a juror. Bac. Abr. Evid. A. 2.

In an action to enforce his award, the arbitrator may be called as a witness to prove what passed before him, what matters were presented for his consideration, and what claims admitted; but he cannot be asked as to what passed in his own mind when exercising his discretionary power on the matters submitted to him, nor can he be asked questions to explain, aid, or contradict his award. *Bucleuch (Duke) v. Metropolitan Board of Works*, 41 L. J. Ex. 137; L. R. 5 H. L. 418; *O'Rourke v. Railways Commissioner*, 59 L. J. P. C. 72; 15 App. Cas. 371.

Counsel and solicitors in the cause may also be witnesses in it (subject to the rule respecting privileged communications); but the practice is open

to objection, and such evidence should, if possible, be dispensed with. *Bac. Abr. Evid.* (A. 3). See also *Best, Evid.*, 10th ed. § 184.

Inference from not calling the party.] Since parties have been made competent witnesses, it has been a common practice to comment on their absence as witnesses, and to make observations on it as a suspicious suppression of unfavourable testimony. There seems to be no legitimate objection to such comments; and where a party is present in court, and testimony has been given which he must be able, if untrue, to contradict, and is interested in doing so, great weight will naturally be given to such comments. But the mere fact of his not being offered as a witness is not, *per se*, evidence against him, though it may turn the scale if his absence is unexplained and there is other slight evidence or some ambiguous admission by him out of court. See *M'Kewen v. Cotching*, 27 L. J. Ex. 41; *Barker v. Furlong*, [1891] 2 Ch. 172, 182; and *Talbot v. Von Boris*, 80 L. J. K. B. 661, 667; [1911] 1 K. B. 854, 864.

Examination in chief.] On almost every trial a great deal of discussion arises as to putting leading questions. Leading questions are those which, from the form in which they are put, are likely to communicate to the witness a knowledge of what answer would be favourable to the person putting it; which would of course be dangerous with a dishonest witness. In some cases of critical inquiries also, it is very desirable to get the witness's own impression, which the most veracious witness might not, after another view had been once suggested to him, be able to recall. The objections to leading questions apply by no means with equal force to all witnesses and to all parts of an inquiry. Some witnesses will adopt anything that is put to them, whilst others scrupulously weigh every answer. Moreover, innumerable questions are put for a mere formal purpose, the facts not really being in dispute, or simply in order to lead the mind of the witness to the real point of inquiry. As a great saving of time is effected by leading a witness, it would be extremely undesirable to stop it, where it is otherwise unobjectionable. There is no distinction recognized by the law between questions which are and questions which are not leading. To object to a question as leading is only a mode of saying that the examination is being conducted unfairly. It is entirely a question for the presiding judge to say, in his discretion, whether or not the examination is being conducted fairly.

It is sometimes said that all questions capable of being answered by merely *yes* or *no*, are objectionable as leading. But this is a very fallacious test, even in the most critical parts of an inquiry. On the other hand, it is sometimes said that the objection that the question is leading may be got over by putting it in the alternative; but it is obvious that nothing would be easier than to suggest in this way a whole conversation to a dishonest witness.

A witness, produced to read or explain a series of ancient records brought into court, may be asked to state the result of them; and this is permitted for saving of time, and because the witness can be interrogated as to the particular entries on which he founds his general statement of their purport and effect, and may be called upon to point them out to the court. *Rowe v. Brenton*, 3 M. & Ry. 212.

It has been already shown that oral proof of a written document cannot be admitted on examination in chief, unless a proper foundation for it be laid by accounting for the non-production of the writing itself; and that where any agreement, communication or statement is the subject of inquiry, the opposite party may interpose the question—whether it was in writing? The circumstances and conditions under which oral evidence of written documents may be admitted have already been explained.

Where a witness for the plaintiff, cross-examined as to the contents of a lost letter, swore that it did not contain a certain passage, and a witness was called by the defendant to contradict this statement, *Ld. Ellenborough* ruled

that he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side; for otherwise it would be impossible ever to come to a direct contradiction. *Courteen v. Touse*, 1 Camp. 43. And where, in cross-examination, a witness, being asked as to some expressions which he had used, denied them, and the counsel on the other side called a person to prove that the witness had used such expressions, and read to him the particular words from his brief, *Abbott, C.J.*, held that he was entitled to do so; *Edmonds v. Walter*, 3 Stark. 7; and this is now the common practice. But where a witness denied, on cross-examination, the use of certain expressions by him in a conversation at which both plaintiff and defendant were present, it was held that a witness, called to prove that such expressions were used, could not have the very words suggested to him; the conversation being evidence in itself, and not proved for the mere purpose of discrediting the witness. *Hallett v. Cousins*, 2 M. & Rob. 238.

Where a witness, on his examination in chief, shows himself decidedly adverse to the party calling him, the judge may allow the party calling him to conduct the examination with the same latitude as we shall hereafter see a cross-examination may be conducted; see *Coles v. Coles*, 35 L. J. P. 40; L. R. 1 P. & D. 70; but he must confine himself to matters material to the issue. The party calling a witness cannot cross-examine him merely to test his credit, as his opponent may. If a witness stand in a situation which of necessity makes him adverse to the party calling him, the presiding judge has a discretion as to the mode of examination in order best to answer the purposes of justice. *Per Abbott, C.J.*, *Barton v. Carew*, Ry. & M. 127; *Acc. Price v. Manning*, 58 L. J. Ch. 649; 42 Ch. D. 372. The party's counsel cannot cross-examine him without the leave of the judge, however hostile he may be. S. C., overruling *Clarke v. Saffery*, Ry. & M. 126. For the definition of a hostile witness, see *Coles v. Coles*, 35 L. J. P. 40; L. R. 1 P. & D. 70.

When a question is propounded, the opposite party may object that it is one which transgresses the rules of evidence. If not objected to, or if the objection be overruled, the witness must answer it, unless he can show that he has some privilege which enables him to refuse to do so. If he refuse to answer the question, and can show no privilege, he will be liable to be fined and imprisoned by the court. *Ex parte Fernandez*, 10 C. B. N. S. 11; 30 L. J. C. P. 321.

Privilege.] There are some questions which a witness is not compellable to answer, though, if he choose to answer them, his evidence is to be received. The following are such cases:—

On the ground of injurious consequences of a civil kind.] A witness is privileged from answering any question, the answer to which might directly subject him to forfeiture of estate. See *Pye v. Butterfield*, 5 B. & S. 829; 34 L. J. Q. B. 17. But it seems that where property is granted to a person subject to a conditional limitation over, that person may be compelled to state whether the condition on which the estate goes over has not been fulfilled. *Per Cur.*, *Id.* And by 46 G. 3, c. 37, "a witness cannot by law refuse to answer a question relevant to the matter in issue, the answering of which has no tendency to accuse himself or to expose him to penalty or forfeiture of any nature whatsoever, by reason only, or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or of any other person or persons." It will be seen that this statute recognizes the privilege when the witness is exposed to a penalty or forfeiture. "Forfeiture" in this statute does not apply to a person in possession of property and become liable to forfeit it by reason of a breach of covenant. *Per Cockburn, C.J.*, in *Pye v. Butterfield*, *supra*.

As to privilege in an action for a penalty, or for statutory liquidated damages, see *Hunnings v. Williamson*, 52 L. J. Q. B. 273; 10 Q. B. D. 459; and *Adams v. Batley*, 56 L. J. Q. B. 393; 18 Q. B. D. 625.

On the ground of injurious consequences of an ecclesiastical kind.] It has generally been considered that a witness may decline answering questions, the answering of which would expose him to ecclesiastical penalties; as on a proceeding under the 2 & 3 E. 6, c. 13, s. 2, for not setting out tithes; *Jackson v. Benson*, 1 Y. & J. 32; or for simony, *Brownsword v. Edwards*, 2 Ves. sen. 245; or incest, *Chetwynd v. Lindon*, 2 Ves. 450. But a judge, in deciding whether or no the witness is entitled to the privilege, would no doubt consider how far the danger suggested by the witness was real: *R. v. Boyes*, *infra*, and the mere chance of an obsolete jurisdiction being set in motion would probably not be considered a sufficient ground for refusing to answer.

With regard to questions tending to show that a witness called in proceedings instituted in consequence of adultery has been guilty of adultery, see 32 & 33 V. c. 68, s. 3, *ante*, p. 146.

On the ground of injurious consequences of a criminal kind.] That the witness may by answering be subjected to a criminal charge, however that charge may be capable of being prosecuted, is clearly a sufficient ground for refusing to answer. A person could not be compelled to confess himself the father of a bastard child, so long as he was thereby subjected to the punishment inflicted by the 18 El. c. 3, s. 2. *R. v. St. Mary, Nottingham*, 13 East, 57, n. A witness could not be compelled to answer a question which subjected him to the criminal charge of usury. *Cates v. Hardacre*, 3 Taunt. 424. But if the time for the recovery of the penalty had expired, the witness might be compelled to answer. *Roberts v. Allatt*, M. & M. 192.

The witness is compellable to answer when he has received, before or at the trial, a pardon under the Great Seal for the offence of which he fears to criminate himself. *R. v. Boyes*, 1 B. & S. 311; 30 L. J. Q. B. 301. In this case the court overruled the objection that the pardon was not, by reason of stat. 12 & 13 W. 3, c. 2, s. 3, pleadable to an impeachment by the House of Commons, because the danger to be apprehended must be real and appreciable, and an impeachment was, under the circumstances, too improbable a contingency to justify the witness in still refusing to answer on that ground.

Although the witness be not bound to answer questions of this nature, yet the question may be *put*, at least such appears on the whole to be the weight of authority. *The Queen's Case*, 2 Br. & B. 311; *R. v. Watson*, 2 Stark. 153. See *contra*, *Cundell v. Pratt*, M. & M. 108. With regard to questions *tending* only to criminate, it was said by Ld. Eldon that it was the strong inclination of his mind to protect the party, not only against any question that has a direct tendency to criminate him, but against one that forms a step towards it. *Paxton v. Douglas*, 19 Ves. 227; *Claridge v. Hore*, 14 Ves. 59; *Swift v. Swift*, 4 Hag. Ecc. 154.

The objection is sometimes obviated by the express provision of the statute creating the offence, *e.g.*, 24 & 25 V. c. 96, s. 85, as to fraudulent bailees, &c.; 38 & 39 V. c. 87, s. 103, as to fraudulent statements, &c., to obtain entry of land on register.

Right to decline answering—how decided.] It is now settled "that to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer. If the fact of the witness being in danger be once made to appear, great latitude should be allowed to him in judging for himself the effect of any particular question." *R. v. Boyes*, 1 B. & S. 311; 30 L. J. Q. B. 301. *Accord. Ex pte. Reynolds*,

51 L. J. Ch. 756; 20 Ch. D. 294, where the earlier cases are collected and considered. The judge will use his discretion, whether he will grant the privilege upon the bare claim of the witness, or whether he will investigate the claim by further inquiry. Of course, the witness must always pledge his oath that he believes the answer to the question will tend to criminate him, and if he assigns a reason which in the opinion of the court will not criminate him, he is not privileged. See *Scott v. Miller*, Johns. 220; 28 L. J. Ch. 584; *Ex pte. Aston*, 4 De G. & J. 320; 28 L. J. Ch. 631.

Counsel interested in excluding the evidence will not be allowed to argue in support of the objection. *R. v. Adey*, 1 M. & Rob. 94. A witness is not compellable to answer questions put for the mere purpose of degrading his character; *Cook's Case*, 13 How. St. Tr. 334; *Freind's Case*, *Id.* 17; *Layer's Case*, 16 How. St. Tr. 161; though such questions may legally be asked. *R. v. Edwards*, 4 T. R. 440; *Cundell v. Pratt*, M. & M. 108. If the witness choose to answer, his answer is generally conclusive. *R. v. Watson*, 2 Stark. 149.

Privilege of husband and wife.] In civil proceedings when the answer to a question put to a husband, H., would tend to criminate his wife, W., H. is competent to answer it. So when the answer to a question put to W. might incriminate H. *R. v. All Saints, Worcester*, 6 M. & S. 194; *R. v. Bathwick*, 2 B. & Ad. 647; *R. v. Williams*, 8 C. & P. 284. But though the husband and wife are, in such a case, competent, it seems to accord with principles of law and of humanity that they should not be compelled to give evidence which tends to criminate each other; and in *R. v. All Saints, Worcester, supra*, Bayley, J., said that, if in that case the witness had thrown herself upon the protection of the court, on the ground that her answer might tend to criminate her husband, he thought she would have been entitled to it.

Communications made by the husband to the wife, or by the wife to the husband, during marriage, are expressly privileged by 16 & 17 V. c. 83, s. 3. The communication must have been made *durante matrimonio*. It seems that the privilege lasts after dissolution of the marriage, *Monroe v. Twistleton*, Peake, Add. Ca. 221; or the death of one of the parties, *O'Connor v. Majoribanks*, 12 L. J. C. P. 161; 4 M. & Gr. 435, which decisions were prior to the statute.

Witness privileged on the ground of confidence.] Counsel, *Curry v. Walter*, 1 Esp. 456; and solicitor, *R. v. Kingston (Duchess)*, 20 How. St. Tr. 613; cannot be compelled to reveal communications made to them in confidence, as such. A person who acts as interpreter, *Du Barré v. Livette*, Peake, 78; S. C., 4 T. R. 756; or as agent, *Parkins v. Hawkshaw*, 2 Stark. 239; see also *Goodall v. Little*, 20 L. J. Ch. 132; between the solicitor and his client; or the solicitor's clerk, *Taylor v. Forster*, 2 C. & P. 195; *R. v. Upper Boddington*, 8 D. & Ry. 732; cannot be called upon to reveal such communications. So a barrister's clerk cannot be called to prove his retainer. *Foot v. Hayne*, Ry. & M. 165. But Parke, B., is said to have held, in *Forshaw v. Lewis*, 1 Jurist, N. S. 263, that the mere fact of retainer is not privileged from disclosure. See also *Levy v. Pope*, M. & M. 410. Cases and the opinions of counsel thereon are privileged. *Reece v. Trye*, 9 Beav. 316; *Penruddock v. Hammond*, 11 Beav. 59; and see *R. v. Woodley*, 1 M. & Rob. 390.

A solicitor will not be allowed to prove the contents of deeds or abstracts deposited with him as solicitor. *R. v. Upper Boddington*, 8 D. & Ry. 726. Where a solicitor is employed both by vendor and vendee to draw a conveyance, the draft of which is perused by another solicitor on behalf of the vendee, the former solicitor will not be allowed to produce the draft of the conveyance against the wishes of the party claiming under the vendee. *Doe d. Strode v. Seaton*, 4 L. J. K. B. 13; 2 Ad. & E. 171. And generally where two parties employ one and the same solicitor he cannot disclose the title

of either. Thus, where a borrower applies for a loan to the solicitor of the lender, and delivers him an abstract of title, the solicitor cannot afterwards be called against the borrower to prove the abstract. *Doe d. Peter v. Watkins*, 6 L. J. C. P. 107; 3 Bing. N. C. 421. Nor can admissions in conversation between the solicitors of the two parties relating to the cause be disclosed, unless made expressly for dispensing with proof in court of the facts stated. *Petch v. Lyon*, 15 L. J. Q. B. 393; 9 Q. B. 147. Where a private account book delivered by the defendant to the plaintiff as his solicitor, to prepare a case for counsel, was tendered to fix the defendant with an admission of liability on a note made by defendant to plaintiff, the court held it inadmissible. *Cleave v. Jones*, 7 Ex. 421; 20 L. J. Ex. 239.

Professional communications of a confidential character made by the client to his counsel, or solicitor, with a view to legal advice or assistance, even though not made with reference to legal proceedings either existing or in contemplation, are privileged from disclosure; *Clark v. Clark*, 1 M. & Rob. 3; *Walker v. Wildman*, Madd. & Geld. 47; *Greenough v. Gaskell*, 1 Myl. & K. 98; and see 4 B. & Ad. 876; *Carpmael v. Powis*, 15 L. J. Ch. 275; 1 Ph. 687; *Robson v. Kemp*, 5 Esp. 52; *Turton v. Barber*, 43 L. J. Ch. 468; L. R. 17 Eq. 329, following the principle laid down in *Minet v. Morgan*, 42 L. J. Ch. 627; L. R. 8 Ch. 361; see also *O'Shea v. Wood*, 60 L. J. P. 83; [1891] P. 286. The privilege or obligation of a legal adviser to withhold the communications between himself and client does not rest simply on the ground of confidence, for such a ground would extend the rule to many other cases where no privilege exists, but on a regard to the interests of justice, which require unreserved information from clients to those who are necessarily employed by them in the conduct of legal business. *Greenough v. Gaskell*, *Minet v. Morgan*, *supra*. On this principle a solicitor cannot be called to prove that a lease shown to him by his client at a professional interview was then unstamped. *Wheatley v. Williams*, 5 L. J. Ex. 237; 1 M. & W. 533. And where the assignees of a bankrupt brought trover for a lease, they were not permitted to call the solicitor of the bankrupt to show that it had been deposited with the defendant as a security after the act of bankruptcy. *Turquand v. Knight*, 6 L. J. Ex. 4; 2 M. & W. 98. And it seems that, where the solicitor is so employed as to give the court a summary jurisdiction over him, his character is confidential within the rule. *Per Alderson*, B., S. C. It is said, too, that a scrivener is on the same footing; at least where he is a solicitor also. S. C., *Id.* 100; *Anon.*, Skinner, 404; Lill. Pr. Reg. 556. The same rule applies in an action for divorce, even when the King's Proctor has intervened. *Branford v. Branford*, 48 L. J. P. 40; 4 P. D. 72. The privilege continues in favour of the executors of their deceased testator who employed the solicitor. *Bullivant v. Att.-Gen. for Victoria*, 70 L. J. K. B. 645; [1901] A. C. 196, except as against another person also claiming under the testator. *Russell v. Jackson*, 21 L. J. Ch. 146; 9 Hare, 387.

The privilege is that of the client, and not of the solicitor; and formerly the court prevented the solicitor, though he were willing, from making the disclosure; B. N. P. 284; *Wilson v. Rastall*, 4 T. R. 759; unless the client waived the privilege, which, of course, he might do, at least in cases where the privilege was for his benefit only. *Merle v. More*, Ry. & M. 390; and see *Id.* 391, n. It seems that the evidence of the solicitor, in relation to a privileged matter, will be received, if the solicitor be willing to give it. *Hibberd v. Knight*, 17 L. J. Ex. 119; 2 Ex. 11. The judge is the proper person to decide whether the communication is privileged, subject to revision by the Court. *Cleave v. Jones*, 7 Ex. 421; 20 L. J. Ex. 238. And he may hear witnesses to satisfy himself on this point. S. C.

It seems that no adverse presumption is to be drawn against a person refusing to allow his former solicitor to disclose statements he has made professionally to the solicitor. *Wentworth v. Lloyd*, 10 H. L. C. 589; 33 L. J. Ch. 688, *per* Ld. Chelmsford.

If the solicitor of one of the parties be called by his own client, and

examined as to a matter which has been the subject of confidential communication, he may be cross-examined as to *that* matter, though not as to others. *Vaillant v. Dodemead*, 2 Atk. 524.

A party himself is not bound to disclose matters as to which his information is derived from privileged communications, the matters not being merely statements of fact patent to the senses. *Kennedy v. Lyell*, 23 Ch. D. 387; 9 App. Cas. 81.

What matters may be disclosed.] A solicitor must state the name of his client in respect of whom he claims privilege. *Bursill v. Tanner*, 55 L. J. Q. B. 53; 16 Q. B. D. 1. Matters not communicated to a solicitor in his professional capacity, as where he acts as under-sheriff at the time, must be disclosed. *Wilson v. Rastall*, 4 T. R. 753; *Cobden v. Kendrick*, 4 T. R. 431. So, matters communicated before the retainer. *Cuts v. Pickering*, 1 Vent. 197. All matters not confidentially communicated must be disclosed, as well as all matters which the solicitor would have known without being intrusted as solicitor in the cause; B. N. P. 284; provided the information was obtained by him independently, and not in the course of his professional employment. See observations in *Wheatley v. Williams*, 5 L. J. Ex. 237; 1 M. & W. 533, 540, 541; and in *Magrath v. Hardy*, 7 L. J. C. P. 299; 4 Bing. N. C. 782, 795. So where counsel has given an opinion otherwise than in a professional capacity it must be disclosed. *Smith v. Daniell*, 44 L. J. Ch. 189; L. R. 18 Eq. 649. A person who is not a solicitor may be compelled to disclose communications which have been made to him under a mistaken idea that he was one. *Fountain v. Young*, 6 Esp. 113. This case was strongly commented on by Romilly, M.R., in *Calley v. Richards*, 19 Beav. 401, where it was held that communications made by A. to B., who had been A.'s solicitor, but who had then, without A.'s knowledge, ceased to practise, were privileged.

A solicitor may be called to prove a deed executed by his client, which he has attested; *Doe d. Jupp v. Andrews*, Cowp. 846; and when so called, he may be cross-examined as to what passed between him and his client at the time. *Cleve v. Powel*, 1 M. & Rob. 228. So, to prove the contents of a notice to produce; or an erasure in a deed belonging to his client; B. N. P. 284; or the delivery of a particular paper by his client; *Eicke v. Nokes*, M. & M. 304; or to prove who employed him to defend the cause; *Levy v. Pope*, *Id.* 410; or that he is in possession of a particular document belonging to his client, so as to let in secondary evidence of its contents after proof of notice to produce it. *Bevan v. Waters*, *Id.* 235; *Coates v. Mudge*, 1 Dowl. (N. S.) 540. The solicitor may be called upon to state whether he has not the document in court. *Dwyer v. Collins*, 22 L. J. Ex. 225; 7 Ex. 639. A communication between a solicitor and his client relative to a matter of fact only, where the character or office of solicitor is not called into action, is not privileged. *Bramwell v. Lucas*, 2 L. J. (O. S.) K. B. 161; 2 B. & C. 745. The defendant's solicitor may be called by the plaintiff to prove admissions made by his client, the defendant, in a conversation between plaintiff and defendant in his presence; though he cannot be allowed to prove such admissions in a conversation between himself and his client. *Griffith v. Davies*, 5 B. & Ad. 502. *Accord. Shore v. Bedford*, 12 L. J. C. P. 138; 5 M. & Gr. 271; *Weeks v. Argent*, 16 L. J. Ex. 209; 16 M. & W. 817. Where two parties employ the same solicitor, a letter by one of them to the solicitor, containing an offer to be made to the other, may be given in evidence against the writer of it. *Baugh v. Cradocke*, 1 M. & Rob. 182. So an application by one for time to pay money to the other. *Perry v. Smith*, 11 L. J. Ex. 269; 9 M. & W. 681. In an action for work done as solicitor of the defendant, the defendant, in order to show the plaintiff was retained by B. and not by defendant, may prove admissions made by the plaintiff to the professional agent employed by him to sue out process in an action by B., which action was the work alleged to be done by the plaintiff for the defendant. *Gillard v. Bates*, 9 L. J. Ex. 171; 6 M. & W. 547.

In the case of testamentary instructions to the testator's solicitor for drawing his will, what passed on the subject of that will as to any secret trust will be admissible in a suit between executors and next of kin. In such a case, indeed, both claim under the testator, and it would seem arbitrary to hold that the privilege belongs to one of the claimants more than to the other. *Turner, V.-C., Russell v. Jackson*, 9 Hare, 387; 21 L. J. Ch. 146.

It is now settled that, when an illegal purpose or a fraud is contemplated, a communication to a solicitor in furtherance thereof will not be privileged from disclosure; for it is no part of professional duty to be assisting in such cases. *R. v. Cox*, 54 L. J. M. C. 41; 14 Q. B. D. 153; *Williams v. Quebrada Ry., &c., Co.*, 65 L. J. Ch. 68; [1895] 2 Ch. 751; *R. v. Smith*, 84 L. J. K. B. 2153. Thus, where A. applied to an attorney to advance money on a forged will, which the attorney refused to do, and he made no charge to A. for the interview, the communication was held *not* privileged. *R. v. Farley*, 1 Den. C. C. 197; *R. v. Jones*, 1 Den. C. C. 166. A counsel engaged for A. on a former inquiry on a criminal charge may be called at a subsequent trial of an action wherein A. is a party to prove as against him the state of a document produced and shown in evidence by A. on the former trial. *Brown v. Foster*, 1 H. & N. 736; 26 L. J. Ex. 249. The inquiry was whether a certain entry was in a book when produced on the first occasion, which A. was suspected of having fraudulently made afterwards; and the counsel was called to negative the existence of it on the previous hearing. But the privilege prevails unless there be a definite charge or proof of illegality or fraud. *Bullivant v. Att.-Gen. for Victoria*, 70 L. J. K. B. 645; [1901] A. C. 196.

Where the client is a witness he is liable to be cross-examined as to the instructions he had given his solicitor in another proceeding. *Maccann v. Maccann*, 3 Sw. & Tr. 142; 32 L. J. P. 29. The client must answer as to matters communicated to him by his solicitor, as to which the solicitor himself could not claim privilege. *Foakes v. Webb*, 54 L. J. Ch. 262; 28 Ch. D. 287.

Communications made to a herald or pursuant of Heralds' College employed in the conduct and support of a protest against the enrolment of a pedigree therein are not privileged. *Slade v. Tucker*, 49 L. J. Ch. 644; 14 Ch. D. 824. So physicians, surgeons, and divines are not privileged from compulsive disclosures of communications, however confidential. *R. v. Kingston (Duchess)*, 20 How. St. Tr. 573; *Gilham's Case*, 1 Moo. C. C. 186. See also *Garnet's Case*, *Jardine's Gunpowder Plot*, pp. 282 *et seq.*, ed. 1857, as to auricular confession, and *Best, Evid.*, 10th ed. §§ 583—585.

Witness privileged on the ground of public policy—disclosures by informers.] Questions on this branch of privilege arise generally in criminal and revenue cases. Such communications are undoubtedly to some extent privileged. *R. v. Hardy*, 24 How. St. Tr. 811; *R. v. Watson*, 2 Stark. 136; *Att.-Gen. v. Briant*, 15 L. J. Ex. 265; 15 M. & W. 169; *R. v. Richardson*, 3 F. & F. 693. Information given to the Director of Public Prosecutions falls within this principle. *Marks v. Beyfus*, 25 Q. B. D. 494.

Witness privileged on the ground of public policy—official communications.] There are some official communications relating to matters which affect the interests of the community at large, which may be withheld; such as communications between the governor and the law officers of a colony, *Wyatt v. Gore*, Holt, N. P. 299; between the governor of a colony and a Secretary of State, *Anderson v. Hamilton*, 2 Br. & B. 156, n.; between the governor of a colony and a military officer, *Cooke v. Maxwell*, 2 Stark. 183; between a military officer and a Secretary of War, *Beatson v. Skene*, 5 H. & N. 838; 29 L. J. Ex. 430; and the report of a military court of inquiry on the conduct of an officer, *Home v. Bentinck*, 2 B. & B. 130; *Dawkins v. Rokeby (Lord)*, 42 L. J. Q. B. 63; L. R. 8 Q. B. 255; the army medical

history sheets of a soldier, *Anthony v. Anthony*, 35 T. L. R. 559. And where a Minister of State appears and objects to the production of documents on the ground that it would be injurious to the public interests, he will not be compelled to produce them. *Beatson v. Skene*, *supra*. So on a trial for high treason, *Ld. Grenville* was called to produce a letter intercepted on its way through the Post Office, but it was held that he was not bound to do so; *per Ld. Ellenborough* in *Anderson v. Hamilton*, *supra*. And the document may appear to be of such a public nature that the judge is bound to exclude it, without objection to its production having been taken. *Home v. Bentinck*, *supra*; *Chatterton v. Secretary of State for India*, 64 L. J. Q. B. 676; [1895] 2 Q. B. 189, 194, 195. See also *Hennessy v. Wright*, 57 L. J. Q. B. 530; 21 Q. B. D. 509, and *In re Hargreaves, Lim.*, 69 L. J. Ch. 183; [1900] 1 Ch. 347. It seems that the objection to the evidence may be taken by the party interested in excluding it, although not taken by the witness himself. *Home v. Bentinck*, *supra*. The rule as to excluding evidence on the above ground is confined to communications made by and between ministers and officers of the Government in the discharge of their public duty; and therefore a letter written by a private individual to the secretary of the Postmaster-General complaining of the conduct of the guard of the mail is not privileged from disclosure. *Blake v. Pilfold*, 1 M. & Rob. 198. The Speaker of the Irish House of Commons was held not to be bound to disclose what a member had there spoken, though he might be asked whether that member had spoken on a particular occasion. *Plunkett v. Cobbett*, 5 Esp. 136; 29 How. St. Tr. 71, *per Ld. Ellenborough*. A Member of Parliament cannot, without leave of the House, be compelled to answer questions respecting the votes of the members. *Chubb v. Salomons*, 3 Car. & K. 75, *per Pollock*, C.B. Confidential proceedings of the Privy Council cannot be divulged. *Layer's Case*, 16 How. St. Tr. 224. In *R. v. Watson*, 2 Stark. 148, an officer of the Tower of London was allowed to refuse to say whether a plan of the Tower which was produced was accurate or not. The Lord Chamberlain cannot be compelled to disclose communications made to him in his official capacity. *West v. West*, 27 T. L. R. 476.

Where a document is privileged from production on the ground of public policy, secondary evidence of its contents is inadmissible. *Home v. Bentinck*, *supra*; *Stace v. Griffith*, L. R. 2 P. C. 420.

Where for revenue or other similar purposes an oath of office has been taken by a person not to divulge matters which have come to his knowledge in his official capacity, he will not be allowed, if the interests of justice are concerned, to withhold his testimony. The clerk to the commissioners of the property tax, being called to produce the books containing the appointment of a person as collector, objected on account of his oath, but *Ld. Ellenborough* said that it did not protect him from giving evidence in a court of justice upon a writ of *subpœna*. *Lee v. Birrell*, 3 Camp. 337. As to the obligation of a tax surveyor to produce income tax returns, see *Shaw v. Kay*, 5 Tax Cas. 74; 12 Sc. L. T. R. 495.

A grand juror is also compellable in furtherance of justice to prove what passed before him. *Anon.*, 4 Bl. Comm. 126, note by Christian; *Sykes v. Dunbar*, 2 Selw. N. P., 13th ed. 1015; but this has been questioned. *Starkie on Slander*, 3rd ed. 475, c.

As to the production of private telegrams by the Postmaster-General, see 31 & 32 V. c. 110, s. 20; 32 & 33 V. c. 73, s. 23. In *Taunton*, 2 O'M. & H. 72, *cor. Grove, J.*; and *Stroud, Id.* 110, *cor. Bramwell, B.*, an order for production was refused, on the officer who attended the trial with them declining to produce them, and *semble* such documents are in the custody of the Crown, and their production cannot be enforced without the consent of the Crown. S. C., *per Id.*

Privilege—how claimed.] It is for the witness himself to claim or to waive the privilege, as he sees fit; the counsel in the cause cannot argue the question in favour of the witness. *Thomas v. Newton*, M. & M. 48, u.;

R. v. Adey, 1 M. & Rob. 94. Except, perhaps, in the case of official communications. The witness may claim his privilege at any part of the inquiry, and he does not waive it altogether by omitting to claim it as soon as he might have done so. *R. v. Garbett*, 1 Den. C. C. 258, overruling *East v. Chapman*, M. & M. 46; S. C., 2 C. & P. 573. The time for the witness to make the objection is after he is sworn. *Boyle v. Wiseman*, 10 Ex. 647; 24 L. J. Ex. 160.

Contradicting party's own witness.] If a witness give evidence contrary to that which the party calling him expects, that party cannot give general evidence to show that the witness is not to be believed on his oath. *Ewer v. Ambrose*, 3 B. & C. 749. And though it was always considered that a party might contradict the evidence of his own witness upon facts material to the issue, yet it was long a question whether it was competent to him to prove that the witness had previously given a different account of the transaction. S. C., *Id.*; *Wright v. Beckett*, 1 M. & Rob. 414; *R. v. Oldroyd*, R. & Ry. 88; *Dunn v. Aslett*, 2 M. & Rob. 122; *Holdsworth v. Dartmouth*, *Mayor of*, *Id.* 153; *Winter v. Butt*, *Id.* 357; *Allay v. Hutchings*, *Id.* 358, n.; *Melhuish v. Collier*, 15 Q. B. 878; 19 L. J. Q. B. 493. In the last case it was held that the witness may, at all events, be examined as to his former statements, and contradicted as to any facts that are relevant, although the direct effect may be to discredit him; and it has been the constant practice to call evidence to contradict the statements of other witnesses already called by the same party; as where attesting witnesses deny their own signature. See also *Friedlander v. London Assurance Co.*, 2 L. J. K. B. 16; 4 B. & Ad. 193. And now it is provided by the Crim. P. Act, 1865, ss. 1, 3, that a "party producing a witness shall not be allowed to impeach his credit by general evidence of bad character, but he may, in case the witness shall, in the opinion of the judge, prove adverse, contradict him by other evidence or, by leave of the judge, prove that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement."

Leave of the judge is made a condition precedent to the proof of former inconsistent statements, and also premonition and pre-examination as to such statements. In one particular the Act seems to limit the former admitted liberty of calling witnesses to contradict another witness called by the same party; for in such cases it had been the practice for counsel to consult only their own judgment in calling other witnesses to prove all relevant facts, although their testimony may incidentally contradict the testimony of one already called on the same side. This difficulty has been noticed by the court in *Greenough v. Eccles*, 5 C. B. (N. S.) 786; 28 L. J. C. P. 160; but it seems to have been the opinion of the court in that case that the Act is not to be construed as limiting the former liberty to call other witnesses to contradict the testimony of the adverse witness. It was there decided also that "adverse" means hostile, and not merely unfavourable, and that the inconsistent statements of the witness are only admissible where the judge considers his *animus* to be hostile. "A hostile witness is a witness who, from the manner in which he gives his evidence, shows that he is not desirous of telling the truth to the court." *Coles v. Coles*, 35 L. J. P. 40; L. R. 1 P. & D. 70.

Where a witness gave evidence quite different from the proof in the brief which had been prepared in the usual way from the previous statements of the witness to the attorney, Bramwell, B., allowed him to be examined under this section as to his previous oral statements to the attorney; and also allowed the attorney to be called to contradict him. *Amstell v. Alexander*, 16 L. T. 830. But in a similar case it was held that the section was not meant to apply to the loose statements made by the witness to the attorney with a view to prepare the evidence, and granted a rule *nisi* for a new trial,

on the ground that witnesses had been called at the trial to prove such statements. *Reed v. King*, 30 L. T. 290. Where a witness had given contrary evidence on his examination in bankruptcy, it seems that evidence was allowed to be used to contradict him. *Pound v. Wilson*, 4 F. & F. 301. See also *Dear v. Knight*, 1 F. & F. 433. A series of letters may be used for the purpose of contradicting the witness, although one only be indirectly inconsistent. *Jackson v. Thomason*, 1 B. & S. 745; 31 L. J. Q. B. 11. The opinion of the judge at the trial as to whether the witness is hostile is conclusive. *Rice v. Howard*, 55 L. J. Q. B. 311; 16 Q. B. D. 681. See also *R. v. Williams*, 77 J. P. 240.

It has been held that, where a party calls other witnesses to contradict his own witness as to a particular fact, the whole of the testimony of the contradicted witness is not therefore to be necessarily repudiated. *Bradley v. Ricardo*, 1 L. J. C. P. 36; 8 Bing. 57. But in *Faulkner v. Brine*, 1 F. & F. 255, *Ld. Campbell, C.J.*, intimated that the effect of such contradiction was to throw over the evidence of the witness altogether.

Opinion of witness, when admissible.] In general the mere opinion of a witness as to any of the facts in issue is not admissible as evidence. See *Payton & Co. v. Snelling, Lampard & Co.*, 70 L. J. Ch. 644; [1901] A. C. 308, 311. But it is admissible upon questions of science. Thus, where the question was whether a bank erected to prevent the overflowing of the sea had caused the choking up of a harbour, the opinions of scientific men as to the effect of such an embankment upon the harbour were held to be admissible. *Folkes v. Chadd*, 3 Doug. 157. Where the question is whether a seal has been forged, seal engravers may be called to show a difference between a genuine impression and that supposed to be false. *Id. per Ld. Mansfield, C.J.* A physician, who has not seen the particular patient, may, after hearing the evidence of others at the trial, be called to testify as to the general effects of the symptoms described by them and their probable consequences in the particular case; *Peake, Evid.* 208; or he may be asked whether the facts proved are symptoms of insanity; *R. v. M'Naghten*, 10 Cl. & F. 200; but he cannot be asked, generally, whether, upon the evidence of the cause, he is of opinion that the party is insane or incapable of distinguishing between right and wrong; for this would leave him at liberty to find facts as well as to form an opinion on those facts, and in effect put him in the place of the jury. *R. v. Frances*, 4 Cox, C. C. 57; *R. v. Layton*, 4 Cox, C. C. 149. The opinion of a person conversant with the business of insurance, as to whether the communication of particular facts would have varied the terms of insurance, has been admitted in evidence both in actions on the policy and against insurance brokers for negligence. *Berthon v. Loughman*, 2 Stark. 258; *Rickards v. Murdock*, 8 L. J. (O. S.) K. B. 210; 10 B. & C. 527; *Chapman v. Walton*, 2 L. J. C. P. 213; 10 Bing. 57. But in other cases the admission of this kind of evidence has been discountenanced. *Carter v. Boehm*, 1 W. Bl. 594; and in *Campbell v. Rickards*, 2 L. J. K. B. 204; 5 B. & Ad. 840, a new trial was granted because such evidence had been admitted, and it was held that the materiality of a fact concealed was a question for the jury alone, and that "witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced if the parties had acted in one way rather than another"; see also *Von Lindenau v. Desborough*, 7 L. J. (O. S.) K. B. 42; 8 B. & C. 586; *Westbury v. Aberdeen*, 6 L. J. Ex. 83; 2 M. & W. 267. The evidence of a shipbuilder has been admitted on a question of seaworthiness, though he was not present at the survey; *Beckwith v. Sydebotham*, 1 Camp. 117; *Thornton v. Royal Exchange Assurance Co.*, *Peake*, 25; and the opinion of a nautical witness on a question of skilful navigation, assuming the facts to be true; *Fenwick v. Bell*, 1 Car. & K. 312. The opinions of persons versed in the laws of a foreign country are also admissible; *Chaurand v. Angerstein*, *Peake*, 44. Persons conversant with old MSS. may be called to speak to the date of

an old writing. *Tracy Peerage Case*, 10 Cl. & F. 154. Where the question is, as to the correct judgment of a captain in abandoning his ship, a witness may be asked the result of his personal observation of the "general habits" of the captain as to sobriety. *Alcock v. Royal Exchange Assurance Corporation*, 18 L. J. Q. B. 121; 13 Q. B. 292. To ascertain the value of a life annuity, an accountant, who stated he was conversant with the business of life assurance offices, was allowed to refer to the Carlisle Tables used by those offices, showing the expectation of life, and then state the sum required to purchase the annuity. *Rowley v. L. & N. W. Ry.*, 42 L. J. Ex. 153; L. R. 8 Ex. 221.

Persons skilled in handwriting may be called to prove forgery or to establish the genuineness of ancient documents.

On the slight value to be attached to the evidence of expert witnesses, see *Abinger (Lord) v. Ashton*, L. R. 17 Eq. 373 *et seq.*, per Jessel, M.R., and *Baily v. Clark*, 71 L. J. Ch. 396; [1902] 1 Ch. 649, 670, per Stirling, L.J.

Memorandum to refresh witness's memory.] A witness will be allowed to refer to an entry, or memorandum, made by himself at the time of, or shortly after the occurrence of the fact to which it relates, in order to refresh his memory, although the entry or memorandum would not of itself be evidence. *Kensington v. Inglis*, 8 East, 289. Even a receipt on unstamped paper may be used for this purpose. *Maugham v. Hubbard*, 6 L. J. (O. S.) 229; 8 B. & C. 14. Nor does the use of such a memorandum by a witness make it evidence in itself. *Alcock v. Royal Exchange Assurance Corporation*, *supra*. But he cannot refresh his memory by extracts from a book, though made by himself; *Doe d. Church v. Perkins*, 3 T. R. 749; nor speak from having refreshed it out of court; at least unless he produces the memorandum in court; *Beech v. Jones*, 5 C. B. 696; nor by a copy of a book, unless the witness himself saw the copy made and checked it at the time by personal examination while the subject was fresh in his recollection, for then the copy is, in effect, an original entry by himself. *Burton v. Plummer*, 4 L. J. K. B. 53; 2 Ad. & E. 341; *Talbot de Malahide (Lord) v. Cusack*, 17 Ir. C. L. R. 213; 12 L. T. 678. In *Burton v. Plummer*, *supra*, a sale was proved by a clerk who refreshed his memory from a ledger entered from a waste book, the waste book being kept by the clerk and the ledger copied by another person under the eye of the clerk. A surveyor may refer to a printed copy of a report made by himself to his employers, and compiled from his rough notes made on the spot. *Horne v. Mackenzie*, 6 Cl. & F. 628. A witness may refresh his memory by reference to entries in a log-book, which he did not write with his own hand, but which he examined from time to time shortly after the events recorded. *Burrough v. Martin*, 2 Camp. 112. Where a witness, on seeing his initials affixed to an entry of payment, said, "I have no recollection that I received the money; I know nothing but by the book, but seeing my initials, I have no doubt that I received the money:" this was held sufficient evidence. *Maugham v. Hubbard*, *supra*; *R. v. S. Martin's*, 2 Ad. & E. 210. A printed form of lease, read over to a tenant as the terms of his tenancy, but not signed according to Statute of Frauds, may be used to refresh the memory of the witness who read it to him. *Bolton (Lord) v. Tomlin*, 6 L. J. K. B. 45; 5 Ad. & E. 856. If the witness be blind, the papers or memorandum may be read over to him in court. *Catt v. Howard*, 3 Stark. 4. A witness was permitted to refresh his memory from a deposition made and signed by him, shortly after the fact to be proved, on examination before commissioners of bankrupts. *Smith v. Morgan*, 2 M. & Rob. 257. In this case Tindal, C.J., permitted it to be only so far used as to refresh the memory of the witness as to the date of a single transaction, on the authority of *Vaughan v. Martin*, 1 Esp. 440; but it is observable that in *Vaughan v. Martin*, the whole account of the act of bankruptcy seems to have been read to the witness, a very aged person, who was then asked "whether the

matters there stated were true?" Such an examination was also allowed to be used by a witness in a like manner by Pollock, C.B., in *Wood v. Cooper*, 1 Car. & K. 645. The examination in both cases was taken recently after the facts, and this seems essential to the use of any memorandum or paper for refreshing memory. *Whitfield v. Aland*, 2 Car. & K. 1015.

Right to inspect memorandum.] Where the witness gives his evidence after having referred to a book or other document, it must be produced; *Howard v. Canfield*, 5 Dowl. P. C. 417; *Beech v. Jones*, 5 C. B. 696; and the counsel on the other side has a right to inspect it, without being bound to read it in evidence; *Sinclair v. Stevenson*, 1 C. & P. 582; *R. v. Ramsden*, 2 C. & P. 603. He may cross-examine upon the entries referred to by the witness, without making the book evidence *per se* for the party who produces the witness; but if he cross-examines as to other entries in the same book, he makes them part of his own evidence. *Gregory v. Tavernor*, 6 C. & P. 281; *Whitfield v. Aland*, 2 Car. & K. 1015. Where a paper is put into a witness's hand only to prove the handwriting, and not to refresh his memory, the opposite party is not entitled to see it. *Sinclair v. Stevenson*, *supra*. Where the question founded on a document handed to witness to refresh his memory wholly fails in its object, it has been considered that the opposite party is not entitled to inspection. *R. v. Duncombe*, 8 C. & P. 369. In *Betts v. Betts*, 33 T. L. R. 200, Low, J., commented on the impropriety of a witness, who referred to a diary in order to refresh her memory, having gummed together the pages other than those to which she referred. The reason for permitting adverse inspection seems to be to check the use of improper documents;—to secure the benefit of the witness's recollection as to the whole facts;—and to compare his oral testimony with the written statement. If it fail to refresh his memory, or is not used for that purpose, the right of inspection fails.

Cross-examination.] "The evidence of one party 'cannot' be received as evidence against another party without the latter having an opportunity of testing its truthfulness by cross-examination." *Allen v. Allen* (No. 2), 63 L. J. P. 120; [1894] P. 248, 253. One defendant has a right to cross-examine another co-defendant called as a witness. *S. C. Id.* 254. A defendant may cross-examine a co-defendant's witnesses. *Lord v. Colvin*, 3 Drew. 222; 24 L. J. Ch. 517; cited, [1894] P. 253. When a party is compelled to call the attesting witnesses to a will he may cross-examine them as they are not the witnesses of either party, but of the court. *Jones v. Jones*, 24 T. L. R. 839. Upon cross-examination, counsel may lead a witness so as to bring him directly to the point in his answer; but he cannot, if the witness shows an obvious leaning in his favour, go the length of putting into the witness's mouth the very words which he is to echo back again. *Hardy's Case*, 24 How. St. Tr. 755. Indeed, in such a case, the usual latitude of cross-examination would perhaps not be allowed. It is not allowable for counsel, on cross-examination, to mislead the witness by assuming facts to be evidence which have not been proved, or to try to entrap him by misstatement. See cases before Abbott, C.J., *Hill v. Coombe*; *Handley v. Ward*, cited in Stark. Ev., 4th ed. 197 (s). This is sometimes attempted in practice by handing wrong papers to a witness, in order to test his judgment in the proof of handwriting. It is not competent to counsel to question a witness concerning a fact irrelevant to the matter in issue for the mere purpose of discrediting him by calling other witnesses to disprove what he says; *Spenceley v. De Willett*, 7 East, 109; and should the witness answer such a question, evidence cannot be given to contradict; *Harris v. Tippett*, 2 Camp. 637; or to confirm his evidence. *Tolman v. Johnstone*, 2 F. & F. 66.

By Rules, 1883, O. xxxvi. r. 38, "The judge may in all cases disallow any questions put in cross-examination of any party or other witness which may appear to him to be vexatious and not relevant to any matter proper to be inquired into in the cause or matter."

Where a witness, not a party, produces on cross-examination a mass of correspondence not shown to be relevant to the issue between the parties, the judge may refuse to allow the documents to be put in and read *seriatim*, and the witness to be examined on each one, on the ground of the time this course would occupy: the proper course is to apply for an adjournment to examine the documents, and afterwards to examine the witness on such as are relevant. *In re Maplin Sands*, 71 L. T. 594.

In consequence of the general rule that the contents of a written document ought to be proved by the production of it, and not by oral testimony, it was held in *The Queen's Case*, 2 Br. & B. 287, that it was not competent to ask a witness, even on cross-examination, respecting a statement formerly made by him in writing without showing to him the writing referred to, and putting it in evidence as part of the case of the cross-examining party either immediately or in the ordinary course of the cause; and this opinion of the judges has been since constantly acted upon, whether the question be put merely to discredit the witness by contradicting him, or as conducive to proof of the matter in issue. *Macdonnell v. Evans*, 11 C. B. 930; 21 L. J. C. P. 141. It seems, however, that when the statement in writing is an affidavit or deposition filed in some court, the rule in *The Queen's Case*, *supra*, is satisfied by the production of an examined or office copy at the trial, for in many cases witnesses have been allowed to be cross-examined or examined on office copies of their previous depositions, and such copies have been allowed to be used to contradict them. On an issue out of Chancery, an examined copy of the deposition of one of the witnesses was allowed to be read for the purpose of contradicting the evidence of the same witness on the trial of the issue. *Highfield v. Peake*, M. & M. 109; *Burnand v. Nerot*, 1 C. & P. 578. An examined copy of an answer, made by a defendant in Chancery, was admitted to contradict the evidence given by him in a subsequent action. *Ewer v. Ambrose*, 4 B. & C. 25. An attested copy of an affidavit, made by the witness and filed in another cause, was held sufficient to contradict him, on proof being given of his identity; *Garvin v. Carroll*, 10 Ir. L. R. 323; and in *Davies v. Davies*, 9 C. & P. 252, Gurney, B. allowed a witness to be cross-examined on an office copy of his affidavit filed in the cause, a judge's order having, under the old practice, been obtained to admit it. As to the use of an office copy now, see Rules, 1883, O. xxxvii. r. 4.

The only case which is cited in support of the proposition that the original must be shown to the witness is that of *Bastard v. Smith*, 10 Ad. & E. 213, 214, in which Tindal, C.J., is said, at N. P., not to have permitted a witness to be cross-examined as to the contents of his former deposition, without first refreshing his memory with the original; as, however, the original was in court, it seems clear that no attempt was made to use an office copy, and all that appears from the report of the case on the motion is, that the court would not interfere with the master's allowance of the costs of bringing down the original deposition. This case can therefore hardly be considered as overruling the numerous cases that have been above cited where the contrary rule was followed.

In *Henman v. Lester*, 12 C. B. (N. S.) 781; 31 L. J. C. P. 366, it was held by Willes and Keating, JJ., *diss.* Byles, J., that a plaintiff could be asked, on cross-examination, in order to test his credit, as to proceedings taken against him in the county court, without producing the record of the court; at the trial, Pollock, C.B., had admitted the question on the broad ground that the contents of a written document might be proved by the admission of a party to the cause, whether in or out of the witness-box; he did not, however, hold that the witness was *compelled* to answer the question; and the court said he could not be so compelled. In *Macdonnell v. Evans*, 21 L. J. C. P. 141; 11 C. B. 930, Cresswell, J. said that a witness could not be asked on cross-examination, in order to test his credit, whether he had been convicted of a crime, as that would appear by the record. This

was denied by Willes and Keating, JJ. in *Henman v. Lester*, *supra*; *contra*, Byles, J.

By the Crim. P. Act, 1865, ss. 1, 5 (replacing the C. L. P. Act, 1854, s. 24), "a witness may be cross-examined as to previous statements made by him in writing, or reduced into writing, relative to the subject-matter of the indictment or proceeding, without such writing being shown to him; but if it is intended to contradict such witness by the writing, his attention must, before such contradictory proof can be given, be called to those parts of the writing which are to be used for the purpose of so contradicting him; provided always, that it shall be competent for the judge, at any time during the trial, to require the production of the writing for his inspection, and he may thereupon make such use of it for the purposes of the trial as he shall think fit." The effect is this. The witness, in the first instance, may be asked, whether he has made such and such a statement, without its being shown to him. *Sladden v. Sergeant*, 1 F. & F. 322, *cor.* Willes, J. If he deny that he has made it, the opposite party cannot put in the statement without first calling his attention to it (showing it, or at least reading it, to him), and to any parts of it relied upon as a contradiction. If the witness, instead of denying that he has made the statement, admit it, although the object of the cross-examining counsel has been attained, it may be very important for the party calling the witness to have the whole statement, which may not be in his possession, before the court and jury. If he be aware of the contents, he will, it would seem, in such case, be at liberty to re-examine the witness, as to the residue of the statement, without its being produced, on the general rule that if part of any connected conversation or statement be given, the whole may be used; or he may ask the judge, under the latter part of the section, to require the production of the writing, for the last provision of the above section was probably introduced for the purpose of guarding against an unfair use of the power of cross-examining upon a document which either has no existence in fact, or may have been only partially brought before the jury and imperfectly understood. This provision would seem, however, not intended in any way to narrow the old practice as to the production of original documents filed in court, and would be substantially satisfied by the production of any copy on which a witness previously to this enactment could have been cross-examined. See 2 Taylor Evid., 10th ed., § 1448. If the statement be used to contradict the witness, the whole must be put in. *North Australian Territory Co. v. Goldsborough*, 62 L. J. Ch. 603; [1893] 2 Ch. 381.

We have seen, that if a conversation be given in evidence to prove an admission, the *whole* of it must generally be laid before the jury, and this if omitted may be got out by cross-examination, subject, however, to the limitation laid down hereafter under the head of *Re-examination*, *post*, 1 Taylor, Evid., 10th ed., § 725. So if any letter, written statement, or single document be given in evidence, the opposite party may insist on having the whole read and given in evidence as part of the case of the party adducing such evidence. But this rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts or entries in one entire collection of documents, as letter-books, court-rolls, &c., shall *all* be put in evidence by the party producing and reading any one of them, unless they are on the face of them connected with the one already in evidence; and this seems to be the rule whether the documents be of a public or a private nature. Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case. Thus, though the defendant is entitled to have the whole of a particular entry in an account-book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read. *Catt v. Howard*, 3 Stark. 6. See also *Remmie v. Hall*, Manning's N. P. Index, 376. Where the plaintiff called for the production of defendant's letter-book, and read letters of the defendant from it, the defendant was not therefore permitted to read from it,

on his own behalf, other letters not referred to in the letters read by the plaintiff. *Sturge v. Buchanan*, 8 L. J. Q. B. 272; 10 Ad. & E. 598. Where a book of bankruptcy proceedings was put in to prove certain depositions for the plaintiff, the defendant's counsel was not allowed to use other parts of the book to refresh the memory of a witness, unless he put it in as part of his own evidence. *Whitfield v. Aland*, 2 Car. & K. 1015; *Gregory v. Tavernor*, 6 C. & P. 281. But the plaintiff could not read the examination of a defendant by commissioners of bankrupt taken on one day without also reading his continued examination on another day; *Smith v. Biggs*, 5 Sim. 391; nor the cross-examination of defendant without his examination in chief; S. C.; nor the examination in chief without the cross-examination. *Goss v. Quinton*, 12 L. J. C. P. 173; 3 M. & Gr. 825.

When a document is put into the hands of a witness under cross-examination merely to prove the signature, or identity, or general nature of it, the opposite party is not entitled to immediate inspection of it, except sufficiently to enable him to re-examine about the writing, and also to identify the document in case it should afterwards be put in evidence; he may not read the document through, or comment upon its contents, until it is put in on the other side, nor does it till then become evidence in the cause; but if any question be put as to its contents, or any further question be founded on it, there will be a right to inspect it. *Semb. Cope v. Thames Dock Co.*, 2 Car. & K. 757; *Collier v. Nokes*, 2 Car. & K. 1012; *Peck v. Peck*, 21 L. T. 670; H. T. 1870, C. P. See 2 Taylor Evid., 10th ed., § 1413. In general, mere proof of handwriting by a witness, whether on examination in chief or cross-examination, does not oblige the party to put it in evidence or entitle his opponent to use it as evidence, although its absence may, of course, be legitimate ground of comment by him. But the handwriting may of course be disputed if afterwards put in.

A witness may be cross-examined as to his having omitted to mention a fact on a former examination, though that examination was in writing and not produced. *Ridley v. Gyde*, 1 M. & Rob. 197.

Where a witness is brought into court merely for the purpose of producing a written instrument, which is to be proved by another witness, he need not be sworn; *Perry v. Gibson*, 3 L. J. K. B. 158; 1 Ad. & E. 48; and, unless sworn, the other party will not be entitled to cross-examine him. Where a person called to produce a document was sworn by mistake and was asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. *Rush v. Smith*, 3 L. J. Ex. 355; 1 C. M. & R. 94. If a wrong witness is called in consequence of a mistake in his name, and is dismissed on the discovery of the mistake, the other side has no right to cross-examine him. *Clifford v. Hunter*, 3 C. & P. 16. If he is called by error of the counsel and actually sworn, yet if dismissed before examination, he is not liable to be cross-examined. *Wood v. Mackinson*, 2 M. & Rob. 273.

Neither a judge nor an umpire is entitled in a civil action to call a witness without the consent of the parties. *In re Enoch & Zaretzky*, 79 L. J. K. B. 363; [1910] 1 K. B. 327.

Contradicting opponent's witness.] In order to impeach the credit of a witness, evidence may be given of statements made by him at variance with his testimony on the trial; but to lay a foundation for the evidence of such contradictory declaration or conversation, the witness must be asked, on cross-examination, whether he has made such declaration or held such conversation. *The Queen's Case*, 2 Br. & B. 301. Before he can be contradicted he must be asked as to the time, place, and person involved in the supposed contradiction. It is not enough to ask him the general question whether he has ever said so-and-so. *Per Tindal, C.J., Angus v. Smith*, M. & M. 474. By the Crim. P. Act, 1865, ss. 1, 4 (replacing the C. L. P. Act, 1854, s. 23), "if a witness upon cross-examination as to a former statement made by him relative to the subject-matter of the

indictment or proceeding, and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked whether or not he has made such statement." See *Ryberg v. Ryberg*, 32 L. J. P. 112.

Where the object in proving the statements of a witness is not merely to contradict him, but to impeach his moral character by proof of loose and unbecoming language, the evidence seems admissible without previous inquiry of himself. *Carpenter v. Wall*, 9 L. J. Q. B. 217; 11 Ad. & E. 803. Where a document is offered in evidence to contradict the statement of a witness as to a material fact denied by him, it is admissible, though it also tends to prove the issue in the cause for which purpose alone it would have been inadmissible. *Watson v. Little*, 5 H. & N. 472; 29 L. J. Ex. 267.

It has been doubted whether to corroborate the testimony of the witness whose credit has been impeached evidence *contra* is admissible that the witness affirmed the same thing before on other occasions; Gilb. Ev., 6th ed., 135; B. N. P. 294; *Lutterell v. Reynell*, 1 Mod. 283; but the better opinion is that such evidence is generally inadmissible. *R. v. Parker*, 3 Doug. 242. *Acc. per* Ld. Redesdale in *Berkeley Peerage Case*, as cited in 2 Phill. & Arn. Ev., 10th ed. 523, n. It has been observed, however, that the rule is subject to this exception, that where counsel on the other side impute a design to misrepresent, from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist, or when motives of interest would have prompted him to make a different statement of the facts. *Id.*, 523, 524. *Flanagan v. Fahy*, [1918] 2 Ir. R. 361.

An opponent's witness may be contradicted on all points material to the issue; but he cannot be contradicted upon any point not material to the issue, with a view of showing that his evidence, generally, is not worthy of credit. In *Palmer v. Trower*, 22 L. J. Ex. 32; 8 Ex. 247, the plaintiff sued the executor of A. on a joint and several note of A. and B.; the defence being that the note was forged by the plaintiff: the defendant being called as a witness denied, on cross-examination, that he had ever heard B. admit that he had signed the note; it was held, that the plaintiff could not call a witness to prove that B. had made such an admission in the defendant's hearing. It should seem that if the admission of B. had been in A.'s presence, and the note had been sued upon in A.'s lifetime as a joint note, the question would have been material and relevant. A witness, being asked on cross-examination whether he had not said that a bribe had been offered to him to give particular evidence in the case, denied that he had said so: it was held that no evidence could be adduced to show that he *did* say so. *Att.-Gen. v. Hitchcock*, 16 L. J. Ex. 259; 1 Ex. 91. The rule seems to be that, if the witness's answer to a question would, if truly made, tend to qualify, or contradict, or discredit some other relevant part of his testimony, then other evidence may be received to contradict him; and a fact may be considered as "relevant," though not part of the transaction in issue, if the truth or falsehood of it may fairly influence the belief of the jury as to the whole case; *semb. Melhuish v. Collier*, 15 Q. B. 878; 19 L. J. Q. B. 493; but a merely irrelevant inquiry cannot be allowed. It is true that, by showing the levity or falsehood of a witness even on irrelevant matters, his testimony would in some degree be discredited; yet the expediency of confining the field of inquiry within a reasonable compass has made it necessary to assign a limit to such collateral issues. Without such restraint the examination of each witness might give rise to different issues remote from the immediate issue on the record, which the parties have not come prepared to try, and by which both witnesses and parties might be unfairly

prejudiced. On this sort of evidence the observations of the court in *Att.-Gen. v. Hitchcock*, *supra*, are very instructive and important. See also *Hollingham v. Head*, 4 C. B. (N. S.) 388; 27 L. J. C. P. 241.

Evidence of character.] In actions unconnected with character, evidence of the character of the parties is inadmissible, as irrelevant to the issue. As, however, the veracity of the witness is always a point in issue, his character for veracity may be impugned by the party interested in discrediting him, by showing that he is unworthy of credit. If a witness's character for veracity be impeached, witnesses may be called in support of it.

Although evidence is admissible to show that a witness bears such a character and reputation that he is unworthy of credit, yet it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one) to prove particular facts in order to discredit him. *R. v. Watson*, 2 Stark. 152; *R. v. Layer*, 14 How. St. Tr. 285. The question as to the witness's character for credibility must be put in a general form. *Mawson v. Hartsink*, 4 Esp. 102. The usual form of the question is as follows:—"From your knowledge of the witness do you believe him to be a person whose testimony is worthy of credit?" See *R. v. Rowton*, 34 L. J. M. C. 57; L. & C. 520, and *R. v. Brown*, 36 L. J. M. C. 59; L. R. 1 C. C. R. 70. And although a witness's answer upon a collateral fact is usually conclusive; *R. v. Watson*, *supra*; yet where the object of the inquiry is to prove that the witness has endeavoured to corrupt another to give false testimony in the cause, his denial of the fact or refusal to answer will not prevent the party from proving it by other evidence. *The Queen's Case*, 2 Br. & B. 311. But this can only be done by the opposite party; the person calling a witness, having once put him forward as a person worthy of belief, though he may contradict him, cannot afterwards discredit him, if the testimony of the witness should turn out unfavourable, or even should the witness assume a position of hostility towards the party calling him. *Ewer v. Ambrose*, 3 L. J. (O. S.) K. B. 128; 3 B. & C. 746. This is the rule at common law, and is affirmed by the Crim. L. P. Act, 1865, ss. 1, 3.

By the Crim. P. Act, 1865, ss. 1, 6 (replacing the C. L. P. Act, 1854, s. 25) (which, however, must be read subject to sect. 1 (f) of the Criminal Evidence Act, 1898, as to the cross-examination of an accused who gives evidence), "a witness may be questioned as to whether he has been convicted of any felony or misdemeanor, and, upon being so questioned, if he either denies or does not admit the fact or refuses to answer, it shall be lawful for the cross-examining party to prove such conviction; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for such offence, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was convicted, or by the deputy of such clerk or officer," . . . "shall, upon proof of the identity of the person, be sufficient evidence of the said conviction, without proof of the signature or official character of the person appearing to have signed the same." As to the signature to the certificate, see *R. v. Parsons*, 35 L. J. M. C. 167; L. R. 1 C. C. R. 24.

Evidence that a witness is not impartial.] What has been said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness does not apply where the facts sought to be proved go to show that the witness does not stand indifferent between the contending parties. Best Ev., 10th ed., § 644 (3). In *R. v. Yewing*, 2 Camp. 638, the witness was asked whether he had not said that he would be avenged upon the prisoner, and would soon fix him in gaol. This he denied, and Lawrence, J., allowed him to be contradicted. It may be proved that a witness has been bribed; *R. v. Langhorn*, 7 St. Tr. 446; or that he has endeavoured to suborn others; *R. v. Strafford (Lord)*, 7 St. Tr. 400; both which cases were recognized in *Att.-Gen. v. Hitchcock*, 16 L. J. Ex. 259; 1 Ex. 93.

Recalling witness.] It is in the discretion of the judge whether he will permit a witness to be recalled. *Adams v. Bankart*, 1 C. M. & R. 681; *The Queen's Case*, 2 Br. & B. 284; *Cattlin v. Barker*, 17 L. J. C. P. 62; 5 C. B. 201.

Re-examination.] A re-examination must be confined to the subject-matter of the cross-examination. The rule is thus laid down by Abbott, C.J., in *The Queen's Case*, 2 Br. & B. 297: "I think the counsel has a right, upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also the motive by which the witness was induced to use those expressions: but I think he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness. . . . I distinguish between a conversation which a witness may have had with a party to the suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit, relative to the subject-matter of the suit, are in themselves evidence against him in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel of that party has a right to lay before the court the whole which was said by his client in the same conversation, not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion." This was, however, qualified in *Prince v. Samo*, 7 L. J. Q. B. 123; 7 Ad. & E. 627, where it was held that a witness of the plaintiff cross-examined as to the assertions of the plaintiff in a particular conversation, could not be examined as to other *unconnected* assertions of the plaintiff in the same conversation, although connected with the subject of the suit. In that case the other part of the conversation was attempted to be shown for the plaintiff in order to prove plaintiff's case by his own assertion; and it was observed by the court that, if such proof were admitted, it ought to go to the jury, and might thus obtain a verdict for the plaintiff on his own unsupported assertion out of the court. It must not therefore be assumed that cross-examination on part of a conversation necessarily lets in proof of the whole of it.

Where a witness of the plaintiff stated, on cross-examination, facts which were not strictly evidence, but might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. *Blewett v. Tregonning*, 3 Ad. & E. 554.

Evidence in reply.] When a party is taken by surprise he should be allowed to produce fresh evidence to meet the case against him. *Bigsby v. Dickinson*, 46 L. J. Ch. 280; 4 Ch. D. 24.

PROOF BY AFFIDAVITS OR DEPOSITIONS.

Although proofs are usually given at the trial by the oral evidence of witnesses, in certain cases affidavits or depositions are allowed to be substituted for such oral evidence. See Rules, 1883, O. xxxvii. Affidavits or depositions so taken will, under O. xxxvii. 1. 4, be proved at the trial

by production of office copies; see also *Duncan v. Scott*, 1 Camp. 101; *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536; but the order so to take evidence must, it seems, be previously proved. See *Bayley v. Wylie*, 6 Esp. 85. The judge cannot, under rule 1, at the trial, order an affidavit to be read, when the opposite party *bonâ fide* desires the witness to be produced for cross-examination; *Blackburn Union v. Brooks*, 47 L. J. Ch. 156; 7 Ch. D. 68; unless the witness cannot be found. See *Gornall v. Mason*, 56 L. J. P. 86; 12 P. D. 142.

By Rules, 1883, O. xxxviii. r. 25, "Within 14 days after a consent for taking evidence by affidavit as between the parties has been given, or within such time as the parties may agree upon or the court or a judge may allow, the plaintiff shall file his affidavits and deliver to the defendant or his solicitor a list thereof." Rule 26: "The defendant within 14 days after delivery of such list, or within such time as the parties may agree upon, or the court or a judge may allow, shall file his affidavits and deliver to the plaintiff or his solicitor a list thereof." Rule 27: "Within 7 days after the expiration of the last-mentioned 14 days, or such other time as aforesaid, the plaintiff shall file his affidavits in reply, which affidavits shall be confined to matters strictly in reply, and shall deliver to the defendant or his solicitor a list thereof." Rule 28: "When the evidence is taken by affidavit, any party desiring to cross-examine a deponent who has made an affidavit filed on behalf of the opposite party, may serve upon the party by whom such affidavit has been filed a notice in writing, requiring the production of the deponent for cross-examination at the trial, such notice to be served at any time before the expiration of 14 days next after the end of the time allowed for filing affidavits in reply, or within such time as in any case the court or a judge may specially appoint; and unless such deponent is produced accordingly, his affidavit shall not be used as evidence unless by the special leave of the court or a judge."

The consent under rule 25 must be a formal consent in writing. *New Westminster Brewery Co. v. Hannah*, 1 Ch. D. 278. It may be given by the guardian *ad litem* of an infant. *Knatchbull v. Fowle*, *Id.* 604. The plaintiff may use affidavits in reply which are confirmatory only of his evidence in chief, notwithstanding rule 27. *Peacock v. Harper*, 47 L. J. Ch. 233; 7 Ch. D. 649.

Unless the agreement has been that evidence should be given by affidavit *only*, the affidavits may be supplemented by the oral evidence of the deponents. *Glossop v. Heston, &c., Local Board*, 47 L. J. Ch. 536.

Where the defendant's evidence is given by affidavit, supplemented by the oral testimony of the deponent, the plaintiff is not entitled to cross-examine those deponents whose affidavits had not been read. *Massam v. Thorley's Cattle Food Co.*, W. N., [1879] 181. As to the power of the judge to order a trial by witnesses, and to exclude the affidavits filed, see *Lovell v. Wallis*, W. N., [1893] 231.

EFFECT OF DOCUMENTARY EVIDENCE.

Under this head will be collected some of the principal cases relating to the effect and authority of such instruments when duly proved, and the circumstances under which they are admissible evidence of the facts which they purport to show.

Where a document, inadmissible as evidence, has been in part read at the instance of counsel, he cannot afterwards object to the admissibility of the whole of it. *Laybourn v. Crisp*, 8 L. J. Ex. 118; 4 M. & W. 320.

Effect of Acts of Parliament.

The preamble of a public general Act of Parliament, reciting the existence of certain outrages, is evidence to prove that fact; because in judgment of law, every subject is privy to the making of it. *R. v. Sutton*, 4 M. & S. 532. But it seems that allegations of fact in a public statute are not conclusive; therefore, a place named as a borough or corporation in the Municipal Reform Act, may be proved not to be one. *R. v. Greene*, 6 Ad. & E. 548. Indeed, recitals in a private Act are not conclusive either of fact or law. *R. v. Haughton*, 1 E. & B. 501; 22 L. J. M. C. 89; *Merttens v. Hill*, 70 L. J. Ch. 489; [1901] 1 Ch. 842. A private statute, though it contain a clause requiring it to be judicially noticed as a public one, is not evidence at all against strangers, either of notice or of any of the facts recited. *Ballard v. Way*, 5 L. J. Ex. 207; 1 M. & W. 520; *Brett v. Beales*, M. & M. 421; *Taylor v. Parry*, 9 L. J. C. P. 298; 1 M. & Gr. 604. But it may be evidence of reputation respecting a franchise as between lords and tenants of a manor. *Carnarvon (Earl) v. Villebois*, 14 L. J. Ex. 233; 13 M. & W. 313. In *Beaufort (Duke) v. Smith*, 19 L. J. Ex. 97; 4 Ex. 456, a general saving in certain Acts of the plaintiff's rights, including a right of toll on all coal exported within his manor, was considered to be inadmissible evidence of such claim in favour of the plaintiff. It is observable that in both the last cases, the rights saved were of a public nature; the Acts were local and personal, public Acts; and the savings were in the usual form in such Acts. In *Carnarvon (Earl) v. Villebois*, *supra*, the Act was an inclosure Act, to which the lords and copyholders were, as it were, parties, and the claim was a free-warren over copyholds. In *Beaufort (Duke) v. Smith*, *supra*, the Acts were harbour and canal Acts. As to the effect of the marginal notes, and title, *vide ante*, pp. 93, 94.

Effect of Proclamations, Gazette, State Papers, &c.

The King's proclamation, being an act of state of which all ought to take notice (*per Treby, C.J., Wells v. Williams*, 1 Ld. Raym. 283), is evidence to prove a fact of a public nature recited in it, viz., that certain outrages had been committed in different parts of certain counties. *R. v. Sutton*, 4 M. & S. 532.

The Gazette is evidence of all acts of state published therein; as where it states that certain addresses have been presented to the King, it is evidence to prove that fact. *R. v. Holt*, 5 T. R. 436. Proclamations may be proved by production of the Gazette. *Ibid.*, 443; *Att.-Gen. v. Theakstone*, 8 Price, 89; and see the Documentary Evidence Act, 1868. But the Gazette is not evidence (unless made so by statute) of matters therein contained which have no reference to acts of state, as a grant by the King to a subject of a tract of land or of a presentation; *R. v. Holt*, 5 T. R. 443; or of the appointment of an officer to a commission in the army; *Kirwan v. Cockburn*, 5 Esp. 233; *R. v. Gardner*, 2 Camp. 513.

A paper from the Secretary of State's office, transmitted by the British ambassador at a foreign court, and purporting to be a declaration of war by the government of that country against another foreign state, is evidence of the precise period of the commencement of that war. *Thelluson v. Costing*, 4 Esp. 266. The existence of a war between this country and another requires no proof. *Post. Cr. L.* 219; *R. v. De Berenger*, 3 M. & S. 67. The articles of war, printed by the King's printer, are evidence of such articles; *R. v. Withers*, cited 5 T. R. 446; of which, it seems, the court will take judicial notice. *Per Abbott, C.J., Bradley v. Arthur*, 4 B. & C. 304. By the Bankruptcy Act, 1914, s. 137, the Gazette is evidence, in some cases conclusive, of certain proceedings in bankruptcy stated therein. A certificate from the Foreign or Colonial Office, as the case may be, is conclusive as to the status of an independent foreign sovereign. *Mighell v. Sultan of Johore*, 63 L. J. Q. B. 593; [1894] 1 Q. B. 149.

Effect of Parliamentary Journals.

The Journal of the House of Lords, containing an address of the Lords to the King, and the King's answer, in which certain differences were stated to exist between the Kings of England and Spain, was admitted to prove the fact of such differences. *R. v. Francklin*, 17 How. St. Tr. 627; *R. v. Holt*, 5 T. R. 445. But the resolutions of either House of Parliament are not evidence of extrinsic facts therein stated; thus the resolution of the House of Commons, stating the existence of the Popish Plot, was held to be no evidence of that fact. *Oates' Case*, 10 How. St. Tr. 1165, 1167.

Effect of Judgments, &c., as Estoppels, or as Evidence.

Effect of judgments and verdicts in the superior courts, with regard to the parties.] The judgment of a court of concurrent jurisdiction directly upon a point is, as a plea, a bar, and, as evidence, conclusive upon the same matter between the same parties; but it is also a general principle that a transaction between two parties in a judicial proceeding ought not to bind a third; for it would be unjust to bind any person who could not be admitted to make a defence, or to examine witnesses, or to appeal from a judgment which he might think erroneous. Therefore the depositions of witnesses in another cause in proof of a fact; the verdict of a jury finding a fact; and the judgment of the court on facts so found, although evidence against the parties and all claiming under them, are not in general to be used to the prejudice of strangers. *Per De Grey, C.J., Kingston's (Duchess) Case*, 20 St. Tr. 538. The language of the judges on the first proposition enunciated above, has been thus explained, viz., that the judgment is conclusive (*i.e.*, an estoppel) if pleaded, where there is an opportunity of pleading it; but that where there is no such opportunity, then it is conclusive as evidence; but if the party forbear to rely upon an estoppel when he may plead it, he is taken to waive the estoppel, and to leave the prior judgments as evidence only for the jury. This view is confirmed by the opinion of the court in *Freeman v. Cooke*, 18 L. J. Ex. 114; 2 Ex. 654; *Litchfield v. Ready*, 20 L. J. Ex. 51; 5 Ex. 939; *R. v. Blackmore*, 21 L. J. M. C. 60; 2 Den. C. C. 410; *R. v. Haughton*, 1 E. & B. 501; 22 L. J. M. C. 89. See further, as to the effect of a judgment as an estoppel, or as evidence only, *Outram v. Morewood*, 3 East, 365; and *Vooght v. Winch*, 2 B. & A. 662. The effect of a judgment is the same whether obtained by consent or otherwise. *South American & Mexican Co. In re; Ex pte. Bank of England* [1895] 1 Ch. 37. Where the actual grounds of the judgment can be clearly discovered from the judgment itself it is conclusive as to the grounds, as well as with reference to the actual matter decided. *Bank of Hindustan, In re; Alison's Case*, 43 L. J. Ch. 1; L. R. 9 Ch. 1, 25; *Priestman v. Thomas*, 53 L. J. P. 109; 9 P. D. 210. A defendant by allowing judgment to go against him by default in an action to which he has a good defence is not estopped from pleading such defence in a subsequent action against him by the same plaintiff, if such defence be not inconsistent with any traversable averment in the declaration in the former action. *Howlett v. Tarte*, 31 L. J. C. P. 146; 10 C. B. (N. S.) 813; *Humphries v. Humphries*, 79 L. J. K. B. 919; [1910] 2 K. B. 531. But this rule does not apply to a plea in confession and avoidance, or to a special plea necessitating proof by the defendant. *Humphries v. Humphries*, 79 L. J. K. B., at p. 920; [1910] 2 K. B. at p. 535; *Cooke v. Rickman*, 81 L. J. K. B. 38; [1911] 2 K. B. 1125.

In order to bind a party, he must have sued or been sued in the same character in both suits. In an action against an executor suggesting a devastavit, he is estopped by a prior judgment against him finding assets. *Jewesbury v. Mummery*, 42 L. J. C. P. 22; L. R. 8 C. P. 56. But in an action by an executor on a bond, he will not be estopped by a judgment in an action brought by him as administrator on the same bond, but he may

show the letters of administration recalled. *Robinson's Case*, 5 Co. Rep. 32 b. In considering the effect of judgments the court will, it seems, look to the real, and not only to the nominal, parties to the suit. Thus, a verdict in trespass against a person who justified as servant of J. S. was allowed to be given in evidence against the defendant, who also acted under J. S., J. S. being shown to be the real defendant in both causes. *Kinnersley v. Orpe*, 2 Doug. 517. Where, in a replevin suit between A. and the bailiff of B., it was found that A. was tenant of B., the judgment was received as conclusive evidence against A. of his tenancy in a suit by B. against A. for subsequent rent. *Hancock v. Welsh*, 1 Stark. 347. But where in trespass *q. c. f.*, the defendant pleaded *lib. ten.* in P., and it appeared that P. had sold and conveyed to plaintiff, and afterwards conveyed, without a covenant for title, to defendant, who had mortgaged to P.: it was held that P. was a competent witness for the defendant, because the verdict would not be evidence for him as between him and the plaintiff. *Simpson v. Pickering*, 4 L. J. Ex. 21; 1 C. M. & R. 527. A former judgment in ejectment was evidence on another ejectment, where the lessor of the plaintiff and the defendant were the same. *Doe d. Strode v. Seaton*, 5 L. J. Ex. 73; 2 C. M. & R. 728. In ejectment on the demise of a mortgagee, a verdict and recovery in a former ejectment brought by the defendant against the mortgagor since the mortgage is not evidence against the plaintiff. *Doe d. Smith v. Webber*, 3 L. J. K. B. 148; 1 Ad. & E. 119. Where a party could not have been prejudiced by a verdict if it had gone against him, a verdict in his favour in a former action will not be available as evidence for him, even against one who was a party to it. *Wenman v. Mackenzie*, 5 E. & B. 447; 25 L. J. Q. B. 44.

A balance order to enforce payment of a call, due from a contributory of a company, is not in the nature of a judgment, and does not merge the right of action for the call. *Westmoreland Slate Co. v. Feilden*, 60 L. J. Ch. 680; [1891] 3 Ch. 15.

Effect of judgments and verdicts in the superior courts with regard to privies.] Privies stand in the same situation as those to whom they are privy. Thus, a privy in blood, as an heir, may give in evidence a verdict for, and is bound by a verdict against, his ancestor. *Lock v. Norborne*, 3 Mod. 142; *Outram v. Morewood*, 3 East, 346; *Whittaker v. Jackson*, 2 H. & C. 926; 33 L. J. Ex. 181. So, of privies in estate; therefore, if there be several remainders limited by the same deed, a verdict for one in remainder may be given in evidence for one next in remainder. *Pyke v. Crouch*, 1 Ld. Raym. 730. See *Doe d. Teynham (Lord) v. Tyler*, 8 L. J. (O. S.) C. P. 222; 6 Bing. 390; *Doe d. Harlow*, 12 Ad. & E. 42 (d). But a verdict against tenant for life or years is inadmissible for or against the reversioner. *B. N. P. 232*; *Rees v. Watts*, 3 M. & W. 527; see *Wenman v. Mackenzie*, 25 L. J. Q. B. 44; 5 E. & B. 447, and the proposition to the contrary in Com. Dig. Testm. (A. 5) cannot be maintained. A verdict for or against A. is admissible against a party claiming under A. where the claim originated since the verdict. *Semb. per Littledale, J.*, in *Doe d. Foster v. Derby (Earl)*, 3 L. J. K. B. 191; 1 Ad. & E. 783, 790. But not otherwise, *Mercantile Investment Co. v. River Plate Trust and Loan Agency*, 63 L. J. Ch. 366; [1894] 1 Ch. 578. A verdict against one defendant, in case for a nuisance, is evidence of the plaintiff's right in a second action against the same and other defendants, if the latter claim under the first defendant. *Strutt v. Bovingdon*, 5 Esp. 58. A. and B. sued defendant for diverting water from their works; they were allowed to give in evidence a former recovery by A. alone against the same defendant for a similar injury, although B. had been a witness for A. in the first action; and it was held that the possession by A. and B. of the same works was evidence of privity of estate. *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 133. Privity in law is sufficient; thus, a verdict against an intestate or testator binds his representatives. *R. v. Hebden*, Andr. 389. In the same manner a

judgment against the schoolmaster of a hospital, concerning the rights of his office, is evidence against his successor. *Travis v. Chaloner*, 3 Gwill. 1237. The estoppel must be mutual. *Concha v. Concha*, 56 L. J. Ch. 257; 11 App. Cas. 541. As to the effect of judgment recovered under the Married Women's Property Act, 1882, see *Beck v. Pierce*, 58 L. J. Q. B. 516; 23 Q. B. D. 316. Where A., though not a party to an action, knowing what is passing, stands by and sees his battle fought by B. in the same interest, A. may be bound by the result; *In re Lart*, 65 L. J. Ch. 846; [1896] 2 Ch. 788. So where A. has expressly indemnified B., A. will as against B. be bound. *Parker v. Lewis*, 43 L. J. Ch. 281; L. R. 8 Ch. 1035, 1059.

Effect of judgments and verdicts in the superior courts with regard to strangers.] There are several exceptions to the general rule that no one shall be bound or prejudiced by judgment to which he is not party or privy. They are admissible where they relate to public matters. Thus, in the case of customs or tolls, verdicts, whether recent or ancient, respecting the same custom, or toll, are evidence between other parties. *London (City of) v. Clerke*, Carth. 181; B. N. P. 233. So in the case of customary commoners, a verdict in an action for or against one is evidence for or against another claiming the same right. *Per* Ld. Kenyon, *Reed v. Jackson*, 1 East, 357. So a verdict with regard to a public right of way. *Id.* 355. And it seems that in all cases where general reputation is evidence, a verdict upon the right claimed will also be evidence, even as between strangers to the former record. *Id.* So also where judgment went by default for want of a plea. *Neill v. Devonshire (Duke)*, 8 App. Cas. 135. A verdict may be evidence, though not delivered according to modern forms, if the record be old. Thus, where the Bishop of L. was presented in the sheriff's tourn for not repairing a bridge, and the presentment, being removed into K. B. by *certiorari*, was tried at N. P., 20 Edw. 3, the jury found that the bishop was not liable to repair, that the bridge was built by alms within 60 years, and that they knew of no one liable to repair: held that, although the only material finding was the non-liability of the then defendant, yet it was not to be assumed that the functions of the jury were so limited *tempore* Edw. 3 as now, and that the record was evidence in favour of the defendant (a stranger to the record), who was charged with a prescriptive liability to repair *ratione tenuræ*, especially when followed by a grant of pontage by the same king, reciting that no one was bound to repair the bridge. *R. v. Sutton*, 7 L. J. Q. B. 205; 8 Ad. & E. 516. A judgment in favour of a lord of a manor on a *quo warranto* for usurping a franchise is evidence of the right even against copyholders of inheritance. *Carnarvon (Earl) v. Villebois*, 14 L. J. Ex. 233; 13 M. & W. 313. So, allowances *in eyre* as against strangers. S. C. *per* Parke, B. The record of a former action of *indebitatus assumpsit* for work and labour by an officer, coupled with oral proof of the point in issue, is evidence of the customary rights of a public corporate officer. *Laybourn v. Crisp*, 8 L. J. Ex. 118; 4 M. & W. 320. But the verdict in such cases is not conclusive. *Biddulph v. Ather*, 2 Wils. 23. And a prosecution by the Crown for usurping tolls resisted, and not carried on to judgment, is not admissible on a trial of the same right. *Per* Tindal, C.J., *Lancum v. Lovell*, 6 C. & P. 437.

A judgment of ouster against a municipal officer is evidence *inter alios* upon issue joined in a *quo warranto* whether he was such officer at the time of defendant's election. *R. v. Hebden*, Stra. 1109; S. C., more fully in 2 Selw. N. P. 13th ed. 1136. And the record of ouster will be conclusive if the ouster avoid the election and the judgment was without fraud; *R. v. York (Mayor)*, 5 T. R. 66, 72; otherwise not. 2 Selw. *ubi supra*; *R. v. Grimes*, 5 Burr. 2598. Such judgments are in the nature of judgments *in rem*.

Where a judgment is produced merely for the purpose of proving the

fact of such recovery and judgment, and not with a view to prove the truth of the facts upon which the judgment was founded, it may be evidence for or against a stranger. Thus, a verdict against a master in an action for the negligence of his servant is evidence in an action by the master against the servant to prove the amount of damages, though not of the fact of the injury. *Green v. New River Co.*, 4 T. R. 590. Plaintiff became surety for a collector on having an indemnity bond from defendant. In an action on it, the breach was, that the plaintiff had been forced to pay a large sum in consequence of the collector's default, and the issue was on a traverse of the plaintiff being forced to pay it. On the trial a judgment for £500 recovered without contest against the plaintiff as surety was given in evidence: held that the judgment could not be used as evidence to show the amount which the plaintiff had been forced to pay; the amount for which the collector was liable ought to have been shown as against the defendant. *King v. Norman*, 17 L. J. C. P. 23; 4 C. B. 884.

A judgment against one of two joint tortfeasors, although unsatisfied, is a bar to an action against the other for the same cause. *Brown v. Wootton*, Cro. Jac. 73; *Yelv.* 67; *Moor*, 762; *Brinsmead v. Harrison*, 41 L. J. C. P. 190; L. R. 7 C. P. 547. This rule has not been affected by any of the rules of Order xxvii. *Goldrei Foucard & Son v. Sinclair*, 87 L. J. K. B. 261; [1918] 1 K. B. 180. See also *The Bellcairn*, 55 L. J. P. 3; 10 P. D. 161.

So a judgment against one of two joint contractors. *Kendall v. Hamilton*, 46 L. J. C. P. 665; 3 C. P. D. 203; 48 L. J. C. P. 705; 4 App. Cas. 504; *Hammond v. Schofield*, 60 L. J. Q. B. 539; [1891] 1 Q. B. 453; *King v. Hoare*, 14 L. J. Ex. 29; 13 M. & W. 494. *Secus*, where the debt is several as well as joint. S. C. And where there is no joint contract or relation of principal and agent an unsatisfied judgment against one person for the price of goods is no bar to a subsequent action against another person for the price of the same goods. *Isaacs v. Salbstein*, 85 L. J. K. B. 1433; [1916] 2 K. B. 139.

The proceedings and verdict of the jury in a suit in the Divorce Court are not admissible in evidence in an action *inter alios*, unless there has been a sentence altering the *status* of the parties to the suit. *Needham v. Bremner*, 35 L. J. C. P. 313; L. R. 1 C. P. 583.

Effect of judgments and verdicts with regard to the subject matter of the suit.] A judgment between the same parties and upon the same cause of action is conclusive, although the form of action is different. A verdict in trover is a bar in an action for money had and received, brought for the value of the same goods. *Hitchin v. Campbell*, 2 W. Bl. 827. So a judgment in debt was a bar in an action of *assumpsit* on the same contract. *Slade's Case*, 4 Co. Rep. 94 b. So a judgment in trespass, in which the right of property is determined, is a bar to trover for the same taking. Com. Dig. Action (K. 3). But where the party mistook his form of action and failed on that account, the judgment in such action did not conclude him. *Ferrers v. Arden*, Cro. Eliz. 668; *Godson v. Smith*, 2 Moore, 157. If the plaintiff omitted to give any evidence under one of two distinct counts in a former action, under which he might have recovered the amount, he was not precluded from giving it in a subsequent action. *Seddon v. Tutop*, 6 T. R. 607; and see *Eastmure v. Laws*, 8 L. J. C. P. 236; 5 Bing. N. C. 444; *Thorpe v. Corper*, 5 Bing. 116, and the observations of the court in *Henderson v. Henderson*, 3 Hare, 115. See also *Widgery v. Tepper*, 47 L. J. Ch. 550; 7 Ch. D. 423. So where separate injuries arise from the same wrongful act, recovery for one such injury is no bar to a recovery for another. *Brunsdon v. Humphrey*, 53 L. J. Q. B. 476; 14 Q. B. D. 141; *Darley Main Colliery Co. v. Mitchell*, 11 App. Cas. 127. So, although an order of removal quashed at the sessions, is evidence between the same parishes that there is no settlement in the appellant parish, yet a subsequent cause of removal may be shown. *R. v. Wick St. Lawrence*, 3 L. J.

M. C. 12; 5 B. & Ad. 526. Judgment for the defendant in an action on part of one connected libel, is a bar to an action brought in respect of another part. *Macdougall v. Knight*, 25 Q. B. D. 1; 59 L. J. Q. B. 517. Where the declaration in the second action was framed in such a manner that the causes of action *might* be the same as those of the first, it was incumbent on the party bringing the second action to show that they were not the same. *Bagot (Lord) v. Williams*, 3 B. & C. 239.

It is a general rule that a judgment is only evidence where it is direct upon the point which it is offered in evidence to prove. It has been denied to be evidence of any matter which came collaterally in question; or of any matter incidentally cognisable; or of any matter to be inferred by argument from the judgment. *Kingston's (Duchess) Case*, 20 How. St. Tr. 533; *Blackham's Case*, 1 Salk. 290. This rule, however, has not been strictly adhered to, and requires qualification. Thus, in settlement cases, an order of removal, unappealed against or confirmed, has always been held to be conclusive evidence not merely of the fact directly denied, but also of those facts which are necessary to arrive at the decision; any fact on which the judgment of the court *must* have been based cannot be considered as merely collateral. *R. v. Hartington*, 4 E. & B. 780, 790; 24 L. J. M. C. 98. A verdict with judgment is not evidence of an immaterial allegation, although included in a general traverse. *Shearman v. Burnard*, 8 L. J. Q. B. 261; 10 Ad. & E. 593.

As to judgments *in rem*, and their effect as against strangers, see the next head.

Effect of Judgments in rem.

There are various legal proceedings, not being suits *inter partes* merely, which bind all mankind, until set aside in due course. The most remarkable examples occur in proceedings brought on the revenue side of the Court of Exchequer *in rem*; by revenue officers; in the Courts of Admiralty, in the Courts of Probate and Divorce, and in the Spiritual Courts. Instances of some of those will be given under future heads. Judgments for the Crown on *scire facias* for the repeal of patents, and informations in the nature of *quo warranto* for seizure of franchises, or ouster from offices, are also of the same nature. A judgment of condemnation of goods in the Exchequer, upon a proceeding *in rem*, is conclusive as to all the world; and therefore, after such judgment, trespass will not lie against the officer who seized the goods to try the point again. *Scott v. Shearman*, 2 W. Bl. 977. But if the proceeding were *in personam* merely, as a conviction for penalties, the judgment is not evidence (except of the fact of conviction) in any case in which the parties are different. *Hart v. M'Namara*, 4 Price, 154, n. A conviction by commissioners of excise on an information for an offence against the excise laws, is conclusive; *Fuller v. Fotch*, Carth. 346; and binds a stranger. *Roberts v. Fortune*, Hargr. Law Tracts, 468, n. It has been said that an acquittal in the Exchequer upon a seizure made for want of a permit is conclusive evidence in an action of trespass that the permit was regular; *per* Ld. Kenyon, *Cooke v. Sholl*, 5 T. R. 255; Vin. Ab. Evid. (A. b. 23); but this opinion has been questioned; for the acquittal does not, like a conviction, ascertain any precise fact, and may have proceeded on the ground of insufficient evidence. 1 Phill. & Arn. Ev., 10th ed., 48, 49. A conviction *in rem* was evidence, though obtained by the evidence of the very party who used it. *Davis v. Nest*, 6 C. & P. 167. A decree of the Court of Probate granting probate and declaring the domicile of the testator is not, as a judgment *in rem*, conclusive as to domicile, unless the declaration was essential to the grant. *Concha v. Concha*, 56 L. J. Ch. 257; 11 App. Cas. 541.

When a judge has, under the Parliamentary Elections Act, 1868 (31 & 32 V. c. 124), tried an election petition, his certificate under sect. 11 (13), as to who is duly elected, is a decision *in rem* and conclusive. *Waygood v.*

James, 38 L. J. C. P. 195; L. R. 4 C. P. 361. But his report under sect. 11 (14, 15), has not this effect. *Stevens v. Tillett*, 40 L. J. C. P. 58; L. R. 6 C. P. 147.

A judgment *in rem* of a competent foreign tribunal is conclusive, and cannot, in the absence of fraud, be questioned in our courts. *Cammell v. Sewell*, 3 H. & N. 617; 27 L. J. Ex. 447; affirmed on another ground in 5 H. & N. 728; 29 L. J. Ex. 350; *Castrique v. Imrie*, 8 C. B. (N. S.) 405; 30 L. J. C. P. 177; L. R. 4 H. L. 414; *Castrique v. Behrens*, 3 E. & E. 709; 30 L. J. Q. B. 163. As to the effect of a decree of divorce by a foreign court, see *Bater v. Bater*, 75 L. J. P. 60; [1906] P. 209. A foreign sentence of condemnation is not evidence of capture, but after other proof of capture it is evidence to show the grounds of condemnation. *Marshall v. Parker*, 2 Camp. 69.

Effect of Verdicts.

The *postea* was evidence of a trial had. But the N. P. record alone was no evidence of it without the *postea* indorsed. *Id.* As between co-plaintiffs and co-defendants for contribution, the *postea* was proof of the damages recovered without proof of the judgment, but not of the costs of suit; *Foster v. Compton*, 2 Stark. 365; and if the verdict and damages be entered generally, oral evidence is admissible to explain on which count the damages were given. *Preston v. Peeke*, 27 L. J. Q. B. 424. And a *postea* has been received to prove a set-off to the extent of the verdict in a subsequent action between the same parties. *Garland v. Scoones*, 2 Esp. 648.

Now, the certificate of the associate or master will take the place of the *postea*.

Effect of Writs.

The production of a writ, with the sum indorsed, was evidence of the amount for which the arrest was made. *Brown v. Dean*, 5 B. & Ad. 848. When commissions of bankrupt used to be issued, a writ superseding the commission was held evidence both of the fact of the commission, and of the date of it as recited, in an action by the assignees. *Gervis v. Grand Water Canal Co.*, 5 M. & S. 76; *Ledbetter v. Salt*, 6 L. J. (O. S.) C. P. 147; 4 Bing. 623, 626. So, in case of a *fiat*. *Wright v. Colls*, 19 L. J. C. P. 60; 8 C. B. 150. A writ of execution is evidence for the sheriff or his vendee, as against the execution debtor, without producing the judgment; but not against strangers. *Doe d. Batten v. Murless*, 6 M. & S. 110. Nor is it evidence for the sheriff's vendee, if he be the execution creditor. *Doe d. Bland v. Smith*, Holt, N. P. 589.

Effect of Inquisitions, &c.

Although an inquisition taken before the coroner *super visum corporis* was formerly considered conclusive evidence of the fact found by it against the executors or administrators of the deceased; 3 Inst. 55; it is now held that everything done under it is traversable. *Per cur.* in *Garnett v. Ferrand*, 5 L. J. (O. S.) K. B. 221; 6 B. & C. 611; 1 Wms. Saund. 362 *et seq.* (1). But the finding of the jury was held in *Prince of Wales, &c. Association v. Palmer*, 25 Beav. 605, to throw the burden of proof in a civil action on the party alleging the contrary.

An inquisition finding lunacy is evidence of it against third persons, though not conclusive. *Sergeson v. Sealey*, 2 Atk. 412; *Faulder v. Silk*, 3 Camp. 126; *Frank v. Frank*, 2 M. & Rob. 314, 315, n. See *Harvey v. Rex*, 70 L. J. P. C. 107; [1901] A. C. 601. Inquests of office duly taken under legal commissions are evidence between third parties. Inquisitions *post-*

mortem are admissible evidence of the facts found by them. *Rowe v. Brenton*, 3 M. & Ry. 141, 142. An inquisition *post-mortem* reciting a conveyance in *hæc verba* is evidence of it for a party who claims title under it. *Burridge v. Sussex (Earl)*, 2 Ld. Raym. 1292: *Accord. per Parke, B.*, in *Wood v. Morewood*, Derby Sum. Ass. 1841. An inquisition taken after the attainer of A. finding of what lands he was seised, is evidence of A.'s seisin as against strangers. *Neill v. Devonshire (Duke)*, 8 App. Cas. 135. So, an extent of Crown lands in the Exchequer, taken in pursuance of 4 E. 1, stat. 1, is evidence of the matters returned in it; *Rowe v. Brenton*, 3 M. & Ry. 164; or an extent of lands purchased by the Crown of a subject purporting to be made by a steward of the Crown and found in the Land Revenue Office. *Doe d. William the Fourth v. Roberts*, 14 L. J. Ex. 274; 13 M. & W. 520. The returns of inquisitions taken by special commissions, *temp.* Ed. 1, called the Hundred Rolls. S. C. *Id.* 140. Old returns by a bishop to a writ out of the Exchequer, inquiring of presentations and vacancies of livings in his diocese, are evidence, even in favour of his successors. *Irish Society v. Derry (Bishop)*, 12 Cl. & F. 641. But a document, *tempore Eliz.*, produced from the office of the Duchy of Lancaster, purporting to be a survey of a duchy manor taken by the deputy surveyor-general by the oaths of twenty tenants of the manor whose names were subscribed, was held inadmissible evidence of the bounds of the manor, there being no proof of the authority under which the survey was taken, and consequently no ground for presuming that any such survey was in fact made. *Evans v. Taylor*, 7 L. J. Q. B. 73; 7 Ad. & E. 617. If, indeed, the document had been generally accepted as a general presentment, it would have been evidence of reputation, *semb.* S. C. An inquisition under a commission from the Court of Exch. to inquire whether a prior or the Crown, after the dissolution of the priory, was seised of certain lands as parcel of a manor, was held to be admissible, but not *conclusive*, evidence of the facts stated in the return. *Tooker v. Beaufort (Duke)*, 1 Burr. 146; Sayer, 297. A survey and report of Crown lands made under the stat. 34 G. 3, c. 75, s. 8, prior to their sale, produced from the Land Revenue Office, is evidence. *Evans v. Merthyr Tydfil Council*, 68 L. J. Ch. 175; [1899] 1 Ch. 241. The surveys of the Church and Crown lands, taken by commissioners under the authority of Parliament during the commonwealth, are admissible in evidence. *Underhill v. Durham*, 2 Gwill. 542; *Rowe v. Brenton*, 3 M. & Ry. 359. And other surveys taken by commissioners during the same period may be evidence of reputation, even though not taken by competent authority. *Freeman v. Read*, 4 B. & S. 178; 32 L. J. M. C. 226.

Inquisitions or surveys made by private lords of manors are not evidence as such on behalf of those claiming under them. A private survey, by direction of Oliver Cromwell, A.D. 1650, of lands granted to him by the Parliament, in which commissioners named by him stated the substance of information received from presentments of the tenants as to manorial tolls and royalties, was not evidence either as reputation of tenants or a public document. *Beaufort (Duke) v. Smith*, 19 L. J. Ex. 97; 4 Ex. 456. A private survey was rejected on a question of parcel, or no parcel, of a lordship. *Daniel v. Wilkin*, 7 Ex. 429; 21 L. J. Ex. 236. Where a manor formerly belonged to the Crown, an ancient grant, and survey of it recorded in the augmentation office, is not evidence for the tenants against their lord. *Semble, Phillips v. Hudson*, 36 L. J. Ch. 301; L. R. 2 Ch. 243, 247.

The *valor beneficiorum*, or Pope Nicholas's taxation, is a document of the same nature as the above-mentioned public documents, and is admissible to prove the rate and value at which the persons employed in that taxation thought fit, at that time, to estimate ecclesiastical benefices. *Bullen v. Michel*, 2 Price, 477. But it is of no value to show whether tithes were then taken in kind or by a modus. *Short v. Lee*, 2 J. & W. 486; 2 Eagle on Tithes, 409, 418. A new *valor beneficiorum* was made, 26 Hen. 8, by virtue of commissions under the great seal, and the surveys under these commissions are admissible to prove the value of the first-fruits and tenths of

ecclesiastical promotions at that period, though they are not conclusive. *Drake v. Smyth*, 5 Price, 377; *Bullen v. Michel*, 4 Dow, 324. A return to inquiries sent by the bishop upon the augmentation of a living by Queen Anne's bounty is in the nature of a public inquisition, and admissible. *Carr v. Mostyn*, 19 L. J. Ex. 249; 5 Ex. 69.

Domesday-book, being a record compiled by the authority of the government and founded on official returns made *temp.* Will. 1, is admissible evidence of the tenure of land, &c.; and where a question arises whether a manor is "terra regis" or ancient demesne, the trial is by inspection of Domesday. Gilb. Ev., 6th ed., 69.

Sheriffs', bailiffs', receivers', and other ministers' accounts of Crown lands, deposited in the public record offices (as the Land Revenue Office or Exchequer), are evidence of the title of the Crown. *Doe d. William the Fourth v. Roberts*, 14 L. J. Ex. 274; 13 M. & W. 520, 523, 524. It has, indeed, been questioned whether they are admissible if the accountant be living. But such accounts seem to stand on a different footing from ordinary accounts, which are not admissible unless the accountant is dead. They are rendered by officers of the Crown, and checked, audited, and enrolled or deposited among the public records, and their authority seems to be independent of the oral testimony of any officer, who, though he may be responsible to the Crown, would probably be personally unable to verify the details of his account.

On account of the interest of the Crown in the Duchy of Cornwall, records of acts affecting its possessions are considered as of a public nature; and on this ground a document, purporting to be a caption of seisin to the use of the first duke by persons assigned by the letters patent to take seisin, found in the Exchequer, and enumerating the possessions of which seisin was then given to the Black Prince, was admitted as evidence not only of seisin, but also of what things the prince had seisin. *Rowe v. Brenton*, 8 B. & C. 743; S. C., 3 M. & Ry. 156. A document purporting to be a survey of a manor while it was part of the possessions of the Duchy of Cornwall, and coming out of proper custody, is admissible as evidence of the boundaries and customs of the manor. *Smith v. Brownlow (Earl)*, 39 L. J. Ch. 636 n.; L. R. 9 Eq. 241.

An inquisition held under a Commission of Sewers issued under stat. 23 H. 8, c. 5, is evidence to prove whether certain lands are within a level or not. *New Romney (Mayor) v. New Romney Sewers Commissioners*, 61 L. J. Q. B. 558; [1892] 1 Q. B. 840.

An inquisition by a sheriff's jury to ascertain the value of property for the information of the sheriff is not, it seems, admissible evidence of property even against the sheriff; *Latkow v. Eamer*, 2 H. Bl. 437; nor is it evidence in his favour; *Glossop v. Pole*, 3 M. & S. 175; unless, perhaps, where the question is whether the sheriff had acted maliciously. S. C.

An inquisition by a sheriff's jury to assess compensation to a landowner under the Lands Clauses Consolidation Act, 1845, s. 68, is conclusive as to the amount of, but not as to the right to, such compensation. *R. v. L. & N. W. Ry.*, 3 E. & B. 443; 23 L. J. Q. B. 185; *Chapman v. Monmouthshire Ry. and Canal Co.*, 5 H. & N. 267; 27 L. J. Ex. 97; *Read v. Victoria Station and Pimlico Ry.*, 1 H. & C. 826; 32 L. J. Ex. 167; *Ricket v. Metropolitan Ry.*, L. R. 2 H. L. 175; and see *Barber v. Nottingham and Grantham Ry.*, 15 C. B. (N. S.) 726; 33 L. J. C. P. 193. If the jury give damages in respect of injury which does not entitle the claimant to compensation, their verdict is altogether bad. *Re Penny*, 7 E. & B. 660; 26 L. J. Q. B. 225. The objection must, however, be taken by *certiorari* and not in an action on the inquisition if the plaintiff is entitled to any damages. *Long Eaton Recreation Grounds Co. v. Midland Ry.*, 71 L. J. K. B. 837; [1902] 2 K. B. 574, 580, 585; following *Metropolitan Board of Works v. Howard*, 5 T. L. R. 732. The verdict of the jury and the judgment thereon, on the trial of a question of compensation, before a judge and jury under 31 & 32 V. c. 119, s. 41, has the same effect only as the sheriff's inquisition. *In re East London Ry.*, 24 Q. B. D. 507.

Effect of Rules or Orders of Court.

The allegation of a fact in an order (or rule) *nisi* is not evidence of it for a party at whose suggestion it is obtained. *Woodroffe v. Williams*, 6 Taunt. 19. A rule, making a judge's order a rule of court, was evidence of the order.* *Still v. Halford*, 4 Camp. 17. A rule purporting to be granted on the motion of a certain counsel, has been admitted as evidence of the attendance of that counsel in court at the date of the rule. *Heath's Case*, 18 How. St. Tr. 176. An allegation in a count that defendant procured a defective security which was set aside by a rule of court was held not proved by merely producing the rule without other proof of the security. *Compton v. Chandless*, 4 Esp. 18. By the Trustee Act, 1893, 56 & 57 V. c. 53, s. 40, a vesting order made as to land under that Act or the Lunacy Act, 1890, 53 & 54 V. c. 5, is conclusive evidence of certain matters therein alleged on which the order is founded, upon any question as to the validity of the order. An order made by a Master in Lunacy under *Id.*, s. 116, for the management of the property of H., a person of unsound mind, not so found by inquisition, stating that fact and that he was incapable of managing his affairs, is *prima facie* evidence of H.'s insanity. *Harvey v. Rex*, 70 L. J. P. C. 107; [1901] A. C. 601.

Effect of Proceedings in Chancery.

Bill in Chancery.] A bill in Chancery is not generally admissible in evidence, further than to show that such a bill did exist, and that certain facts were in issue between the parties. *Doe d. Rowerman v. Sybourn*, 7 T. R. 2, 3; *Boileau v. Rutlin*, 2 Ex. 665; *Banbury Peerage Case*, 1 Selw. N. P. 13th ed. 677. The ground of this exclusion is that, together with statement of facts, a bill usually also contains allegations made with no other object than to obtain a discovery on the oath of the defendant. It is equally inadmissible as evidence, though read at the requisition of the opposite party. *Pennell v. Meyer*, 2 M. & Rob. 98; *Parsons v. Purcell*, 12 Ir. L. R. 90. In an action of trespass to a several fishery brought by the lessee of a grantee, A., of the fishery, a bill and answer in a suit instituted long before by another grantee, B., against A., in which the limits of the fishery were described, were held admissible in evidence as part of the history of the fishery and of the claims to it. *Malcolmson v. O'Dea*, 10 H. L. C. 593.

Answer.] An answer in Chancery is good evidence against the defendant as an admission on oath, and must all be taken together. Therefore, if upon exceptions taken a second answer has been put in, that also must be read. B. N. P. 237. But it has been said that where one party reads part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and he does not thereby admit, as evidence, facts which may happen to be stated in it by way of hearsay only. *Obiter per* Chambre, J., *Roe d. Pellatt v. Ferrars*, 2 B. & P. 548; but see note, *Id.*

The answer of a guardian is no evidence against an infant. B. N. P. 237. But an answer will be evidence against privies. *Dartmouth, Ly. v. Roberts*, 16 East, 334. An answer by one who has sold an advowson, filed after the conveyance, is not admissible against a party claiming under the grant. *Gully v. Exeter (Bishop)*, 5 Bing. 171. The answer of one defendant is not evidence against a co-defendant; *Wych v. Meal*, 3 P. Wms. 311; but after evidence has been given to connect two persons as partners, the answer of one will be evidence against the other. *Grant v. Jackson*, Peake, 203. In *Rooth v. Quin*, 7 Price, 193, 198, the Court held the answer to be inadmissible on the grounds of the practice in equity.

Decree or decretal order.] A decree in equity may be given in evidence between the same parties or any claiming under them. B. N. P. 243. It is evidence, but not conclusive, against the defendant of every fact stated, whether by way of assertion or denial. *Percival v. Caney*, 4 De G. & S. 610. Where the parties to an action respectively sue and defend on behalf of themselves and a multitude of others in the same interest on each side, a decision in the action binds them all as to the general right claimed in the action, e.g., a right of common. *Sewers, Commissioners v. Gellatly*, 45 L. J. Ch. 788; 3 Ch. D. 610. A decree is even evidence as against parties not privy to it for some purposes; thus, on a trial touching the title to land, decrees between former litigants were admitted for the defendant to show how, and in what character, he came into possession under them, although the plaintiff did not claim under any party to the suits. *Davies v. Loundes*, 1 L. J. C. P. 214; 1 Bing. N. C. 606. So it is evidence where hearsay is inadmissible: thus, a decree in favour of a public officer, founded on an issue, is evidence of the right to exercise the office; and by such evidence the deputy oyster-meters of London established their exclusive rights within the port of London. *Laybourn v. Crisp*, 8 L. J. Ex. 118; 4 M. & W. 320. A decree for payment of tithe in kind in a suit by the incumbent against the occupiers of land who set up a district modus, is evidence, but not conclusive evidence, for him in an issue (under 6 & 7 W. 4, c. 71) between him and the landowners to try a manorial modus. *Croughton v. Blake*, 13 L. J. Ex. 78; 12 M. & W. 205. In a suit for tithe by ecclesiastical improPRIATORS, in which the defendant set up a district modus, the answer of the predecessors of the plaintiff in a suit to establish a *farm* modus, in which answer the defendants set up a *district* modus, was held evidence against them, although the suit was *inter alios*. *Whelpdale v. Milburn*, 5 Price, 485. A decree against the lord of a manor establishing customs, is evidence against a succeeding lord. *Price v. Woodhouse*, 18 L. J. Ex. 271; 3 Ex. 616. Where a decree in a possessory suit brought by C. was inconsistent with a public right of fishing, the proceedings were, in an action brought by C.'s successor in title, against strangers, held to be evidence to negative such right. *Devonshire (Duke)*, 8 App. Cas. 135. But an interlocutory order, made to quit possession *pendente lite*, is not evidence of reputation. *Pim v. Curell*, 6 M. & W. 234. The decree of an unauthorized court of equity is inadmissible either as an award (for want of submission) or as reputation. *Rogers v. Wood*, 2 B. & Ad. 245. An order for an attachment for non-payment of the costs in a suit in equity is in itself *prima facie* evidence that a suit has been pending there. *Blower v. Hollis*, 2 L. J. Ex. 176; 1 Cr. & M. 393.

As to the effect of issues out of Chancery, see *Robinson v. Dhuleep Singh*, 48 L. J. Ch. 758; 11 Ch. D. 798.

Effect of Depositions and Examinations in other Suits.

Though evidence must generally be given *vivâ voce* on oath and in the very cause in which the witnesses are sworn, yet the testimony of witnesses so taken in another cause between the same parties, upon the same issue, is admitted where their personal attendance cannot be procured. Thus, where a witness was examined in a former action on the same point between the same parties, his testimony may be proved, if he be since dead; B. N. P. 242; or if he appear to be kept away by contrivance. *Green v. Gatewick*, B. N. P. 243. It seems to be enough if the parties to the two actions be substantially though not nominally the same; as where the lessor of the plaintiff in the second was joined with other lessors in the first action. *Wright v. Doe d. Tatham*, 3 L. J. Ex. 366; 1 Ad. & E. 3, 18, 19; *Att.-Gen. v. Davison*, M'Cl. & Y. 60. So if the parties and the title in issue be the same, the evidence is admissible, though the land sought to be recovered is different. *Doe d. Foster v. Derby (Earl)*, 3 L. J. K. B. 191; 1 Ad. & E. 791, n. But where the parties are neither the same, nor in privity with

each other, such testimony is not admissible, though the title and one of the parties may be the same. *Morgan v. Nicholl*, 36 L. J. C. P. 86; L. R. 2 C. P. 117. And this rule is not altered by O. xxxvii., r. 3, which only substitutes a notice for an order to read such depositions as are admissible in evidence. *Printing Telegraph, &c., Co. v. Drucker*, 64 L. J. Q. B. 58; [1894] 2 Q. B. 801. The admissibility of this evidence seems to turn rather on the right to cross-examine than upon the precise identity, either of the parties or the points in issue in the two proceedings. See 1 Taylor, *Evid.*, 10th ed., § 467, and cases there cited. Cf. *Allen v. Allen*, 63 L. J. P. 120; [1894] P. 248, and *Mangena v. Wright*, 78 L. J. K. B. 879; [1909] 2 K. B. 958, 978. Depositions in Chancery may be given in evidence in an action at law on the same matter between the same parties or their privies, where the witness is dead or cannot be found. B. N. P. 239; *Llanover (Ly) v. Homfray*, 19 Ch. D. 224. But they are not evidence of the facts contained in them against a person who does not claim under a party in the suit. B. N. P. 239. Where depositions were taken under a commission issued on a bill to perpetuate testimony filed against the Att.-Gen. on a petition of right, they were admitted as evidence against the Crown on the trial of a traverse of the inquisition taken on such petition. *De Bode's Case*, 8 Q. B. 208.

In some cases such depositions are evidence even *inter alios*. Thus, depositions relating to a question upon which hearsay would be good evidence, may be read against a person who was no party to the former suit. B. N. P. 239. A deposition, taken in a cause between other parties, will be admitted to be read, to contradict what the same witness swears at a trial; B. N. P. 240; and it will, of course, be evidence in any cause against the deponent himself. The deposition of a witness, taken to perpetuate memory, was not admissible merely because he had since become interested; for it is taken only to prevent the loss of his testimony by death. *Tilley's Case*, 1 Salk. 286.

In *Johnson v. Ward*, 6 Esp. 47, where the defendant moved to put off the trial upon an affidavit made by D., wherein D. swore that he had subscribed a policy for and on account of the defendant, this affidavit was received as evidence of the agency of D. In *Brickell v. Hulse*, 7 L. J. Q. B. 18; 7 Ad. & E. 454, an action of trover against the sheriff, the affidavit of one W., used by the sheriff in order to obtain an interpleader rule, in which W. swore that he was the officer of the sheriff, was received. In *Gardiner v. Mault*, 8 L. J. Q. B. 270; 10 Ad. & E. 464, an action by the assignees of a bankrupt, the plaintiffs, in order to prove the act of bankruptcy, were allowed to put in evidence a deposition made by one H., whom the defendant had sent to prove the act of bankruptcy at the opening of the fiat. In *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J. C. P. 161, an action of trover was brought against a company, who had previously filed a bill for specific performance of a contract of sale, and upon the suit being referred to the master the company had made use before him of the affidavit of one D., in which he stated that he was the manager of the company at certain works: the affidavit was received in the action as an admission of the agency of D. So depositions used by the vendee of an estate in a suit in Chancery commenced against him for the purpose of setting aside the sale, and containing statements as to the extent of land, were received in a subsequent action as admissions of the extent of the estate in question. *Richards v. Morgan*, 4 B. & S. 641; 33 L. J. Q. B. 114. So in *Fleet v. Perrins*, 37 L. J. Q. B. 233; L. R. 3 Q. B. 536, the answers to interrogatories made in a former action by one of the parties was held to be admissible as evidence against him. A deposition in an action by A. to perpetuate testimony cannot be used as an admission by A. unless it is proved to have been used or adopted by A. *Evans v. Merthyr Tydfil Council*, 68 L. J. Ch. 175; [1899] 1 Ch. 241.

In trespass *q. c. f.* defendant denied the possession of the plaintiff, and put in evidence the examination of A. B., then living, but abroad, who had

been called by the plaintiff to prove possession in a previous summary proceeding for malicious trespass by plaintiff against defendant, but who on such examination had denied the plaintiff's possession: it was held that the deposition was admissible. *Cole v. Hadley*, 11 Ad. & E. 807. This unsatisfactory case is shortly reported, and the grounds of the judgment do not distinctly appear. It has been suggested that the evidence "was received as the deposition of a witness on a prior inquiry between the same parties on the same question"; *Boileau v. Rutlin*, 2 Ex. 665, 680, *per cur.*; but, even if this were the reason, a proceeding for conviction of an offence can hardly be considered as a cause between the same parties as a subsequent action of trespass. See further *R. v. Latchford*, 6 Q. B. 567, and the judgment in *Boileau v. Rutlin*, *supra*.

Where the plaintiff in an action for goods sold had used an affidavit in another proceeding, erroneously alleging payment of the debt by the defendant to the plaintiff's agent, it was held that he was not estopped from suing the defendant, if the debt were not really paid. *Morgan v. Couchman*, 14 C. B. 100; 23 L. J. C. P. 36.

Even a voluntary deposition may be evidence as an admission of the party making it, on mere proof of signature. B. N. P. 238.

The answers of a bankrupt A. on his public examinations are not admissible in evidence against other parties in proceedings against them by A.'s trustee. *In re Brünner*, 56 L. J. Q. B. 606; 19 Q. B. D. 572.

Depositions previously made before any justice or magistrate in H.M.'s dominions out of the U. K., or before any British Consular officer abroad, in relation to the same subject-matter, are admissible in evidence, on proof that the witness cannot be found in the U. K. 57 & 58 V. c. 60, s. 691.

Effect of Sentences in the Ecclesiastical and Divorce Courts.

While the Ecclesiastical Courts had the exclusive right of deciding directly upon the legality of marriage, the temporal courts received their sentences upon such questions as conclusive evidence of the fact (*Bunting v. Lepingwell*, 4 Co. Rep 29 a), upon the principle that the judgment of a court of exclusive jurisdiction, directly upon the point, is conclusive upon the same matter coming incidentally in question in another court for a different purpose, unless impeached for fraud. *Kingston's (Duchess) Case*, 20 How. St. Tr. 538, 540. See the cases cited *arguendo*, in *Stockdale v. Hansard*, 8 L. J. Q. B. 294; 9 Ad. & E. 1. The verdict of a jury in a divorce suit is not evidence *inter alios*, where there has been no decree. *Needham v. Bremner*, 35 L. J. C. P. 313; L. R. 1 C. P. 583. But where the jury have found the petitioner guilty of adultery, and on that ground his petition was dismissed, the verdict is conclusive evidence against him in a subsequent divorce suit, brought by him against a different co-respondent. *Conradi v. Conradi*, 37 L. J. Mat. 55; L. R. 1 P. & D. 514. So where the respondent husband was found guilty of adultery and cruelty, and a decree *nisi* made against him, the proceedings were held to be conclusive evidence against him on a petition brought by him against his wife, although the decree *nisi* had been set aside on the intervention of the Queen's Proctor on grounds not affecting the propriety of the findings. *Butler v. Butler*, 62 L. J. P. 105; [1893] P. 185; *Butler v. Butler* (No. 2), 63 L. J. P. 1; [1894] P. 25. A sentence in a suit of jactitation of marriage is evidence in an action at common law to disprove the marriage. *Jones v. Bow*, Carth. 225. In the last-mentioned case such sentence was held to be conclusive evidence; but on this point the authority of the decision has been overruled; for a sentence in a suit of jactitation has only a negative effect, *viz.*, it shows that the party has failed in his proof, leaving it open to new proofs of the same marriage in the same cause, and it does not conclude even the court which pronounces it. *Kingston's (Duchess) Case*, 20 How. St. Tr. 543. See *Blackham's Case*, 1 Salk. 290, and *Hargr. Law Tr.* 451. A sen-

tence of nullity of marriage may be impeached by proving that it was procured by fraud and collusion. *Harrison v. Southampton Corporation*, 4 De G. M. & G. 137; 22 L. J. Ch. 722. A personal answer in a suit for tithes by a former rector is admissible against his successor in support of a modus. *Taylor v. Cook*, 8 Price, 668. As to the effect of the sentence of consecration of ground, see *R. v. Twiss*, 38 L. J. Q. B. 228; L. R., 4 Q. B. 407, 412; *Campbell v. Liverpool Corporation*, L. R. 9 Eq. 579; and *In re Bideford Parish*, [1900] P. 314.

Effect of Probate and Letters of Administration.

A probate granted by a competent court is conclusive of the validity and contents of such a will and the appointment of executors till it is revoked, and no evidence can be admitted to impeach it, except in proceedings in the Probate Division for its revocation. *Allen v. Dundas*, 3 T. R. 125; *Meluish v. Milton*, 45 L. J. Ch. 836; 3 Ch. D. 27. See *Pinney v. Hunt*, 6 Ch. D. 98. On this ground the payment of money to an executor, who has obtained a probate of a forged will, is a discharge to the debtor of the intestate, though the probate be afterwards declared null. *Allen v. Dundas*, *supra*. See Hargr. Law. Tracts, 459. Letters of administration are not evidence of any fact which is matter of inference and not of adjudication, as the intestate's death, for the grant *assumes* the fact of death. *Thompson v. Donaldson*, 3 Esp. 63; *accord. Moons v. De Bernales*, 1 Russ. 301, 306. Though it could not be shown in a court of common law that the Ecclesiastical Court had erred in granting probate, yet evidence might be given to show that the court had no jurisdiction; as that the testator was alive. *Allen v. Dundas*, 3 T. R. 130. So the letters of administration might be proved to have been revoked. B. N. P. 247. And the books of the Prerogative Office are evidence of the revocation. *R. v. Ramsbottom*, 1 Leach, C. C. 25, n. So, it may be shown that the seal of the ordinary has been forged; but it cannot be shown that the will was forged, or that the testator was *non compos mentis*, or that another person was appointed executor; B. N. P. 247; *Noell v. Wells*, 2 Lev. 236; for those questions are settled by the judgment of the court.

As to the effect of a judgment granting probate, see *Concha v. Concha*, 11 App. Cas. 541.

A probate is not, except under special circumstances, evidence of a will of real property where the testator died before Jan. 1st, 1898; nor is it generally evidence that an instrument is a will so as to pass copyhold or customary estates; *Hume v. Rundell*, 6 Madd. 331; or to operate as an execution of a power to charge land. S. C. It is *not* primary evidence in cases of pedigree to prove relationship.

Effect of Sentences in Admiralty Courts.

Upon questions of prize the Court of Admiralty, now the Probate, Divorce and Admiralty Division, has exclusive jurisdiction; therefore a sentence of condemnation in that court is conclusive, and being a proceeding *in rem*, it binds all the world. *Kindersley v. Chase*, Park, Ins. 8th ed. 743. The sentence of a foreign Court of Admiralty is also, by the comity of nations, held to be conclusive upon the same question arising in this country. *Hughes v. Cornelius*, 2 Show. 232; *Bolton v. Gladstone*, 5 East, 155. But the sentence of a Court of Admiralty, sitting in contravention of the law of nations, will not be recognized in our courts. *Havelock v. Rockwood*, 8 T. R. 268. If the property be condemned on the ground of its not being neutral, the sentence is conclusive evidence of that fact. *Barzillay v. Lewis*, Park, Ins. 8th ed. 725. So, where no special ground is stated, but the ship is condemned generally as good and lawful prize, it is to be presumed that the

sentence proceeded on the ground of property belonging to an enemy, and the sentence will be conclusive evidence of that fact. *Saloucci v. Woodmas, Park, Ins.* 8th ed., 727; S. C., 3 Doug. 345. But where there is some ambiguity in the sentence of a foreign Court of Admiralty, so that the precise ground of the determination cannot be collected, the courts here may examine the ground on which it proceeded. *Bernadi v. Motteux*, 2 Doug. 574; *Lothian v. Henderson*, 3 B. & P. 499. And if the condemnation do not plainly proceed upon the ground of enemies' property, or of non-compliance with subsisting treaties, but on the ground of regulations arbitrarily imposed by the captor, to which neither the government of the captured ship nor the other powers of Europe have been made parties, such a condemnation will not be admitted as conclusive of a breach of neutrality. *Pollard v. Bell*, 8 T. R. 444, and cases collected in Park, Ins. 8th ed. 730 *et seq.* To conclude the parties from contesting the ground of condemnation, such ground must appear clearly upon the face of the sentence; it must not be collected by inference only, or left in uncertainty whether the ship was condemned upon one ground which would be a just one by the laws of nations, or upon another ground which would amount only to a breach of the municipal regulations of the condemning country. *Per Tindal, C.J., Dalgleish v. Hodgson*, 9 L. J. (O. S.) C. P. 138; 7 Bing. 495, 504; *Hobbs v. Henning*, 18 C. B. (N. S.) 791; 34 L. J. C. P. 117. A salvage award against a ship does not conclude the insurers thereon from setting up the defence that the loss was not occasioned by sea perils. *Ballantyne v. Mackinnon*, 65 L. J. Q. B. 616; [1896] 2 Q. B. 455.

Proceedings *in rem* in the Admiralty Court, in a collision cause, followed by an order for the sale of the ship and payment of the amount to the plaintiffs, are no bar to an action of damages against the owners personally, if the proceeds of the sale are less than the damage sustained by the collision. *Nelson v. Couch*, 15 C. B. (N. S.) 99; 33 L. J. C. P. 46; and see *The Sylph*, 37 L. J. Adm. 14; L. R. 2 A. & E. 24.

Effect of Judgments of Inferior Courts.

It would seem, upon principle, that the final judgment of a competent inferior court, whether of record or not, acting within its jurisdiction, will be conclusive between the same parties upon the same subject-matter where properly relied on. *Moses v. Macferlan*, 2 Burr. 1009; *Galbraith v. Neville*, 1 Doug. 6, *n.*; *Routledge v. Hislop*, 2 E. & E. 549; 29 L. J. M. C. 90; *Gibbs v. Cruikshank*, 42 L. J. C. P. 273; L. R. 8 C. P. 454; *Flitters v. Allfrey, infra.* And see the observations in 1 Stark. Ev., 4th ed., 346 *et seq.* So it has been held that a certificate from commissioners under an Act for settling the debts of the Army, stating the sum due from the defendant to the plaintiff, is conclusive in an action brought to recover the money. *Moody v. Thurston*, Stra. 481; see *Att.-Gen. v. Davison*, M'Cl. & Y. 160. The judgment in a County Court action is conclusive as to any facts decided thereby; the judgment will appear by the record, but from the form of proceedings it is necessary to explain by parol what points were raised in the County Court and decided by the judgment. *Flitters v. Allfrey*, 44 L. J. C. P. 73; L. R. 10 C. P. 29. But where title incidentally comes in question, and the parties consent in writing to the judge deciding the claim, the judgment shall not be evidence of title in any other action. County Courts Act, 1888, 51 & 52 V. c. 43, s. 61. An action will not lie on a County Court judgment. *Berkeley v. Elderkin*, 1 E. & B. 805; 22 L. J. Q. B. 281. See *Reg. v. Essex County Court Judge*, 56 L. J. Q. B. 315; 18 Q. B. D. 704; but an action is maintainable upon an order of a county court judge made in the exercise of his bankruptcy jurisdiction. *Savill v. Dalton*, 84 L. J. K. B. 1583; [1915] 3 K. B. 174.

A County Court order under *Id.* sect. 138, for giving up possession of premises made against a person holding under the tenant and complied with

by him, is not conclusive evidence of title in a subsequent action against such person for mesne profits. *Campbell v. Loader*, 3 H. & C. 520; 34 L. J. Ex. 50. And such order would seem not to be conclusive against him, even as to the right to possession; *Hodson v. Walker*, 41 L. J. Ex. 51; L. R. 7 Ex. 55; in which case it was held that the order did not affect the rights of a person not a party to the proceedings. A judgment in an action of ejectment under *Id.* sect. 59, would however be conclusive. See *Flitters v. Allfrey*, *supra*.

In order to be a bar, the proceedings in a court of limited jurisdiction must show on the face of them, expressly or by necessary intendment, that the court had jurisdiction in the matter. *Taylor v. Clemson*, 2 Q. B. 978, 1031; 11 Cl. & F. 610; *London Corporation v. Cox*, 36 L. J. Ex. 225; L. R. 2 H. L. 239. So also the judgment of an inferior court of local jurisdiction may be avoided by proof that the cause of action did not arise within its jurisdiction; *Herbert v. Cook*, 3 Doug. 101; S. C. Willes, 36, n.; *Briscoe v. Stephens*, 3 L. J. (O. S.) C. P. 257; 2 Bing. 213; or that defendant, the debtor against whom the inferior court awarded process, did not reside within the district; *Carratt v. Morley*, 10 L. J. Q. B. 259; 1 Q. B. 18; it not appearing that any proof of residence had been, in fact, given to the court below. See also *Huxham v. Smith*, 2 Camp. 19. The above cases related to district courts having no statutable or other power, except over causes arising within the territorial limits. Where the court is limited only as to certain persons or causes, and not as to locality; or where the jurisdiction of the court, though established for a limited district, can lawfully exercise powers out of it; or where the practice of the inferior court requires, and is warranted by law in requiring, that the defect of jurisdiction should be pointed out by plea or otherwise, and the defendant has waived the objection;—in such cases it would seem that the inquiry will be, not simply where the cause of action arose, or where the parties reside, but whether the court had jurisdiction. See *Moore v. Gamgee*, 59 L. J. Q. B. 505; 25 Q. B. D. 244. As to the jurisdiction of the Mayor's Court, London, see *London Corporation v. Cox*, *supra*; *London Joint Stock Bank v. London Corporation*, 45 L. J. C. P. 213; 1 C. P. D. 1; affirmed, 5 C. P. D. 494, C. A.; 6 App. Cas. 393; and *Cooke v. Gill*, 42 L. J. C. P. 98; L. R. 8 C. P. 107.

It has been held that a judgment of the old County Court is examinable, and the existence of the facts necessary to the regularity of such judgment is a question for the jury, although a motion made in the County Court to set aside the proceedings for irregularity had been dismissed. *Thompson v. Blackhurst*, 2 L. J. K. B. 97; 1 N. & M. 266. But in such case there must be a proper defence to let in the inquiry. *Williams v. Jones*, 14 L. J. Ex. 145; 13 M. & W. 628. Where trespass was brought for executing a warrant to levy a poor rate, the plaintiff was not permitted to impugn the appointment of the overseers on the ground of irregularity or miscalculation of votes at the meeting of justices at which the appointment was made; the jury having expressly negatived fraud. *Penny v. Slade*, 8 L. J. C. P. 221; 5 Bing. N. C. 319.

Where a cause was removed by *habeas* from an inferior court after a judgment by default, that judgment was not evidence against the defendant in the superior court. *Bottings v. Firby*, 7 L. J. (O. S.) K. B. 329; 9 B. & C. 762.

Where an affiliation order obtained by A. has been quashed by Quarter Sessions on the ground that C. was not the father of A.'s child, there is no estoppel to an action by A.'s master against C. for seduction, it being *res inter alios acta*. *Anderson v. Collinson*, 70 L. J. K. B. 620; [1901] 2 K. B. 107.

Effect of Convictions.

It is a general rule that the judgments of all courts of competent jurisdiction are conclusive for the purpose of protecting their judicial officers acting within the scope of their authority. Thus, where justices have an authority

given to them by Act of Parliament, and they appear to have acted within the jurisdiction so given, and to have done all that they are required by the Act to do in order to originate their jurisdiction, a conviction drawn up in due form, and remaining in force, is a protection in any action brought against them for the act so done. *Per Abbott, C.J., Basten v. Carew*, 3 B. & C. 649, 653; *McVittie v. Marsden*, 86 L. J. K. B. 653; [1917] 2 K. B. 878. Where, in trespass against two magistrates for giving the plaintiff's landlord possession of a farm as deserted, the defendants produced in evidence a record of their proceedings under the statute 11 G. 2, c. 19, s. 16, which set forth all the circumstances necessary to give them jurisdiction, and by which it appeared that they had pursued the directions of the statute, it was held that this record was not traversable, and was a conclusive answer to the action. S. CC. In trespass against magistrates for taking and detaining a vessel, a conviction by them under the Bum-boat Act (2 G. 3, c. 28), was conclusive evidence that the vessel in question was a "boat" within the meaning of the Act. *Brittain v. Kinnaird*, 1 Br. & B. 432. See further *Kemp v. Neville*, 10 C. B. (N. S.) 523; 31 L. J. C. P. 158.

The recital of an information on oath in a warrant of commitment in the nature of a conviction (as for refusal to give sureties of the peace) is evidence for the justice of such information; *Haylocke v. Sparke*, 22 L. J. M. C. 67; 1 E. & B. 471; though it was held otherwise in the case of a warrant to apprehend on a charge. *Stevens v. Clark*, 2 M. & Rob. 435. See *R. v. Richards*, 13 L. J. M. C. 147; 5 Q. B. 926. In like manner a conviction for a contempt by commissioners of a court of requests is conclusive for them in an action of trespass against them; and the plaintiff cannot controvert the fact of contempt, though unnecessarily alleged in the plea. *Aldridge v. Haines*, 9 L. J. (O. S.) K. B. 202; 2 B. & Ad. 395. But a want of jurisdiction in the commissioners may be shown. *Andrews v. Marris*, 10 L. J. Q. B. 225; 1 Q. B. 3.

An affiliation order obtained by E. W. may be used to contradict E. W., who, when called to prove her marriage and the legitimacy of the plaintiff her son, denied, on cross-examination, that she had ever applied to the magistrates for an affiliation order. *Watson v. Little*, 5 H. & N. 472; 29 L. J. Ex. 267.

As a general rule the record of a conviction is inadmissible as evidence of the same fact coming into controversy in a civil suit. *Gibson v. M'Carty*, Cas. temp. Hardw. 311; *March v. March*, 28 L. J. P. & M. 30; *Castrique v. Imrie*, 39 L. J. C. P. 350; L. R. 4 H. L. 414, 434, *per* Blackburn, J. In many of the earlier cases the conviction was held inadmissible by reason of the evidence on which it was procured. See *Blakemore v. Glamorgan Canal Co.*, 2 C. M. & R. 139; *Brook v. Carpenter*, 4 L. J. (O. S.) C. P. 70; 3 Bing. 297; *Smith v. Rummens*, 1 Camp. 9, 151. But the conviction was also inadmissible, on the ground that it was *res inter alios acta*. See *Gibson v. M'Carty*, *supra*; and Peake, Ev. 41 *et seq.* In *re Crippen*, 80 L. J. P. 47; [1911] P. 108, appears at variance with the above cases. There, Evans, P., admitted, in probate proceedings, a certified copy of the conviction of a husband for the murder of his wife as evidence not only of the fact of the conviction, but also as *primâ facie* evidence of the commission of the crime. But there the conviction was admitted as against the claim of the representative of the convicted felon to enforce rights accruing to the felon from the commission of the very crime of which he was convicted; the position was the same as if the felon himself were claiming. In those circumstances the court treated the case not as *res inter alios acta*. See also *Prince of Wales, &c., Association v. Palmer*, 25 Beav. 605. A plea of guilty on an indictment for assault is evidence by way of admission against the defendant in an action for that assault. 1 Phill. Ev., 7th ed., 338; *R. v. Fontaine Moreau*, 17 L. J. Q. B. 187; 11 Q. B. 1033. Though a verdict of guilty would not be evidence. *R. v. Warden of the Fleet*, 12 Mod. 337—9. A conviction may sometimes be admissible as evidence of reputation. See *Petrie v. Nuttall*, 11 Ex. 569; 25 L. J. Ex. 200; *Eaton v. Swansea Waterworks Co.*, 20 L. J.

Q. B. 482; 17 Q. B. 267. When a conviction operated *in rem* it was evidence *inter alios*, though obtained by the testimony of the party who used it in evidence. *Davis v. Nest*, 6 C. & P. 167.

Effect of Sentences of Visitors, &c.

The sentence of expulsion of a member of a college by the master and fellows is conclusive, and cannot be impeached in a court of law. *R. v. Graddon*, Cowp. 315. A sentence of deprivation by a visitor of a college is in the same manner conclusive, and the grounds of it not examinable in any court. *Philips v. Bury*, 1 Ld. Raym. 5; S. C., 2 T. R. 346; see Hargr. Law Tracts, 464, 465. So, in ejection against a schoolmaster, who has been removed by sentence of the trustees of the school (such power being vested in them) for misbehaviour, it is not necessary for the plaintiffs to prove the grounds of the sentence, and the defendant cannot disprove them. *Doe d. Davy v. Haddon*, 3 Doug. 310.

Effect of Judgments of Foreign Courts.

The judgment of a foreign court (and for this purpose, Irish, Scotch, and Colonial courts are foreign courts) of competent jurisdiction, directly deciding a question cognisable by the law of the country, is conclusive here, if the same question arise incidentally between the same parties, and the sentence be conclusive by the law of the foreign country. *Garcias v. Ricardo*, 12 Cl. & F. 368; *Burrows v. Jemino*, Str. 733; *Stafford v. Clark*, 3 L. J. (O. S.) C. P. 48; 2 Bing. 377; *Crispin v. Doglioni*, 32 L. J. P. 169; L. R. 1 H. L. 301; *Dent v. Smith*, 38 L. J. Q. B. 144; L. R. 4 Q. B. 414; *Messina v. Petrocchino*, 41 L. J. P. C. 27; L. R. 4 P. C. 144; see cases collected in notes to *Kingston's (Duchess) Case*, Smith's L. C. Thus, in an action on a covenant to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, defendant, and another, and from all suits, &c., proof of the proceedings in a foreign court in a suit there instituted against the late partners for the recovery of a partnership debt, in which suit a decree passed against them for want of answer, *per quod* the plaintiff was obliged to pay the debt, is conclusive against the defendant, who will not be permitted to show that the proceedings were erroneous. *Tarleton v. Tarleton*, 4 M. & S. 20.

In an action brought in this country upon the judgment of a foreign court having jurisdiction over the parties and subject-matter of the suit, such judgment must now be taken as conclusive and binding on both parties, so as to preclude their contesting the merits or propriety of the decision, although formerly on this question much difference of opinion prevailed. *Ferguson v. Mahon*, 9 L. J. Q. B. 146; 11 Ad. & E. 179; *Bank of Australasia v. Nias*, 16 Q. B. 717; 20 L. J. Q. B. 284; *De Cosse Brissac v. Rathbone*, 6 H. & N. 301; 30 L. J. Ex. 238; *Munroe v. Pilkington*, 2 B. & S. 11; 31 L. J. Q. B. 81; *Vanquelin v. Bonard*, 15 C. B. (N. S.) 341; 33 L. J. C. P. 78; *Ellis v. M'Henry*, 40 L. J. C. P. 109; L. R. 6 C. P. 228; *Godard v. Gray*, 40 L. J. Q. B. 62; L. R. 6 Q. B. 139. The English courts will enforce the judgments of the Indian courts as to status and will also enforce ancillary orders as to damages such as they themselves make in similar cases. *Phillips v. Batho*, 82 L. J. K. B. 882; [1913] 3 K. B. 25.

But if it appear on the face of the foreign proceedings or by extrinsic proof that the judgment is against natural justice, as that the defendant has never been summoned (in which case the court could have no jurisdiction), the courts here will not give effect to it. *Ferguson v. Mahon*, *supra*; *Buchanan v. Rucker*, 9 East, 192; S. C., 1 Camp. 63; *Cavan v. Stewart*, 1 Stark. 525. So, where the judgment has been obtained by fraud; *Ochsenbein v. Papelier*, 42 L. J. Ch. 861; L. R. 8 Ch. 695; even although the

foreign court tried the question of fraud and decided that it had not been committed. *Abouloff v. Oppenheimer*, 52 L. J. Q. B. 1; 10 Q. B. D. 295; *Vadala v. Lawes*, 25 Q. B. D. 310. So, where the judges in the foreign court were interested parties. *Price v. Dewhurst*, 8 L. J. Ch. 57; 8 Sim. 279. In *Becquet v. MacCarthy*, 2 B. & Ad. 951, it was held to be no objection that the proceedings had (according to the law of the foreign country) been served upon a public officer in the absence of the defendant. See, however, *Singh v. Rajah of Faridkote*, [1894] A. C. 670, 685. Service of process at a domicile elected by the defendant for that purpose is good. *Valle v. Dumergue*, 4 Ex. 290; *Copin v. Adamson*, L. R. 9 Ex. 645; 45 L. J. Ex. 15; 1 Ex. D. 17. See further *Cowan v. Braidwood*, 10 L. J. C. P. 42; 1 M. & Gr. 882; *Bank of Australasia v. Harding*, 19 L. J. C. P. 345; 9 C. B. 661, and *Emanuel v. Symon*, 77 L. J. K. B. 180; [1908] 1 K. B. 302. Where judgment has been obtained in a foreign court for a penalty for an act of a criminal nature, it cannot be enforced here. See *Huntington v. Attrill*, 62 L. J. P. C. 44; [1893] A. C. 150. But the courts here are not concluded by the judgment of the foreign court that the act is criminal within this rule. S. C. And where by the law of the foreign country a person can and does obtain in the same proceeding punishment for the act complained of and also damages, the part of the judgment awarding damages can be severed from the part inflicting the penalty and enforced in this country. *Raulin v. Fischer*, 80 L. J. K. B. 811; [1911] 2 K. B. 93.

To render the judgment binding here, it must appear that it was final and conclusive in the foreign court in which it was given; *Plummer v. Woodburn*, 4 L. J. (O. S.) K. B. 6; 4 B. & C. 625, 637; *Frayes v. Worms*, 10 C. B. (N. S.) 149; *In re Henderson, Nouvion v. Freeman*, 57 L. J. Ch. 367; 37 Ch. D. 244; 59 L. J. Ch. 337; 15 App. Cas. 1; *Harrop v. Harrop*, 90 L. J. K. B. 101; [1920] 3 K. B. 386; that the cause of action was exactly the same; *Callendar v. Dittreich*, 4 M. & Gr. 68; and that the parties were within or subject to its jurisdiction; *Obicini v. Bligh*, 1 L. J. C. P. 99; 8 Bing. 335; *Novelli v. Rossi*, 9 L. J. (O. S.) K. B. 307; 2 B. & Ad. 757, explained in *Castrique v. Imrie*, 39 L. J. C. P. 350; L. R. 4 H. L. 414, 435. As to when a court has jurisdiction, see *Schibsby v. Westenholz*, 40 L. J. Q. B. 73; L. R. 6 Q. B. 155; *Sirdah Gurdial Singh v. Rajah of Faridkote*, [1894] A. C. 670; *Gibson v. Gavin*, 82 L. J. K. B. 1315; [1913] 3 K. B. 379. Where the court has jurisdiction over the subject-matter, and the persons brought before it are either subject to its jurisdiction or have acted in such a way as that they must be taken to have submitted to its jurisdiction, its judgment is final, if the proceedings are not against substantial justice, although irregular under the local law. *Pemberton v. Hughes*, 68 L. J. Ch. 281; [1899] 1 Ch. 781; *Guiard v. De Clermont*, 83 L. J. K. B. 1407; [1914] 3 K. B. 145; *Harris v. Taylor*, 84 L. J. K. B. 1839; [1915] 2 K. B. 580. The exclusion by the foreign court of evidence that would be admitted here does not make the judgment contrary to natural justice. *Scarpetta v. Lowenfeld*, 27 T. L. R. 509; *Robinson v. Fenner*, 83 L. J. K. B. 81; [1913] 3 K. B. 835. See also *Bater v. Bater*, 75 L. J. P. 60; [1906] P. 209, 237, *per Romer, L.J.* The mere fact that an appeal is pending from the foreign judgment is not a bar to its enforcement here. *Munroe v. Pilkington*; *Scott v. Pilkington*, 31 L. J. Q. B. 81; 2 B. & S. 11. The judgment to be conclusive must be on the merits. *The Delta*, 45 L. J. P. 111; 1 P. D. 393; *The Challenge and The Duc d'Aumale*, 73 L. J. P. 2; [1904] P. 41. Thus, a foreign judgment in favour of the defendant on the foreign Statute of Limitations is no bar to an action here, where the statute only bars the remedy and not the right. *Harris v. Quine*, 38 L. J. Q. B. 331; L. R. 4 Q. B. 653. In these respects an Irish, Scotch, or Colonial judgment stands on the same footing as a foreign judgment. *Harris v. Saunders*, 3 L. J. (O. S.) K. B. 239; 4 B. & C. 411; *Ferguson v. Mahon*, 9 L. J. Q. B. 146; 11 Ad. & E. 179. Mistake by the foreign court as to the English law applicable to the case affords no defence to an action on the judgment, it

being a question of fact in that court. *Godard v. Gray*, 40 L. J. Q. B. 62; L. R. 6 Q. B. 139; *In re Trufort*, 57 L. J. Ch. 135; 36 Ch. D. 600. But where the foreign court acts in defiance of the comity of nations by refusing to recognise a title properly acquired according to the laws of England, our courts will not give effect to its decision. *Simpson v. Fogo*, 1 J. & H. 18; 29 L. J. Ch. 657; 1 H. & M. 195; 32 L. J. Ch. 349. This case was recognised as good law in *Castrique v. Imrie*, 39 L. J. C. P. 350; L. R. 4 H. L. 414, 436, *per* Blackburn, J. The judgment must be for a sum certain. *Sadler v. Robins*, 1 Campb. 253.

Where there was a decree in Ireland against the validity of a will of lands in England and Ireland, such decree was held no bar to a suit between the same parties in the English Chancery respecting the land in England devised by the same will. *Boyse v. Colclough*, 1 K. & J. 124; 24 L. J. Ch. 7. In *Bank of Australasia v. Harding*, 9 C. B. 661; 19 L. J. C. P. 345, it was held on demurrer to a plea of judgment recovered in a British colony against the defendant, pleaded to a count on a simple contract, that such a judgment was no merger in this country, though it might be so in the colony; and, generally, that a foreign judgment was only *prima facie* evidence of a debt here. The mere pendency of a suit in a foreign court is no bar to a suit in this country for the same cause. *Ostell v. Lepage*, 5 De G. & Sm. 95; 21 L. J. Ch. 501. A judgment against the defendant in the Consular Court in Constantinople, and payment to the plaintiff under the judgment, is a conclusive bar to another action in this country by the plaintiff against the defendant for the same cause of action. *Barber v. Lamb*, 8 C. B. (N. S.) 95; 29 L. J. C. P. 234. See *Taylor v. Hollard*, 71 L. J. K. B. 278; [1902] 1 K. B. 676.

A notarial attestation, purporting to contain the substance, but not the tenor, of a judgment of the Court of the Inquisition at Rome, stating the offences for which the defendant had been sentenced, and sealed with the seal of that court, is inadmissible as evidence of the offences alleged therein to have been committed. *R. v. Newman*, 22 L. J. Q. B. 156; Dears. C. C. 85. The document was there admitted as proof that a judgment had been pronounced, but not of the grounds of it; and it seems questionable how far it was admissible even for this purpose; for it was a mere certificate of what the notary considered to be the result of a selected portion only of the original proceedings.

Effect of Court Rolls and Manor Books.

Court Rolls, whether of a court baron or customary court, are evidence as well between the lord of the manor and his tenants or copyholders (B. N. P. 247), as against them; *Att.-Gen. v. Hotham*, Turn. & R. 217; and for many purposes, as against strangers. Copies of court rolls, purporting to be a surrender by a person shown to have been in possession of the land, and an admittance of the surrenderee accordingly, are evidence against the defendant both of the copyhold tenure and of the title of surrenderee, in an action by him for use and occupation. *Standen v. Christmas*, 16 L. J. Q. B. 265; 10 Q. B. 135.

They will be admitted as evidence of reputation within the manor; and even an ancient custumal, not properly a court roll, nor signed by any of the tenants, but found among the rolls, and delivered down from steward to steward, purporting to have been made *assensu omnium tenentium*, has been admitted as evidence to prove the course of descent within a manor. *Denn d. Goodwin v. Spray*, 1 T. R. 466; *Johnstone v. Spencer (Earl)*, 30 Ch. D. 581. So, a presentment by the homage on the court rolls of a manor, stating the mode of descent of lands in the manor, is evidence of such mode, though no instance of any person having taken according to it be proved. *Roe d. Beebee v. Parker*, 5 T. R. 26. Entries of admissions *durante castâ viduitate* are evidence of a custom to hold on that condition, though there may be no

instance of a forfeiture for incontinence. *Doe d. Askew v. Askew*, 10 East, 520. Proof of the admission of the youngest among the collaterals of a certain degree of consanguinity is not evidence *per se* of the custom of descent to the youngest of a more remote degree; thus the entry of an admission of the youngest son of an uncle is no evidence that the custom extends to youngest son of the youngest brother of a great-grandfather. *Muggleton v. Barnett*, 1 H. & N. 282; 26 L. J. Ex. 47; 2 H. & N. 653; 27 L. J. Ex. 125, Ex. Ch. An entry of an admission reciting a previous surrender to the use of a will is evidence of the surrender (the latter being lost) in proof of a settlement by estate. *R. v. Thruscross*, 1 Ad. & E. 126. In an action by a copyholder against a freeholder of a manor, an ancient parchment writing, preserved among the muniments of a manor, purporting to be signed by certain copyholders of the manor, was held to be evidence, as against the plaintiff, of the reputation of the manor as to a customary right of common set up to him. *Chapman v. Cowlan*, 13 East, 10. The court rolls are evidence of a custom for the copyholds and freehold tenants of a manor to get stone from a quarry thereon to repair their tenements. *Heath v. Deane*, 74 L. J. Ch. 466; [1905] 2 Ch. 86. So of proclamations before seizure of a forfeited copyhold, though tendered on behalf of a party claiming under the lord after seizure. *Doe d. Tarrant v. Hellier*, 3 T. R. 164. A presentment of a jury at a manor court, setting forth the bounds of the manor, is admissible evidence of the bounds, though mutilated in part, such part not being apparently connected with the subject of boundary. *Evans v. Rees*, 9 L. J. M. C. 33; 10 Ad. & E. 151. The existence of a customary compiled within the period of legal memory is conclusive evidence against the existence of a custom not mentioned therein. *Portland (Duke) v. Hill*, 35 L. J. Ch. 439; L. R. 2 Eq. 765. See also *Anglesey (Marquis) v. Hatherton (Lord)*, 12 L. J. Ex. 57; 10 M. & W. 218.

Entries of amerancements on court rolls for acts of waste, offered in proof of the nature of a customary tenure, were said not to be admissible for that purpose without proof of payment. *Rowe v. Brenton*, 3 M. & Ry. 302. Yet it is not common to find in ancient court rolls anything to indicate such payments. Whether made voluntarily or upon process, the entry of payment is more likely to appear in the bailiff's accounts, or in the estreat rolls.

Presentments by the leet jury of unlawful fishing in a stream belonging to the lord of the manor are not evidence for the lord of his right to the stream; for they are made in the exercise of a criminal jurisdiction, and are *res inter alios*; *per Erle, J.*, in *Mildmay v. Newton*, Winton Sum. Ass. 1846; *dubitante Coleridge, J.*, in *Waddington v. Newton*, Winton Sum. Ass. 1850, who was disposed to admit them, on the same presentments being tendered at a subsequent trial on the same question between other parties. In *Calmady v. Rowe*, 6 C. B. 861, 877, 878, presentments of purprestures were rejected by Pattenon, J., because no fine appeared to have been imposed; and it should seem that a bare presentment, without more, is only evidence where *reputation* within the manor is admissible. Entries of fines *assessed* in the books of a deceased steward are not evidence of a custom to take such fines unless there be some proof of payment. *Ely (Dean) v. Caldecott*, 9 L. J. (O. S.) C. P. 171; 7 Bing. 433. Presentments are not evidence of matters not within the jurisdiction of the homage; as a presentment by the freeholders of a right of common enjoyed by the owner of a certain farm. *Richards v. Bassett*, 8 L. J. (O. S.) K. B. 289; 10 B. & C. 657.

Effect of Public Books and Public Documents.

Public books and documents of an official character are in many instances evidence, even as between strangers, of the facts therein recorded. Thus where a duty is cast by common law or statute upon a person to register or certify that certain facts existed *within his knowledge*, the register or

certificate would, it seems, be evidence of those facts; and in some cases the statute requiring the registration to be made provides that the register shall be evidence, although the facts are not within his knowledge, e.g., registers of births and deaths. In all other cases, however, the register would be admissible in proof of the fact of registration only. Thus a report made by public officers is admissible only in proof that they have made a report, but not of the facts therein stated. *Sturla v. Freccia*, 50 L. J. Ch. 86; 5 App. Cas. 623. The term "public document" is used in the sense of one made by a public officer, for the purpose of the public using it and being able to refer to it: the public having access thereto are not necessarily all the world, but may be limited, e.g., the tenants of a manor, or the members of a corporation. *Id.* 643, per Ld. Blackburn. Such publicity must be contemporaneous, and such "as would afford the opportunity of correcting anything that was wrong." *Mercer v. Denne*, 74 L. J. Ch. 723; [1904] 2 Ch. 534, 544.

The official indorsement or certificate, or entry in the officer's book, of the registration of a deed required by statute to be registered, is *prima facie* evidence of its registration; *Grindell v. Brendon*, 6 C. B. (N. S.) 698; 28 L. J. C. P. 333; and also where the statute requires the observance of certain formalities at the time of such registration, that those formalities have been complied with. S. C. The registration does not, however, afford evidence that other requisites necessary to the validity of the deed registered have been complied with, as that a composition deed has been assented to by the requisite majority of creditors. *Bramble v. Moss*, 37 L. J. C. P. 209; L. R. 3 C. P. 458. Particular facts supplied by private persons do not necessarily become evidence against third persons merely because they are entered in a public register. *Huntley v. Donovan*, 15 Q. B. 96. The stats. 8 & 9 V. c. 113, s. 1, and 14 & 15 V. c. 99, s. 14, will assist in the proof of public documents.

The register of the Navy Office, with proof of the usage to return all persons dead with the mark *Dd.*, has been admitted to prove the death of a sailor. B. N. P. 249. The books of the Sick and Hurt Office, made up from returns of the King's ships, and kept by a public officer under the Admiralty, are evidence of the death of a sailor. *Wallace v. Cook*, 5 Esp. 117. As to similar registers in the Army, see 42 & 43 V. c. 8, s. 3. An Army "Medical History Sheet" was admitted in evidence in *Gleen v. Gleen*, [1900] W. N. 258. Books in the First Fruits Office are evidence of collations. *Irish Society v. Derry (Bishop)*, 12 Cl. & F. 641. The book at Lloyd's, stating the capture of a ship, was held evidence of such capture in an action on a policy, and also of notice of the loss, as against a subscriber to Lloyd's in the habit of examining the books there. *Abel v. Potts*, 3 Esp. 242. It is also evidence against an underwriter of the time of sailing, for he is presumed to have knowledge of its contents. *Macintosh v. Marshall*, 12 L. J. Ex. 337; 11 M. & W. 116. But a certificate by an agent of Lloyd's is not evidence of the amount of damage even against a subscriber. *Drake v. Maryatt*, 1 L. J. (O. S.) K. B. 161; 1 B. & C. 473. The log-book of a man-of-war is evidence to prove the time of a vessel sailing under its convoy, in an action on a policy upon such vessel. *D'Israeli v. Jowett*, 1 Esp. 427. It, however, is only evidence when produced as an official public book from the Admiralty; *Rundle v. Beaumont*, 6 L. J. (O. S.) C. P. 91; 4 Bing. 537; otherwise it can only be used to refresh the memory of the person who made the entries. *Burrough v. Martin*, 2 Camp. 112. As to merchant-logs, see the Merchant Shipping Act, 1894, s. 239. An official letter written at the end of a voyage by the captain of a convoy, and produced by the Admiralty, seems to have been held evidence of the facts stated in it in a suit *inter alios*. *Watson v. King*, 4 Camp. 275. Muster rolls of the King's ships, produced from the Admiralty, are evidence of the fact that persons therein named were then on board. *Semb. Barber v. Holmes*, 3 Esp. 190, and the cases cited and recognised *arguendo*, 15 Q. B. 100. A copy of the searcher's report at the Custom House is

evidence of the cargo on board, being an official paper made under the statute. *Johnson v. Ward*, 6 Esp. 48. In the Court of Admiralty, entries in the journals of the lighthouses, *The Maria das Doreas*, 32 L. J. Adm. 163; Br. & Lush. 27, and of coastguard stations, *The Catherina Maria*, L. R. 1 Ad. & Ec. 53, were admitted in evidence to show the state of wind and weather at a given time without further proof, although not admissible at common law. *Per Lushington, J.*, Br. & Lush. 28; 32 L. J. Adm. 164.

The bank books are the best evidence to prove a transfer of stock; the testimony of the broker is not enough. *Breton v. Cope*, Peake, 30. The book from the master's office will prove a person to be a solicitor of a superior court, without production of the roll. *R. v. Crossley*, 2 Esp. 526. The poll-books at an election were evidence. *Mead v. Robinson*, Willes, 424. So, the polling papers, handed in at a municipal election and produced by the town clerk, were, it seems, evidence of the vote given; but the custody of them must be traced so as to identify them as original papers; and the mere production of papers, purporting to be such, by a succeeding town clerk was not enough. *R. v. Ledgard*, 7 L. J. Q. B. 237; 8 Ad. & E. 535. So, the books of the Old King's Bench and Fleet prisons were admitted to prove the dates of the commitment and discharge of prisoners; *R. v. Aickles*, 1 Leach, C. C. 390; although not then kept by any public authority; but they are not evidence of the cause of commitment, of which the commitment itself is the best evidence. *Salte v. Thomas*, 3 B. & P. 188.

The copy of an official paper containing the number of passengers on board a vessel, made by the master in pursuance of an Act of Parliament, and deposited at the India House, is admissible to show the number and description of the persons on board the vessel. *Richardson v. Mellish*, 3 L. J. (O. S.) C. P. 265; S. C., 2 Bing. 229. Excise books, transcribed from the maltster's specimen paper, are evidence against him, without calling the officers who have transcribed them. *R. v. Grimwood*, 1 Price, 369. Shipping entries at the Custom House have been disallowed as evidence to fix a party with fraud, unless the original note, from which the entry was made, were produced and traced to him or his agent. *Hughes v. Wilson*, 1 Stark. 179. So, formerly, an entry of the sale of a ship in the register of the Custom House was thought not to be evidence of ownership without connecting the party with it, though made under an Act of Parliament. *Fraser v. Hopkins*, 2 Taunt. 5; but now see *Effect of ship's register, post*. So, the certificates or reports which are required to be made by masters of foreign vessels at the Custom House for the purpose of landing, and filed there, are not evidence of the particulars certified (except as against the master and those in privity with him). *Huntley v. Donovan*, 15 Q. B. 96. The books of the clerk of the market, made up under stat. 47 G. 3, sess. 2, c. 68, s. 29, were not, *per se*, evidence of the contract of sale as between the buyer and seller of coals in London, though the Act made such entries evidence "in all actions touching anything done in pursuance of it." *Brown v. Capel*, M. & M. 374.

Entries in the books of the clerk of the peace of deputations granted many years since to gamekeepers by the owner of a manor are evidence, without production of the deputations themselves, to show that the party therein mentioned exercised the right of appointing gamekeepers. *Hunt v. Andrews*, 3 B. & A. 341; and see *Rushworth v. Craven*, M'Cl. & Y. 417. A book of claims, kept by the clerk (deceased) of an enclosure commission, signed by the commissioners, is evidence of such claims, the originals being lost. *Doe d. Welsh v. Langfield*, 16 M. & W. 497. A manuscript book of the date of Eliz., purporting to be written by an officer of the Duchy of Lancaster, and describing the duties of the office, is not evidence in behalf of his successor claiming to exercise the same rights and duties under an appointment from the Duchy. *Jewison v. Dyson*, 2 M. & Rob. 377. Surveys made for a Department of the Government for a temporary purpose and not affecting Crown property revenues or grants are not evidence of facts therein

stated or appearing. *Mercer v. Denne*, 74 L. J. Ch. 71, 73; [1904] 2 Ch. 534; [1905] 2 Ch. 538, C. A. So as to maps and plans. S. C.

Where the plaintiff, the surgeon of a workhouse, was desirous of disproving neglect of a pauper, he was not permitted to put in evidence a journal kept by him and stating his attendances, though it was kept by order of the Poor Law Commissioners under 4 & 5 W. 4, c. 76. *Merrick v. Wakley*, 7 L. J. Q. B. 190; 8 Ad. & E. 170. Returns of sales of corn under 1 & 2 G. 4, c. 87, were not conclusive, if evidence at all, to show the parties to whom the corn was delivered; for it was no part of the duty of the corn factor to mention this in the return. *Woodley v. Brown*, 2 Bing. 527. An entry in a vestry-book, stating that A. was duly elected treasurer of the parish at a vestry duly held in pursuance of notice, is evidence of such election, and of its regularity. *R. v. Martin*, 2 Camp. 100; *Hartley v. Cook*, 5 C. & P. 441. But it must appear by the entry, or *aliunde*, that the meeting was duly convened after proper notice. *Heysham v. Forster*, 5 M. & Ry. 277. So, a ward-mote book proves the election of a constable in the City of London. *Underhill v. Witts*, 3 Esp. 56. In an action for disturbing the plaintiff in the enjoyment of a pew claimed in right of his messuage, an old entry in the vestry-book signed by the churchwardens, stating repairs of the pew by a former owner of the messuage (under whom the plaintiff claims), in consideration of his using it, is evidence to prove the plaintiff's title; for it is made by the churchwardens on a subject within the scope of their official authority. *Price v. Littlewood*, 3 Camp. 288. But see *Cooke v. Banks*, 2 C. & P. 478. The documents kept by the Post Office showing the times of the receipt and delivery of telegrams are not admissible in evidence as public records, being kept only for a short time are not the result of a public enquiry, and do not deal with a general public right. *Heyne v. Fischel*, 110 L. T. 264.

Books, &c., of public companies.] The transfer book of a railway company is not evidence of the title of the transferee, though an Act of Parliament makes the entry necessary to complete the title. *Hare v. Waring*, 3 M. & W. 362. Where a water company was sued on a bond, their books were rejected, as proof for them that the bond was executed at an irregular meeting, although the plaintiff was a proprietor, and the private Act required such books to be kept, and to be open for inspection to proprietors. *Hill v. Manchester and Salford Waterworks Co.*, 3 L. J. K. B. 19; 5 B. & Ad. 866. In the Act in the last case there was no provision to make the books evidence, and the plaintiff, though a proprietor, was considered as a stranger *quoad hoc*, the books being those of the *corporate body*, and not of the proprietors generally. But in the Acts now in force which regulate the incorporation of companies provision is made for the entry of proceedings, &c., in books and those books are receivable in evidence.

Banker's account books.] As to effect in evidence of banker's account books under the Bankers' Books Evidence Act, 1879, *vide ante*, pp. 110, 111.

Land-tax books.] Land-tax assessment books are evidence of the occupation of land by the parties named in them. *Doe d. Strode v. Seaton*, 4 L. J. K. B. 13; 2 Ad. & E. 171. But where it was proved to be usual to make no alteration in the name as long as the land was in the *same family*, they were rejected. *Doe d. Stansbury v. Arkwright*, *Id.* 182, n. The proof of redeemed land-tax is the certificate of the commissioner, or copy of the register. *Buchanan v. Poppleton*, 4 C. B. (N. S.) 20; 27 L. J. C. P. 210.

Rate-books.] Parish rate-books are admissible to prove who are the owners and occupiers of the property rated, *Smith v. Andrews*, [1891] 2 Ch. 678, 682; so are receipts for the rates. *Blount v. Layard*, *Id.* 681, 691, n.

Heralds' books.] The heralds' visitation-books, made under commissions regularly issued till the close of the 17th century (2 Jac. 2), are evidence of the facts therein recorded in matters of pedigree. B. N. P. 248; Report on Public Records, 1800, p. 82. It is usual, and safer, to be prepared with evidence of the commissions; though, as they were general ones and not merely issued *pro hac vice*, such evidence is, perhaps, not strictly necessary. It is doubtful, however, whether these visitation-books are admissible in evidence, *inter alios*, of the facts therein recorded. See *Polini v. Gray*, 49 L. J. Ch. 41; 12 Ch. D. 411, 428, 433, 435. A certificate taken from the register of the funerals of Peers at the Heralds' College is admissible in evidence as an official document taken by persons whose duty it was to make it up. *Vaux Peerage*, 5 Cl. & F. 526. But a pedigree deduced from these books and drawn up by a herald is not admissible. *King v. Foster*, T. Jones, 224; 2 Rol. Ab. 686. So, a written pedigree, *purporting* to be made by one of the family, and entered in the heralds' books, is not evidence. *Per Fortescue, J.*, 12 Vin. Abr. Evid. p. 119. An affidavit stating the members of deponent's family found in the Heralds' Office may be good evidence as a declaration; and where the original was lost, an entry of it in their books has been allowed as secondary evidence. *Per Littledale, J.*, *Doe d. Hungate v. Gascoigne*, 2 Stark. Ev. 2nd ed., App. 1087.

Bishops' registers.] The official register-book of a bishop, containing entries of the transactions at visitations, has been admitted as evidence of the right of nomination to a curacy. *Arnold v. Bath and Wells (Bishop)*, 7 L. J. (O. S.) C. P. 120; 5 Bing. 316. So, episcopal registers have been admitted as evidence of vicarial endowments; *Tucker v. Wilkins*, 4 L. J. Ch. 158; 4 Sim. 241, 262; *Leonard v. Franklyn*, 1 Daniel, 34; or of collations; *Irish Society v. Derry (Bishop)*, 12 Cl. & F. 641; or of the foundation of a deanery in the 13th century; *R. v. S. Peter's, Exeter*, 12 Ad. & E. 512. An enrolment-book of leases, granted by the Bishop of Durham, was allowed as secondary evidence of a lease on behalf of one claiming under the bishop; being a public muniment; *Humble v. Hunt*, Holt, N. P. 601; and a similar register of chapter leases, from the Chapter House of Salisbury, was admitted as evidence of reputation respecting the limits of a parish. *Per Tindal, C.J.*, in *Coombs v. Coeher*, M. & M. 398. It seems to be on this footing that old copies of the foundation charters and grants, registered and preserved among the muniments of dissolved monasteries, are admitted in evidence on behalf of the successors to their estates, at least where the originals cannot be found.

Reports of Charity Commissioners.] By the Charitable Trusts Recovery Act, 1891 (54 & 55 V. c. 17), s. 5 (1), for the purpose of any action or other proceeding instituted by them under that Act, the printed reports of the Charity Commissioners appointed under stat. 58 G. 3, c. 91, "shall be admissible as *prima facie* evidence of the documents and facts therein stated, provided that either party intending to use any such report as evidence shall give notice of such intention in the prescribed manner to the other party." By Rules S. C. (Charitable Trusts Recovery), 1892 (made under sect. 6), r. 4, the notice "shall be a two days' notice in writing, and shall be served on the opposite party or his solicitor; but the Court or a judge may give leave for shorter or substituted or other notice, and the notice may be given before appearance." See *In re Alms Corn Charity*, 71 L. J. Ch. 76; [1901] 2 Ch. 750.

Notarial and consular certificates.] A notarial certificate of the protest abroad of a foreign bill of exchange is evidence of that fact. Bayley on Bills, 90; *Anon.*, 12 Mod. 345; and see further *Geralopulo v. Wieler*, 10 C. B. 690; 20 L. J. C. P. 105. A certificate, which purported to be given by a notary public, verifying the signature of a person abroad before whom an affidavit is sworn, and stating that that person is competent to administer

oaths, is evidence of these facts. *Ex parte Worsley*, 2 H. Bl. 275; *Omealey v. Newell*, 8 East, 364; *Cole v. Sherard*, 11 Ex. 482. See *Abbott v. Abbott*, 29 L. J. P. & M. 57. As to the admissibility of an affidavit sworn before a notary abroad, see *In re Bernard*, 2 Sw. & Tr. 489; 31 L. J. P. & M. 89; *In re Lambert*, 35 L. J. P. & M. 64; L. R. 1 P. & D. 138, *contra*; and *In re Davis' Trusts*, L. R. 8 Eq. 98. See also the Commissioners for Oaths Act, 1889 (52 & 53 V. c. 10), ss. 3, 6, 11.

But, in other cases, notarial and consular certificates are not evidence of the facts certified; thus the presentment in England of a foreign bill cannot be so proved. *Chesmer v. Noyes*, 4 Camp. 129. A notarial certificate of the execution of a power of attorney abroad was held to be insufficient evidence. *Ex parte Church*, 1 D. & Ry. 324. In *Waldron v. Coombe*, 3 Taunt. 162, it was held, in an action on a policy of marine insurance on goods, that the amount of the loss could not be proved by a certificate from the British vice-consul at Rio Janeiro, although it was the duty of the vice-consul to superintend the sale.

In Batavia charterparties are entered into by the instrument being written in a book by a notary (he being a public officer by the Dutch law, which prevails in Batavia), and there signed by the parties. The notary makes copies, which he signs and seals, and which the principal officer of the Government of Java signs, upon proof of their being executed by the notary. Then one copy is delivered to each party. In the courts of Java, in order to prove the charterparty, it is requisite to produce the notary's book; but this book is never allowed to be taken out of Java; and in Dutch courts, out of Java, faith is given to the above copies as to an original. It was held that the copies were not receivable in evidence in this country. The chief contention was that they had been made originals by the authority given to the notary by the parties themselves, which failed. The court also thought that, though secondary evidence of the contents of the notary's book might, under the circumstances, be admissible, still these copies were not sufficiently authenticated to be used for that purpose. *Brown v. Thornton*, 6 L. J. K. B. 82; 6 Ad. & E. 185. See *Boyle v. Wiseman*, 11 Ex. 360; 24 L. J. Ex. 160; and *Permanent Trustee Co. v. Fels*, 87 L. J. P. C. 172; [1918] A. C. 879.

A certificate of ordination, under the seal of the bishop, is evidence of holy orders. *R. v. Bathwick*, 2 Br. & B. 639.

Post-mark.] The post-mark on a letter has been admitted as evidence of the date of its being sent. *Abbey v. Lill*, 7 L. J. (O. S.) C. P. 96; 5 Bing. 299; *R. v. Plumer*, R. & Ry. 264; *Kent v. Lowen*, 1 Camp. 177. But a post-mark may be contradicted by oral evidence of the real date of posting. *Stocken v. Collin*, 7 M. & W. 515. The post-mark is no proof of a publication of the contents of the letter at the place of posting. *R. v. Watson*, 1 Camp. 215. Where it was required to prove that A. effected an insurance by order of B., the production by B. of an order in a letter, with the post-mark, addressed to A., was received as evidence that a policy effected in A.'s name of the date of the letter was effected under that order. *Arcangelo v. Thompson*, 2 Camp. 260. In *R. v. Plumer*, *supra*, it was held that the double postage office-mark on a letter was not, *per se*, proof that it contained an inclosure.

Books of history, &c.] A general history may be given in evidence to prove a matter relating to the kingdom in general. B. N. B. 248; Vin. Ab. Av. (A. b. 40); *Read v. Lincoln (Bishop)*, 62 L. J. P. C. 1; [1892] A. C. 644. Thus, Speed's Chronicle was admitted to prove the death of Isabel, Queen Dowager to Edward II. *Brounker v. Atkyns*, Skin. 15. So chronicles are said to have been admitted to prove that at a certain period Charles V. of Spain had not surrendered the crown to Philip. *Neale v.*

Fry, cited 1 Salk. 281; *S. C. sub nom. Neal v. Joy*, cited 12 Mod. 86; *S. C. sub nom. Joy (Lady) & Neale's Case*, cited Skin. 623. But see, however, *S. C. sub nom. Mossam v. Ivy*, 10 How. St. Tr. 625, where it is reported that the evidence was *rejected*, and observations in *Peake*, Ev. 82, 83, and 2 Taylor, Evid., 10th ed., § 1785, n. (1). Historical evidence of this kind is only to be used in proof of a matter concerning the Government, and was therefore rejected as proof that King Alfred was the founder of a college. *Cockman v. Mather*, 1 Barnardist. 14. Nor can it be admitted in proof of a local custom: thus Camden's "Britannia" was held to be no evidence on an issue whether, by the custom of Droitwich, salt-pits could be sunk in any part of the town. *Stainer v. Droitwich*, 1 Salk. 281. Habington's Survey of Worcestershire, a work written in the seventeenth century, was not admitted as evidence of the physical condition of a particular church when the author saw it. *Fowke v. Berington*, 83 L. J. Ch. 820; [1914] 2 Ch. 308, where the earlier cases on the subject are considered. Nor is it evidence of the creation of a peerage. *Vaux Peerage*, 5 Cl. & F. 526. It seems, indeed, only to be used to refresh the memory of the jury on notorious facts, which require no evidence at all. Thus, it has been held that counsel may, in addressing a jury, refer generally to matters of history, whether ecclesiastical or political, and cite the language of writers or statesmen by way of illustration or explanation; but they are not at liberty to cite specific canons or foreign treaties, or the printed works in use among certain communities, and purporting to represent their doctrines, so as to fix a party to the suit with those doctrines, and to persuade the jury to act upon such imputation, unless such documents be proved by regular evidence, and brought home to the party by proof of his personal adoption of them. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.

Effect of Corporation Books.

The public official acts of a municipal corporation, registered in their books, regularly kept and entered by the proper officer, ought to be proved by the books themselves, which are evidence of them even as between strangers. *Thetford, Case of*, 12 Vin. Ab. 90; *R. v. Mothersell*, Stra. 93; *Lauderdale Peerage*, 10 App. Cas. 692, 700. Thus, an entry of the disfranchisement of a corporator is evidence to prove it, and it cannot be collaterally examined on the merits. *Brown v. London Corporation*, 11 Mod. 225. But the books of a corporation, whether public or private, are not admissible in their own favour as to matters of a private nature; as to establish a claim of toll; *Brett v. Beales*, 8 L. J. (O. S.) K. B. 141; *M. & M. 419*; *Marriage v. Lawrence*, 3 B. & Ald. 142; *London v. Lynn*, 1 H. Bl. 214, n.; or a right to appoint a curate as against the vicar; *Att.-Gen. v. Warwick Cor.*, 4 Russ. 222; or an exclusive right of trading. *Davies v. Morgan*, 9 L. J. (O. S.) Ex. 153; 1 C. & J. 587, 590—3. Where plaintiff sued a corporation (of which he was an alderman) on a bond, and defendants pleaded, 1. Fraud; 2. That the bond was irregularly executed contrary to a bye-law, Parke, B., admitted the books of the corporation to prove the bye-law, but rejected them as evidence for the defendants of a private transaction between the plaintiff and the corporation in proof of the fraud. *Holdsworth v. Dartmouth (Mayor)*, Exeter Sum. Ass. 1838, MS.

Effect of Parish Registers, &c.

The registers of baptisms, marriages, and burials, preserved in churches, are good evidence of the facts which it is the duty of the officiating minister to record in them. *B. N. P. 247*; *Doe d. Warren v. Bray*, 7 L. J. (O. S.) K. B. 161; 8 B. & C. 813, 816. Where it appeared that the practice was to make entries in the general parish register, once in three months,

out of a day-book in which the entries were made immediately after the baptism or on the same morning; and in the day-book after a particular entry, the letters B.B. (signifying base-born) were inserted, which were omitted in the register, it was held that evidence of the day-book could not be received, for there could not be two parish registers. *May v. May*, 2 Stra. 1073. An entry by the minister of a baptism which took place before he became minister, and of which he received information from the parish clerk, is not admissible; nor is the private memorandum of the fact made by the clerk, who was present at the baptism. *Doe d. Warren v. Bray*, 7 L. J. (O. S.) K. B. 161; 8 B. & C. 813. But see *Doe d. France v. Andrews*, 15 Q. B. 756.

The books of Fleet, King's Bench, May Fair, and Mint marriages are not evidence to prove a marriage, for they were not made by public authority. They were, in fact, only private memoranda kept by ministers who officiated at clandestine marriages contrary to the canons of the Church. See Burn on Fleet Registers, ch. 6, and 3 & 4 V. c. 92, ss. 6, 20. Such a register, however, may, if signed by a party, be equivalent to a declaration by such party, and, as such, admissible where hearsay is admissible. *Lloyd v. Passingham*, 16 Ves. 59. A register of ceremonies performed at a dissenters' meeting-house seems admissible in evidence to the same extent; *Newham v. Raithby*, 1 Phillim. 315; *Ex pte. Taylor*, 1 J. & W. 483; but cannot be proved by an examined copy, for it is not a public document; S. C.; *Whittuck v. Waters*, 4 C. & P. 375; and 6 & 7 W. 4, c. 86, would appear not to have made any difference in this respect, for the register appointed by that Act is to be kept by the registrar. Such of these registers, however, as have been deposited with the Registrar-General under 3 & 4 V. c. 92, and 21 & 22 V. c. 25, are admissible in evidence after notice. See 3 & 4 V. c. 92, ss. 19 *et seq.*; *In re Woodward*, 82 L. J. Ch. 230; [1913] 1 Ch. 392. And in the case of marriages entered into under 61 & 62 V. c. 58, the register kept thereunder is a public document.

An attempt is sometimes made to use the register for the purpose of proving facts stated therein, in addition to the main fact of baptism, marriage, or burial, as the case may be. There has been a good deal of discussion as to how far this can be done. In a criminal proceeding against a person for falsely swearing that he was 21 years of age, *Ld. Tenterden* refused to allow that part of a register of baptisms which stated the day upon which the defendant was born to be read; *R. v. Clapham*, 4 C. & P. 29; and in *Wihen v. Law*, 3 Stark. 63, and *Burghart v. Angerstein*, 6 C. & P. 690, the entry in a register of baptisms of the day of the defendant's birth was rejected as a proof of a plea of infancy. But such an entry has been admitted where the inquiry is as to the legitimacy of the person to whom the entry relates. *In re Turner*; *Glenister v. Harding*, 54 L. J. Ch. 1089; 29 Ch. D. 985, following *Cope v. Cope*, 1 M. & Rob. 269, in which case, upon an issue as to the legitimacy of a child, a baptismal register which described it as the illegitimate son of E. C. was admitted by *Alderson, J.*, though with the observation that it was entitled to little weight. See also *Brierley v. Brierley*, 87 L. J. P. 153; [1918] P. 257. In *R. v. North Petherton*, 4 L. J. (O. S.) K. B. 213; 5 B. & C. 508, a copy of a register of baptism was put in to show that an infant was born in a certain parish, but *Bayley, J.*, rejected the evidence, saying, however, that, if it could be shown that the child was very young at the time of baptism, the register would afford presumptive evidence of its having been born in the parish where it was baptised. See *R. v. S. Katharine*, 5 B. & Ad. 970, n. A register of marriage is evidence of the time of the marriage. *Doe d. Wollaston v. Barnes, Id.* 386. In *Wigley v. Treasury Solicitor*, 71 L. J. P. 115; [1902] P. 233, the entries in the Scotch register of a son's marriage were admitted as *prima facie* evidence of the marriage of his parents.

As to the effect of the registers of births, marriages, and deaths under 6 & 7 W. 4, cc. 85, 86, and 37 & 38 V. c. 88, see *ante*, pp. 112 *et seq.* As to

the effect of registers of births, marriages, and deaths in Scotland, Ireland, the colonies, at sea and abroad, *vide ante*, pp. 114 *et seq.*

Effect of Ship's Register.

Under the Merchant Shipping Act, 1894, ss. 64, (2) (b), 695 (1), the certificate of registry given under sect. 14 is *prima facie* evidence of all the matters contained in it or certified by the registrar in his certificate, as, for instance, that the ship is British; *R. v. Bjornsen*, 34 L. J. M. C. 180; L. & C. 545; or that the defendant is owner; *Hibbs v. Ross*, 35 L. J. Q. B. 193; L. R. 1 Q. B. 534.

Effect of Awards.

An award, regularly made by an arbitrator to whom matters in difference are referred, is conclusive in an action at law between the parties to the reference upon all matters inquired into within the submission. 1 Phillipps Ev., 7th ed., 380; *Campbell v. Twenlow*, 1 Price, 81. Thus, where a covenantor and a covenantee submitted the amount of damages of a breach of covenant to arbitration, the award was held conclusive of the amount in an action on the covenant to which defendants pleaded *non est factum*. *Whitehead v. Tattersall*, 1 Ad. & E. 491. See also *Commings v. Heard*, 39 L. J. Q. B. 9; L. R. 4 Q. B. 669. Where in an action of ejectment it appeared that the lessor of the plaintiff and the defendant had before referred their right to the land to an arbitrator, who had awarded in favour of the lessor, it was held that the award precluded the defendant from disputing the lessor's title. *Doe d. Morris v. Rosser*, 3 East, 11. But where, on a reference by landlord and tenant, the arbitrator awarded that a stack of hay, left upon the premises by the tenant, should be delivered up by him to the landlord upon the tenant being paid a certain sum, it was held that the *property* in the hay did not pass to the landlord on his tender of the money by mere force of the award. *Hunter v. Rice*, 15 East, 100. Where the commissioners under an inclosure Act were directed to make an award respecting the boundaries of a parish, and to advertise a description of the boundaries so fixed, and the boundaries so fixed were to be inserted in their award, and to be binding, final, and conclusive, but the boundaries mentioned in the award varied from those which had been advertised; it was held that the commissioners, not having pursued their authority, their award was not binding as to the boundaries. *R. v. Washbrook*, 4 B. & C. 732; but see the remedial Acts; see *Proof of Awards, ante*, p. 137.

An award made on a reference of all matters in difference between the parties will not be a bar with regard to any demand which was not in difference between them at the time of the submission, nor referred by them to the arbitrators. *Ravee v. Farmer*, 4 T. R. 146; *Smith v. Johnson*, 15 East, 213. And awards under inclosure Acts are so far on the same footing as private submissions, that if the award go beyond the powers of the commissioners, it is void *pro tanto*; and if it omit to decide on anything within the scope of the submission, the interest of parties remains *in statu quo*. *Per Best, C.J., Thorpe v. Cooper*, 5 Bing. 116, 129. But where an action by a person for his salary, and also for damages for dismissal from service, was referred, and the plaintiff gave evidence of dismissal, but claimed no damages for it before the arbitrator, who only awarded the amount of salary; held that the award was nevertheless a bar to a second action for damages for the dismissal. *Dunn v. Murray*, 7 L. J. (O. S.) K. B. 390; 9 B. & C. 780. See *Hadley v. Green*, 1 L. J. Ex. 137; 2 C. & J. 374. A. filed a bill against B. for the infringement of a patent, and the arbitrator found that the patent was not illegal and void: it was held that, in a subsequent action, by A. against B. for infringement of the same

patent, this award did not estop B. from setting up the defence that A. was not the first and true inventor. *Newall v. Elliott*, 1 H. & C. 797; 32 L. J. Ex. 120.

The judgment of an usurped jurisdiction between parties is not admissible as an award without proof of mutual submission. *Rogers v. Wood*, 2 B. & Ad. 245.

An award made on ejectment, brought by A. against a mortgagor after mortgage, is not evidence for A. on an ejectment brought by the mortgagee against him. *Doe d. Smith v. Webber*, 3 L. J. K. B. 148; 1 Ad. & E. 119. In a suit for injury to A.'s reversionary interest in a close whereof F. was tenant, in which the defendant set up the right of G., and denied that of A., it was held that the plaintiff could not put in, as evidence of such right, an award made in a former action between F. as plaintiff and G. as defendant, in which the same right was in question, and in which G. had pleaded not guilty only, and afterwards paid damages awarded against him; for as it was not shown that A. was substantially the plaintiff in the first action, or that F. brought it by A.'s authority, a verdict or award against F. could not have prejudiced A., and therefore could not be available as evidence for A. *Wenman (Lady) v. Mackenzie*, 5 E. & B. 447; 25 L. J. Q. B. 44. But where the right to a watercourse and a question of boundary were referred by a submission between A. and his tenant B. on the one side, and C., a neighbouring landowner, on the other, the award was held admissible evidence for C. on both points in a subsequent action by him against B.; although B. had, in the meantime, become tenant of the same land to another landlord, under whom he now justified, and who was not shown to be in privity with A. *Breton v. Knight*, Winton Sum. Ass. 1837, per Tindal, C.J., confirmed in Banc on motion for a new trial; MS. On an issue between plaintiff and an execution creditor of B., whether growing crops belonged to B., an award made between plaintiff and B. touching the crops, just before the execution, was held admissible as against the defendant. *Thorpe v. Eyre*, 1 Ad. & E. 926. In an action on a policy *Ld. Kenyon* admitted evidence that the defendant had agreed to be bound by an award to which other persons were parties, and that the award was in favour of the plaintiff. *Kingston v. Phelps*, Peake, 228.

That an award is not evidence, as between strangers, even in a matter in which hearsay is admissible, see *Evans v. Rees*, 9 L. J. M. C. 83; 10 Ad. & E. 151; *Wenman (Lady) v. Mackenzie*, *supra*. So an award against a principal debtor is not evidence in an action against his surety. *Ex pte. Young; Kitchin, In re*, 50 L. J. Ch. 824; 17 Ch. D. 688.

The award of arbitrators or an umpire upon a claim for compensation under the Lands Clauses Consolidation Act, 1845, has the same effect as the verdict of a jury in an inquisition before the sheriff under that Act, and is conclusive as to the amount, but not as to the right to compensation. *In re Newbold & Metropolitan Ry.*, 14 C. B. (N. S.) 405; *Beckett v. Midland Ry.*, 35 L. J. C. P. 163; L. R. 1 C. P. 241; *R. v. Cambrian Ry.* 38 L. J. Q. B. 198; L. R. 4 Q. B. 320. So in the case of an award under the Public Health Act, 1875; *Pearsall v. Brierley Hill Local Board*, 52 L. J. Q. B. 529; 11 Q. B. D. 735; 54 L. J. Q. B. 25; 9 App. Cas. 595; or under the Artizans' and Labourers' Dwellings and Improvement Act, 1875 (*Id.* c. 36). *Wilkins v. Birmingham Corporation*, 53 L. J. Ch. 93; 25 Ch. D. 78. Where the award is for one entire sum, if any part of the sum be given contrary to law the whole is invalidated, and this objection may be taken in an action on the award. *Beckett v. Midland Ry.*, *supra*.

Where an award under seal directs the payment of money, the award does not create a specialty debt, although the submission was also under seal. *Talbot v. Shrewsbury (Earl)*, 42 L. J. Ch. 877; L. R. 16 Eq. 26.

STAMPS.

The subject of stamps, though important and useful at *Nisi Prius*, is one that cannot be treated of at length in a work of this kind. For the duty on particular instruments reference must be made to the Stamp Act, 1891 (54 & 55 V. c. 39).

Stamp duty is chargeable on an instrument in accordance with its legal effect. *R. v. Ridgwell*, 5 L. J. (O. S.) M. C. 67; 6 B. & C. 655, 669, *per* Bayley, J.; *Hutton v. Lippert*, 52 L. J. P. C. 54; 8 App. Cas. 309. It is immaterial by what title the parties thereto may designate the transactions therein recorded. S. C. See also *Wale v. Inland Rev. Commsrs.*, 48 L. J. Ex. 574; 4 Ex. D. 270, and *Limmer Asphalte Paving Co. v. Inl. Rev. Commsrs.*, 41 L. J. Ex. 106; L. R. 7 Ex. 211. Where an instrument falls under two classes in the schedules the Commissioners may require it to be stamped as of that carrying the higher duty. *Speyer v. Inl. Rev. Comrs.*, 76 L. J. K. B. 186; [1907] 1 K. B. 246.

Effect of want of stamp—stamp when presumed.] By the Stamp Act, 1891, s. 14 (4), unless the duty and penalty be paid at the trial under sect. 14 (1), "an instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall not, except in criminal proceedings, be given in evidence, or be available, for any purpose whatever, unless it is duly stamped in accordance with the law in force at the time when it was first executed."

Sect. 17 imposes a penalty on the person who, in the course of his office, enrols, registers, or enters, in or upon any rolls, books or records any instrument not duly stamped. See also sect. 41. Where the instrument appears on its face to be duly stamped, it does not seem to be the duty of such person to enquire *aliunde* whether all the circumstances material to the amount of duty are correctly stated. If, however, he know that this is not the case, and that the amount is insufficient, he may (and *semble* must) refuse registration. *Maynard v. Consolidated Kent Collieries Corporation*, 72 L. J. K. B. 681; [1903] 2 K. B. 121. These sections do not, however, invalidate the registration, &c., otherwise regular, of an instrument not duly stamped. *Bellamy v. Saull*, 4 B. & S. 265; 32 L. J. Q. B. 366.

The effect of sect. 14 (4), *supra*, is that an instrument requiring a stamp, cannot, in general, be admitted in evidence without being stamped; and consequently the objection of the want of a proper stamp is raised by any pleading that renders it necessary to put the document in evidence. Thus, in an action on a bill, the objection will arise on a traverse of the drawing or acceptance. *Dawson v. Macdonald*, 6 L. J. Ex. 10; 2 M. & W. 26; *M'Dowall v. Lyster*, 6 L. J. Ex. 11; 2 M. & W. 52. If parties agree orally or by implication to be bound by the same terms as those contained in another written instrument, the latter cannot be given in evidence unless properly stamped. *Turner v. Power*, 6 L. J. (O. S.) K. B. 122; 7 B. & C. 625; *Wallis v. Broadbent*, 6 L. J. K. B. 269; 4 Ad. & E. 877; *Alcock v. Delay*, 24 L. J. Q. B. 68; 4 E. & B. 660. Where a bond, required to be given by a judge's order, had been inadvertently filed by an officer of the court, although unstamped, and immediately the defect was discovered, the party filing the bond procured it to be stamped, the original defect was cured as regards third parties who had no notice of the defect; and it would seem also for all purposes. *Darby v. Waterlow*, 37 L. J. C. P. 203; L. R. 3 C. P. 453.

When an unstamped instrument in writing has been lost; *R. v. Castle Morton*, 3 B. & A. 588; or destroyed even by the party who objects to the want of the stamp; *Rippener v. Wright*, 2 B. & A. 478; oral evidence of the contents is inadmissible. But where an instrument has been lost or is not produced upon notice, and there is no evidence given respecting it one way

or the other, the presumption is that it was properly stamped; but if it be shown to be at one time unstamped, the presumption is that it continued unstamped, until the presumption is rebutted by some evidence *contra*, so as either to prove the stamping, or to leave it altogether uncertain. *Closmadeuc v. Carrel*, 25 L. J. C. P. 216; 18 C. B. 36; *Marine Investment Co. v. Haviside*, 42 L. J. Ch. 173; L. R. 5 H. L. 624. See also *Arbon v. Fussell*, 7 L. T. 283; *Blair v. Ormond*, 1 De G. & Sm. 428. Where an indenture of apprenticeship, executed 30 years before, was lost, it was presumed to have been properly stamped, though an officer from the Stamp Office stated that it did not appear that any such indenture had been stamped. *R. v. Long Buckley*, 7 East, 45. So, an order for payment given by the defendant to the plaintiff, and lost by the latter, will be presumed, as against the defendant, to have been duly stamped. *Pooley v. Goodwin*, 4 Ad. & E. 94. An unstamped copy under the hand of the party against whom it is offered as secondary evidence is admissible, and the due stamping of the original is presumed, unless disproved. *Smith v. Maguire*, 1 F. & F. 199. Where a party refuses to produce an agreement after notice, it will be presumed, as against him, to be properly stamped; *Crisp v. Anderson*, 1 Stark. 35; unless evidence be given that it was not stamped. *Crowther v. Solomons*, 18 L. J. C. P. 92; 6 C. B. 758. In the cases in which a *personal* penalty is imposed by sect. 15 (2), for not stamping a document within a certain time, it would seem, on the principle of the presumption of innocence, that unless the document be shown to be unstamped after the lapse of that time, it must be presumed to have been duly stamped within that time. In *London & County Banking Co. v. Ratcliffe*, 51 L. J. Ch. 28; 6 App. Cas. 730, the C. A. received a copy, stamped as an original, as evidence of an unstamped document which had been destroyed; but it is difficult to see on what principle this copy could have been admitted. See also *Marine Investment Co. v. Haviside*, 42 L. J. Ch. 173; L. R. 5 H. L. 624, 630. If an instrument be produced at the trial bearing adhesive stamps properly cancelled, it will be presumed that they were affixed at the proper time. *Bradlaugh v. De Rin*, 37 L. J. C. P. 146; L. R. 3 C. P. 286.

When the transaction is capable of being legally proved by other evidence than that of the instrument which ought to bear a stamp, such evidence, if allowed by the pleadings, may be resorted to; thus, where a promissory note appears to be improperly stamped, the plaintiff may resort to the original consideration. *Farr v. Price*, 1 East, 58; *Tyte v. Jones*, *Id.* n. In *Vincent v. Cole*, M. & M. 257, where a witness called by the plaintiff stated that the work, the payment for which formed the subject of the claim, was commenced under a written agreement, but that the items relied on by the plaintiff were extras, and not contained in it, Ld. Tenterden ordered the agreement to be produced, and as it was unstamped the plaintiff was non-suited. But, in *Reid v. Batte*, *Id.* 413, a distinct order by the defendant having been proved, Ld. Tenterden thought that, though it was shown that the work was commenced under a written contract, the contract need not be produced. And a verbal admission of a debt, and promise to pay it, may be proved, though the party at the same time gave an unstamped admission and promise to pay. *Singleton v. Barrett*, 1 L. J. Ex. 134; 2 C. & J. 368. So, though an unstamped receipt is no evidence of payment, the fact of payment may be proved by a witness who was present, and he may be allowed to use the unstamped receipt for the purpose of refreshing his memory. *Rambert v. Cohen*, 4 Esp. 213. So, an unstamped promissory note may be used in an action for money lent, to refresh the defendant's memory and to obtain an admission of the loan. *Birchall v. Bullough*, 65 L. J. Q. B. 252; [1896] 1 Q. B. 325. But see *Fengl v. Fengl*, 84 L. J. P. 29; [1914] P. 274; noted under next heading. Where an action is brought upon an instrument which ought to be stamped, and the form of the pleading is such that at the trial it is not necessary to produce it, the court will not examine whether it is legally available with reference to the stamp laws. *Per* Ld. Eldon, C., *Huddleston v. Briscoe*, 11 Ves. 596; *Thynne v. Protheroe*, 2 M.

& S. 553. When a bill of exchange on a wrong stamp has been given for goods sold, the vendor, in suing for the price, need not prove notice of dishonour. *Cundy v. Marriott*, 9 L. J. (O. S.) K. B. 70; 1 B. & Ad. 696.

If a plaintiff succeed in making out a case of implied or oral contract, and it does not appear on the cross-examination of his witnesses that there was any contract in writing, the defendant will not be allowed to give an unstamped written contract in evidence for the purpose of nonsuiting the plaintiff. *Fielder v. Ray*, 8 L. J. (O. S.) C. P. 65; 6 Bing. 332; *R. v. Padstow (Inhabitants)*, 2 L. J. M. C. 15; 4 B. & Ad. 208; *Magnay v. Knight*, 1 M. & Gr. 944. But where the defendant, being called as a witness for the plaintiff, proved that there was a written agreement, and on his being called on to produce it, it appeared to be unstamped, it was held that the plaintiff must be nonsuited; *Alcock v. Delay*, 24 L. J. Q. B. 68; 4 E. & B. 660; for an unstamped agreement is not a nullity. S. C.; *R. v. Watts*, 23 L. J. M. C. 56; *Dears. C. C.* 326. A party who executes the counterpart of a deed, properly stamped, cannot object to its admissibility in evidence on the ground that the original is not properly stamped. *Paul v. Meek*, 2 Y. & J. 116. Now, however, by sect. 72, in every case, except a lease not executed by the lessor, the counterpart must bear a denoting stamp, unless it be stamped as an original. The stamp must be such as was applicable to the instrument at the time of its execution. *Clarke v. Roche*, 47 L. J. Q. B. 147; 3 Q. B. D. 170.

Unstamped instrument, when evidence for collateral purposes.] In many cases, an instrument, not properly stamped, is admissible to prove a collateral fact. And the fact seems to be collateral, if the instrument be offered, not for the purpose of giving effect to it, but in order to prove something independent of, and unconnected with, the purpose for which the stamp is required to be impressed. Thus, in an action of debt for bribery at an election, an unstamped promissory note payable to the defendant, which a witness said he had given for the repayment of money received by him, as a voter, from the defendant, is evidence to corroborate the testimony of the witness. *Dover v. Maestaer*, 5 Esp. 92. So, an unstamped agreement has been admitted between the parties to prove usury. *Nash v. Duncomb*, 1 M. & Rob. 104. Or, to show the illegal consideration of the plaintiff's debt. *Coppock v. Bower*, 8 L. J. Ex. 9; 4 M. & W. 361. Or, to refresh the memory of a witness. *Maugham v. Hubbard*, 6 L. J. (O. S.) K. B. 229; 8 B. & C. 14; *Birchall v. Bullough*, 65 L. J. Q. B. 252; [1896] 1 Q. B. 325. Or, to show fraud: thus an unstamped promissory note may be given in evidence to establish fraud, by showing that it was written by the maker in a state of intoxication. *Gregory v. Fraser*, 3 Camp. 454; *Keable v. Payne*, 7 L. J. Q. B. 218; 8 Ad. & E. 555; *R. v. Gompertz*, 16 L. J. Q. B. 121; 9 Q. B. 824. So, an unstamped agreement may be used to show fraud. *Ashcombe v. Ellam*, 2 F. & F. 306. And see *Holmes v. Siasmith*, 7 Ex. 802; 21 L. J. Ex. 312. And an allegation that plaintiff delivered up a guarantee may be proved by delivery of an unstamped guarantee. *Haigh v. Brooks*, 9 L. J. Q. B. 194; 10 Ad. & E. 309. In *Mason v. Motor Traction Co.*, 74 L. J. Ch. 273; [1905] 1 Ch. 419, Buckley, J. said he could look at an unstamped agreement for the sale by a company of its undertaking, not as an agreement but as a document evidencing the terms upon which the company proposed to sell if not restrained from so doing.

An unstamped deed of assignment is admissible in proof of an act of bankruptcy. *Ponsford v. Walton*, 37 L. J. C. P. 113; L. R. 3 C. P. 167; *Ex pte. Squire*, 38 L. J. Bk. 13; L. R. 4 Ch. 47.

On the other hand, in *Fengl v. Fengl*, 84 L. J. P. 29; [1914] P. 274, Evans, P., in giving the judgment of a Divisional Court, said (84 L. J. P. p. 30) in reference to the language of s. 14, sub-s. 4 of the Stamp Act, 1891, that it "is very wide, and I think includes the tendering of a document for any collateral purpose. That provision in the Act of 1891 appears to have

been moulded upon sect. 17 of the Stamp Act, 1870, which has been held to exclude unstamped documents even if tendered only for collateral purposes." These observations, however, which are at variance with what is said in several of the preceding cases, were *obiter*, for the document sought to be admitted in the case then before the court was tendered not for a collateral purpose but to prove a material issue. The case cannot therefore be taken as overruling the cases set out above.

It has been held that the court cannot inspect an unstamped contract even for the purpose of ascertaining whether its contents preclude the admission of oral evidence of extras. *Buxton v. Cornish*, 13 L. J. Ex. 91; 12 M. & W. 421, 426. But the dictum of Bayley, J., *R. v. Pendleton*, 15 East, 449, and the decision in *Reed v. Deere*, 7 B. & C. 261, seem at variance with this ruling; however, the cases may perhaps be reconciled by holding that where the work, the price of which is claimed, cannot be proved without disclosing the existence of a written and unstamped contract, the court cannot inspect that contract for the purpose of ascertaining whether the work actually in question does or does not come within its terms; but it is otherwise where such work can be proved by independent evidence which does not require the contract to be produced; see *infra*. Such an instrument cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues. *Jardine v. Payne*, 9 L. J. (O. S.) K. B. 129; 1 B. & Ad. 663. Yet, in an action for goods sold, a bill of parcels, on which the seller has written an unstamped receipt when he made out the bill, may be put in by the defendant as evidence that another person, and not he, was debited by the plaintiff as buyer: for it is not used as a receipt, nor need that part be read. *Millen v. Dent*, 16 L. J. Q. B. 374; 10 Q. B. 846. A statement of account is admissible against the party whose unstamped receipt for the balance is signed at the foot. *Matheson v. Ross*, 2 H. L. C. 286. But if the payment had been in dispute in the cause, or had been material in the issue between the parties, so that it would have been necessary to instruct the jury to discharge the receipt from their minds, it is questionable whether the statement could then have been admitted, even for the collateral purpose of proving the account. S. C. *Id.* 307, *per* Ld. Campbell, C.J.

On trial of issues out of Chancery upon a suit for specific performance of a sale, a writing in the following form was put in by the vendee:—"Received of A. B. the sum of —, being the amount of three tenements sold by me adjoining, &c. Signed, C. D." (the vendor). The two questions were, 1. Whether there was a contract of sale? 2. Whether there was any payment? The writing was stamped as an agreement only. Upon an appeal in Chancery, Ld. Cottenham considered the paper inadmissible on the first issue, being an attempt to prove an agreement by proving the fact of payment. On a further trial and appeal, Ld. St. Leonards, C., held it admissible evidence of the contract of sale. It was not contended to be admissible as proof of payment, and it contained all the terms of the contract, with the signature of the vendor subscribed. *Evans v. Prothero*, 2 Mac. & G. 319; 20 L. J. Ch. 448; S. C. 1 D. M. & G. 572; 21 L. J. Ch. 772. But where a memorandum stamped as a receipt only, amounts to a promissory note it is not admissible to prove an advance of money claimed to be due under an equitable mortgage; *Ashling v. Boon*, 60 L. J. Ch. 306; [1891] 1 Ch. 568; or on an account stated; *Green v. Davies*, 3 L. J. (O. S.) K. B. 185; 4 B. & C. 235.

A party declared upon two written agreements, by the second of which variations were made in the first: there were counts upon each separately, and it appeared, when the instruments were produced in evidence by the plaintiff, that the first only was stamped: it was held that the second could not be read in evidence to support the plaintiff's case, but might be looked at by the court in order to ascertain whether the first was altered by it; and that, if it were, the plaintiff could not exclude the second agreement, and proceed upon the first only. *Reed v. Deere*, 7 B. & C. 261. Where, in an action against an acceptor, it appeared that, on the bill becoming due, his

name had been erased and another bill (unstamped) drawn on the back of the first, it was held that the unstamped bill could not be submitted to the jury for the purpose of drawing the conclusion that the first bill had been cancelled. *Sweeting v. Halse*, 7 L. J. (O. S.) K. B. 156; 9 B. & C. 365. But where the plaintiff proved a deposit of money on certain terms contained in a promissory note duly stamped, and the note was afterwards altered by consent so as to become invalid for want of a fresh stamp, it was held to be still admissible evidence of the terms of the deposit. *Sutton v. Toomer*, 6 L. J. (O. S.) K. B. 49; 7 B. & C. 416. On a plea of payment to an action on a bill, where some proof appeared on the plaintiff's evidence that payment was made by another bill, he may put in the bill to show that it was unavailable for want of a stamp. *Smart v. Nokes*, 13 L. J. C. P. 79; 6 M. & Gr. 911.

Stamps—Number required.] The stamp required depends on the true character of the instrument, notwithstanding what it purports to be, and it is to be stamped for its leading and principal object, and this stamp covers everything accessory to this object. *Limmer Asphalt Paving Co. v. Inl. Rev. Comms.*, 41 L. J. Ex. 106; L. R. 7 Ex. 211, 215, 217. But where one instrument operates as two independent ones, each of which would be liable to duty, it must be stamped in respect of each. *Hadgett v. Inl. Rev. Comms.*, 3 Ex. D. 46.

Where the subject-matter of the instrument is joint, though several persons are interested in it, only one stamp is requisite. Thus an assignment of the prize-money of several seamen on board a privateer, payable out of one fund, requires only one stamp. *Baker v. Jardine*, 13 East, 235, n. So, an agreement by several for a subscription to one common fund. *Davis v. Williams*, 13 East, 232. So an agreement of reference by all the underwriters on one policy. *Goodson v. Forbes*, 6 Taunt. 171. So, a bond by several obligors in a penalty conditioned for the performance of certain acts by each and every of them. *Bowen v. Ashley*, 1 B. & P. N. R. 274; and see *Stead v. Liddard*, 1 L. J. (O. S.) C. P. 52; 1 Bing. 196. So an agreement by three persons, in consideration that A. would pay a certain debt and costs, to indemnify A. to the extent of £50, to be paid separately by each with one-fourth of the costs, requires only one stamp. *Ramsbottom v. Davis*, 8 L. J. Ex. 80; 4 M. & W. 584. A release by several commoners of their respective rights, to make them competent witnesses, required only one stamp. *Carpenter v. Buller*, 2 M. & Rob. 298. And a single release of all encroachments by persons who had severally encroached on a common, made to the trustees of the commoners in general, was held to require only one stamp. *Doe d. Croft v. Tidbury*, 23 L. J. C. P. 57; 14 C. B. 304. See also *Thomas v. Bird*, 11 L. J. Ex. 261; 9 M. & W. 68. So, where the members of a mutual insurance club all executed the same power of attorney, severally authorizing the persons therein named to sign the club policies for them. *Allan v. Morrison*, 7 L. J. (O. S.) K. B. 106; 8 B. & C. 565. So, where several shareholders convey their interests by one deed, only one *ad valorem* stamp for the total amount is necessary. *Wills v. Bridge*, 18 L. J. Ex. 384; 4 Ex. 193. See also *Freeman v. Inl. Rev. Comms.*, 40 L. J. Ex. 85; L. R. 6 Ex. 101.

When an agreement refers to another document, and the two papers form, in fact, but one agreement, it is sufficient if one of them only bear a stamp. *Peate v. Dicken*, 4 L. J. Ex. 28; 1 C. M. & R. 422. But where a paper contains several contracts, and consequently requires several stamps, and only one is impressed upon it, that stamp applies to the contract only on which the stamp is impressed. *Powell v. Edmunds*, 12 East, 6. Where a paper contains a number of independent contracts with different tenants, though under the same general terms of holding, and there is but one stamp upon it, it is matter of evidence to which contract the stamp applies, and the juxtaposition of the stamp is to be regarded. *Doe d. Copley v. Day*, 13 East, 241; and now see sect. 3. And if it be uncertain to which the

stamp applies, the paper is inadmissible. *Shipton v. Thornton*, 8 L. J. Q. B. 73; 9 Ad. & E. 314, 331. The several admissions of five corporators, as freemen, were written on the same paper with only one stamp; such stamp was held to apply to the first admission only, and the others could not be read. *R. v. Reeks*, 2 Ld. Raym. 1445; and see *Perry v. Bouchier*, 4 Camp. 80; *Waddington v. Francis*, 5 Esp. 182. To a stamped agreement to refer a question to A., the parties some days afterwards added a memorandum appointing B. instead of A. : held that one stamp was sufficient. *Taylor v. Parry*, 9 L. J. C. P. 298; 1 M. & Gr. 604. Where the defendant made in his own name a single agreement as to goods of his own and also goods of himself and partners, the whole of the goods forming part of the cargo of one ship, and signed in the name of the firm; held in an action on it against him alone, that only one stamp was necessary. *Shipton v. Thornton*, 8 L. J. Q. B. 73; 9 Ad. & E. 314.

Foreign instruments.] Under sect. 14 (4) of the Stamp Act, 1891, no instrument, wherever executed, relating to any property situate, or to any matter or thing done or to be done, in the United Kingdom, shall be given in evidence unless stamped. See *Inland Rev. Comrs. v. Maple*, 77 L. J. K. B. 55; [1908] A. C. 22. If a stamp be necessary to render an instrument valid in one of the British colonies, it has been held that it cannot be received in evidence without that stamp here. *Clegg v. Levy*, 3 Camp. 167; *Alves v. Hodgson*, 7 T. R. 241. So where a foreign contract is void for want of a foreign stamp, it will also be void in this country. *Bristow v. Sequeville*, 19 L. J. Ex. 289; 5 Ex. 275. But as a general rule our courts do not take notice of foreign revenue laws; therefore an unstamped receipt, given in France, will be evidence here, though the French law requires that it should be stamped. *James v. Catherwood*, 3 D. & Ry. 190.

Under sect. 15 (3 a), an instrument first executed abroad may be stamped within thirty days after its first arrival in the United Kingdom, without the payment of any penalty. See *In re English Chartered Bank*, 62 L. J. Ch. 825; [1893] 3 Ch. 385. A contract made in a British ship at sea is in the same position with regard to a stamp as one made abroad; see *Ximenes v. Jaques*, 1 Esp. 311.

Adhesive stamps, how cancelled.] Sect. 8 (1): "An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel the adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, together with the true date of his so writing, or otherwise effectively cancels the stamp and renders the same incapable of being used for any other instrument, or for any postal purpose, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time." Where two or more adhesive stamps are used to denote the stamp duty, each or every stamp is to be cancelled in the manner aforesaid. [45 & 46 V. c. 72, s. 14 (1).]

It will be seen that under these sections cancellation is not imperative; it merely obviates the necessity of adducing evidence that the stamp was affixed at the proper time. See *Marc v. Rouy*, 31 L. T. 372.

The several sections allowing the use of adhesive stamps enact by whom the same are to be respectively cancelled. In general the person first signing the instrument is the proper person to cancel the stamp; in the case, however, of charterparties, the last person executing is to cancel the stamp. See sect. 49 (2). The cancellation may be by any mark of a defacing nature. *M'Mullen v. "Sir Alfred Hickman" S.S. Co.*, 71 L. J. Ch. 766.

Time of stamping.] By sect. 15, an instrument may in general be stamped by the Commissioners of Stamps with an impressed stamp, after execution,

on payment of the duty and a penalty; and instruments first executed abroad may be stamped within 30 days after their first arrival in the United Kingdom without the payment of any penalty. [S. Act, 1870, s. 15; 51 & 52 V. c. 8, s. 18 (2).] If an instrument bear a proper impressed stamp when produced at the trial it is sufficient, though it was not stamped when executed, provided the commissioners are not expressly prohibited from subsequently affixing a stamp. *R. v. Chester (Bishop)*, Stra. 624; and see *Rogers v. James*, 7 Taunt. 147. The court will not inquire whether the penalty has been paid, or whether the stamp has been affixed in proper time, but will receive the instrument in evidence, when the stamp is not required by statute to be affixed within a certain time. *R. v. Preston*, 3 L. J. M. C. 58; 5 B. & Ad. 1029; *Rose v. Tomlinson*, 3 Dowl. 49; *Lacy v. Rhys*, 33 L. J. Q. B. 157; 4 B. & S. 873. But with regard to an instrument to which a stamp cannot by law be subsequently affixed, an inquiry as to the time of affixing is admissible. *Green v. Davies*, 3 L. J. (O. S.) K. B. 185; 4 B. & C. 235. And as an adhesive stamp cannot in general be applied to an instrument after its execution, it would seem that in this case an inquiry as to when the stamp was affixed is admissible. Express evidence as to the time of the affixing of the stamp is required by sect. 8 (1), unless it has been cancelled as required by that section. But where, as in the case of foreign bills of exchange, an adhesive stamp is to be affixed before negotiation in this country, if the stamp appear on the bill at the trial, this is, *primâ facie*, sufficient evidence. *Bradlaugh v. De Rin*, 37 L. J. C. P. 146; L. R. 3 C. P. 286.

Penalty for stamping.] By sect. 15 (1), in general the penalty for stamping after execution is £10, and where the duty to be paid exceeds £10, interest is chargeable on the duty at the rate of £5 per cent. per annum from the day on which the instrument was first executed to the time when the interest is equal to the amount of unpaid duty. But (3 b and 6, and 58 & 59 V. c. 16, s. 15) the Commissioners of Inland Revenue may, if they think fit, mitigate or remit any penalty payable on stamping. [S. Act, 1870, s. 15, 51 & 52 V. c. 8, s. 18 (2).]

Some instruments may be stamped within a certain time of their execution without penalty; and in the case of others the amount of the penalty differs from that above stated.

Stamping at the trial.] By sect. 14 (1) unstamped or insufficiently stamped documents produced as evidence may, if they can be legally stamped after the execution thereof, be received in evidence on payment to the officer of the court of the unpaid duty, the penalty, and a further sum of £1.

Time and mode of objecting to the stamp.] After proof of the due execution of an instrument, the rule is that it lies on the opponent to point out any objection to the stamp. If indications of an effaced stamp appear, it is for the judge to decide whether he is satisfied of its admissibility. *Doe d. Fryer v. Coombs*, 12 L. J. Q. B. 36; 3 Q. B. 687; *Wilson v. Smith*, 13 L. J. Ex. 113; 12 M. & W. 401. And the objection must be made before the paper is read in evidence, *Foss v. Wagner*, 7 Ad. & E. 116, n. But where the objection does not appear except on extrinsic evidence, the objection may be made after it has been read. *Field v. Woods*, *Id.* 114. In that case the objection was that a cheque was post-dated. Interlocutory proof in support of the objection must be received *instantly*, and the question be decided by the judge. *Bartlett v. Smith*, 12 L. J. Ex. 287; 11 M. & W. 483. The court will grant a new trial where the evidence is left to the jury as part of the defendant's case. *Id.* If, however, the objection is not a mere stamp objection, as where the existence of the original stamped policy of insurance, a copy of which is tendered in evidence, is disputed, the whole question must be left to the jury. *Stowe v. Querner*, 39 L. J. Ex. 60;

L. R. 5 Ex. 155. A stamp objection must be taken at the earliest possible moment. *Robinson v. Vernon (Lord)*, 7 C. B. (N. S.) 235; 29 L. J. C. P. 310. Where a probate was read without objection, its evidence could not be excluded by afterwards showing that the amount of personalty passing under the will exceeded the amount covered by the stamp. S. C. Where an instrument hearing an agreement stamp only was put in as such, and the defendant's counsel afterwards relied on it as a lease, it was held that the objection ought then to be taken to the stamp, and was too late on a motion for a new trial. *Doe d. Philip v. Benjamin*, 8 L. J. Q. B. 117; 9 Ad. & E. 644. The fact that the defendant was a party to the fraud on the revenue will not estop him from objecting. *Steadman v. Duhamel*, 14 L. J. C. P. 270; 1 C. B. 888. It should be observed that it is not usual for counsel to take a stamp objection to a document where the objection can be cured by stamping at the trial under sect. 14 (1).

It was formerly competent for the parties to overlook the want of a stamp or of a proper stamp; but by sect. 14 (1), *ante*, p. 197, the objection is now to be taken by the judge, &c., at the trial.

By Rules, 1883, O. xxxix. r. 8, "A new trial shall not be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp." Where a judge trying an action without a jury rules that a document is sufficiently stamped or does not require a stamp, his decision is final. *Blewitt v. Tritton*, 61 L. J. Q. B. 773; [1892] 2 Q. B. 327. Where, however, he rejects it on account of the insufficiency of the stamp, the ruling is, of course, still open to review. *Sharples v. Rickard*, 2 H. & N. 57; 26 L. J. Ex. 302. After the expression of the judge's opinion adverse to the reception of the document, counsel must formally tender it in evidence and require a note to be taken of the tender, otherwise the point will be of no avail on a motion for a new trial. *Campbell v. Loader*, 34 L. J. Ex. 50.

Stamp objections by the officer of the court are sometimes avoided by the consent of the parties to the use of copies of unstamped originals, for the officer of the court can only take such objections as the parties might have taken if sect. 14 (1) had not been enacted. If an admitted copy of a document be put in evidence, and it afterwards appears that the original was not duly stamped, the unstamped copy is still admissible. *Traviss v. Hargreave*, 4 F. & F. 1078; *cor.* Keating, J. Where, however, the objection appeared on the face of a special case, the court refused to allow the case to be argued. *Nixon v. Albion Marine Insurance Co.*, 36 L. J. Ex. 180; L. R. 2 Ex. 338.

COURSE OF EVIDENCE AND PRACTICE AT NISI PRIUS.

Prior to the C. L. P. Act, 1854, trials were always held before a judge and jury. Under sect. 1 of that Act, a trial might by consent of the parties and leave of court take place before a judge alone. Now under Rules, 1883, O. xxxvi. r. 7, the mode of trial is in general by a judge without a jury; provided that in any such case the court or a judge may at any time order any cause, matter, or issue to be tried by a judge with a jury or by a judge sitting with assessors or by an official referee with or without assessors. By r. 2, in actions of slander, libel, false imprisonment, malicious prosecution, seduction, or breach of promise of marriage, either party is entitled on notice to have a trial by jury. See also the Juries Act, 1918, which is declared to have effect during the continuance of the war and for a period of six months thereafter.

Before whichever tribunal the cause is tried the rules of practice at the trial are nearly the same.

The following was the course of practice before the C. L. P. Act, 1854 :— When the jury was sworn, the junior counsel for the plaintiff opened the pleadings; after which, if the proof of the issue rested on the plaintiff, the senior counsel stated the case to the jury, and after witnesses had been examined in support of it, the counsel for the defendant was heard. If he called any witness, the plaintiff's counsel had the general reply.

By Rules, 1883, O. xxxvi. r. 36 (which replace the C. L. P. Act, 1854, s. 18, in similar terms), it is provided that, "upon a trial with a jury, the addresses to the jury shall be regulated as follows: the party who begins, or his counsel, shall be allowed at the close of his case, if his opponent does not announce any intention to adduce evidence, to address the jury a second time for the purpose of summing up the evidence; and the opposite party, or his counsel, shall be allowed to open his case, and also to sum up the evidence, if any, and the right to reply shall be the same as heretofore."

This rule merely allows the defendant's counsel to sum up his evidence, and does not permit the counsel to comment generally on the case; *Gilford v. Davis*, 2 F. & F. 23; but it must be observed that the summing-up usually amounts to a general reply. Where a counsel has not announced his intention to adduce evidence, in consequence of which the party who began sums up his case, he cannot afterwards be permitted to alter his mind and adduce evidence. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227. The same course of practice is usually adopted on a trial before a judge alone; *Metzler v. Wood*, 47 L. J. Ch. 139, one counsel only being heard on questions of fact; *Conington v. Gilliat*, 45 L. J. Ch. 273; 1 Ch. D. 694. A trial before a referee is conducted in the same manner as a trial before a judge.

Where there are several issues, some of which are incumbent on the plaintiff and others on the defendant, it is usual for the plaintiff to begin and to prove those which are essential to his case; *Jackson v. Heskeith*, 2 Stark. 521; the defendant then does the same; and the plaintiff is then entitled to go into evidence to controvert the defendant's affirmative proofs. The defendant's counsel is entitled to comment by way of reply upon such last-mentioned evidence in support of his own affirmative; and the plaintiff's counsel has a general reply. Where the judge decides that there is no evidence to go to the jury on the plaintiff's case, his counsel will not be entitled to sum up. *Hodges v. Ancrum*, 11 Ex. 214; 24 L. J. Ex. 257.

It was formerly laid down as a general rule that, when by pleading or notice the defence is known, the counsel for the plaintiff is bound to open the whole case in chief and cannot proceed in parts unless some specific fact be adduced by the defendant to which the plaintiff can give an answer, and that he cannot go into general evidence in reply. *Rees v. Smith*, 2 Stark. 31. And this appears to be still the rule where a single fact or transaction forms the whole subject of dispute between the parties on the pleadings, which is affirmed on one side and denied on the other. Thus where the plaintiff's title to a mine was in issue, and the plaintiff relied on *prima facie* evidence from possession, he was considered not to be entitled to support his case in reply by general evidence of his title. *Rowe v. Brenton*, 3 M. & Ry. 139, 281 (on a trial at bar; but the objection was waived by the defendant); *Lacon v. Higgins*, 3 Stark. 178. But where the defendant traverses, and also justifies, the plaintiff may reserve his case on the justification until the defendant has proved it. *Browne v. Murray*, Ry. & M. 254, and note *Id.* Or he may enter upon the disproof thereof in the first instance; in which case he will not be allowed to give further evidence of the same kind in reply. *Id.*; *Accord. Shaw v. Beck*, 8 Ex. 392. And the plaintiff is entitled so to reserve his answer to the defendant's case, although his witnesses have been cross-examined so as to disclose the nature of the defence relied upon. *Id.* So where there are cross-demands, and the defendant pleads a set-off, the plaintiff has the option of proving, in the first instance, the balance only he claims, and after the defendant has proved his set-off, of proving other parts of his account to show that a larger sum was due. *Williams v. Davies*,

2 L. J. Ex. 102; 1 Cr. & M. 464. Upon the trial of issues in a patent case, the plaintiff was held entitled to call evidence in reply for the purpose of rebutting a case of prior user set up by the defendant. But after the evidence for the defence was summed up, the defendant was not allowed to adduce further evidence in answer to that given by the plaintiff in reply. *Penn v. Jack*, L. R. 2 Eq. 314.

The general rule was recognized in *Jacobs v. Tarleton*, 17 L. J. Q. B. 194; 11 Q. B. 421, where, in an action against acceptor, the issue was on the indorsement of a bill to the plaintiff. The plaintiff proved the handwriting of the indorser; the defendant, *à contra*, gave evidence that the plaintiff was too poor to have given value for the bill; that he had disclaimed knowledge of it, and had denied any authority from himself to bring the action: in reply the plaintiff offered proof that he was able to discount, and had in fact discounted the bill; it was held that the proof in reply was merely confirmatory and ought not to have been received. It is observable on the report of this case that neither the evidence in defence nor in reply seems to have been pertinent to the issue; but the report in 17 L. J. Q. B. 194 shows that fraud and want of consideration by the plaintiff were also in issue on the record. In *Wright v. Wilcox*, 9 C. B. 650; 19 L. J. C. P. 333, it was held that the plaintiff might, and (*ut semble*) ought to, be allowed to explain by evidence a fact which appears for the first time on the defendant's evidence, and that the judge has a discretion in admitting evidence in reply. And where the judge allowed the plaintiff to put in additional proof of title at the close of the case, and when he was about to sum up, the court above refused to interfere with his discretion. *Doe d. Nicoll v. Bower*, 16 Q. B. 805.

Where a party tenders documentary evidence *prima facie* admissible, the other party will not, except under the rule mentioned below, be allowed to interpose with evidence for the purpose of excluding it. Thus, where plaintiff tendered an examination of defendant taken before bankruptcy commissioners, the defendant was not permitted to call witnesses to prove, before the examination was read, that it was incomplete, and therefore inadmissible. Such evidence, if not obtained by cross-examination, must be postponed as part of the defendant's case. *Jones v. Fort*, M. & M. 196. But evidence to disprove possession of an instrument, of which secondary evidence is tendered; *Harvey v. Mitchell*, 2 M. & Rob. 366; or to show that a contract about which the witness is questioned is in writing; *Cox v. Couveless*, 2 F. & F. 139, Martin, B.; may be given immediately.

It seems that under Rules, 1883, O. xxxi. r. 15, the opposite party may show that the document sought to be put in evidence was referred to in the pleadings or affidavits of the party seeking to put it in, and was not produced on notice, and is therefore inadmissible, unless the non-production be excused under the rule. See *Quilter v. Heatly*, 23 Ch. D. 42, explaining *Webster v. Whewall*, 49 L. J. Ch. 704; 15 Ch. D. 120.

Where the judge has expressed an opinion adverse to the admissibility in evidence of a document, the counsel seeking to put it in must formally tender it in evidence and require a note to be taken of the tender, and if this course is neglected the rejection cannot afterwards be relied on. *Campbell v. Loader*, 34 L. J. Ex. 50.

Both parties are bound by the view taken of their respective cases, and the mode of conducting them, by their counsel at the trial; and they cannot move for a new trial upon grounds omitted to be urged at N. P. See *Doe d. Gord v. Needs*, 6 L. J. Ex. 59; 2 M. & W. 129; *Henn v. Neck*, 3 Dowl. P. C. 163; *Short v. Kalloway*, 11 Ad. & E. 28; *Haslor v. Carpenter*, 3 C. B. (N. S.) 172; *Macdougall v. Knight*, 58 L. J. Q. B. 537; 14 App. Cas. 194; *Seaton v. Burnand*, 69 L. J. Q. B. 409; [1900] A. C. 135. And where counsel offers evidence for one purpose which the judge rejects, he will not, after the trial, be permitted to rely upon it as admissible for another purpose. *R. v. Grant*, 5 B. & Ad. 1081. Nor can he complain of misdirection upon a point which he has, in effect, waived at N. P. *Robinson v. Cook*,

6 Taunt. 336. And misstatement of facts by the judge should be adverted to by counsel at the time, though counsel need not object to the law as laid down by him. *Payne v. Ibbotson*, 27 L. J. Ex. 341. And where evidence has been admitted, without objection, as relevant to the issue, it cannot be objected to as inapplicable after the judge has begun to sum up. *Abbot v. Parsons*, 7 Bing. 563. Where the judge has, in the opinion of counsel, omitted to submit some material point or view of the case to the jury, he ought, it seems, to be reminded of it. *Magor v. Chadwick*, 9 L. J. Q. B. 159; 11 Ad. & E. 571, 584, 585; *Wedge v. Berkeley*, 6 L. J. M. C. 86; 6 Ad. & E. 663. But counsel will not, it is apprehended, be taken to have acquiesced in the summing-up of the judge in point of law, merely because he has not interposed at the time. See *Hughes v. G. W. Ry.*, 14 C. B. 637; 23 L. J. C. P. 153, *per* Cresswell, J. Where the point relied upon by counsel has been distinctly brought under the notice of the judge in the course of the cause, it would be very inconvenient to require that counsel should again advert to it, by way of protest, while the judge is charging the jury.

A party appearing in person must examine the witnesses as well as address the jury. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254. The party in person may conduct his own cause, examine witnesses, and give evidence in his own favour. *Cobbett v. Hudson*, 1 E. & B. 11; 22 L. J. Q. B. 11. But his wife cannot claim to conduct it in his absence. S. C., 15 Q. B. 988. A barrister has no privilege to be heard both personally and by his counsel in his own cause. *Newton v. Chaplin*, 10 C. B. 356; 19 L. J. C. P. 374; *New Brunswick & Canada Ry. & Land Co. v. Conybeare*, 9 H. L. C. 711; 31 L. J. Ch. 297.

The leading counsel has a right, in his discretion, to interpose and take the examination of a witness out of the hands of his junior; but after one counsel has brought the examination to a close, a question cannot regularly be put to the witness by another counsel on the same side. *Doe v. Roe*, 2 Camp. 280.

Counsel for the defendant, in addressing the jury, has no right to ask them whether they are satisfied that defendant is entitled to a verdict as the case stands, without calling witnesses. *Moriarty v. Brooks*, 6 C. & P. 684, *per* Ld. Lyndhurst, C.B.

A judge at N. P. is not bound, at the request of counsel, to put insulated questions to the jury not distinctly raised by the issue on the record, although the verdict may turn upon them; nor is the jury bound to answer them; but with the consent of parties, and where the question is simple and decisive, a judge may in his discretion put it to the jury; *per Cur.* in *Walton v. Potter*, 11 L. J. C. P. 138; 3 M. & Gr. 411, 433, 444; and it may be proper to do so; as where it is desirable to know on which of several grounds the verdict is given. *Id.* 433. Where distinct and divisible wrongs, *ex. gr.*, several imprisonments under different warrants are complained of, the jury may be directed to make a separate assessment of damages; and this is desirable where the legality of each warrant stands on a different footing. *Eggington v. Mayor of Lichfield*, 5 E. & B. 100; 24 L. J. Q. B. 360.

Trial of several causes together.] Where there are several different actions all depending on the same point—*e.g.*, whether defendant was guilty of negligence whereby each of the several plaintiffs was injured—all the causes may, by consent, be tried together by the same jury; but *semb.* they must be sworn in each of the causes. *Pike v. Polytechnic Institution*, 1 F. & F. 712.

Trial of several issues separately.] By Rules, 1883, O. xviii. r. 1, a judge may order the separate trial of causes of action, united in the same action, if they cannot be conveniently tried together. See *Frean v. Watley*, 4 F. & F. 1038.

Power to refer.] Generally, the counsel and attorneys in a cause were at common law presumed to have power to consent to refer the cause at N. P., and the court would not set aside an award made under such order: *Filmer v. Delber*, 3 Taunt. 486; *Faviell v. Eastern Counties Ry.*, 17 L. J. Ex. 297; 2 Ex. 344; but enforced it, though the client repudiated the reference and did not attend. *Smith v. Troup*, 7 C. B. 757. But although counsel have this implied power of reference (see *Neale v. Gordon Lennox*, 71 L. J. K. B. 536; [1902] 1 K. B. 843, 849), yet where the plaintiff consented to the reference of an action for defamation on the express terms of the withdrawal by the defendant's counsel I., of all imputations against her moral character, but her counsel C. agreed to the reference, omitting by mistake to require the withdrawal of the imputations, the reference was set aside, although the restriction on C.'s authority was not known to I. S. C. in H. L., 71 L. J. K. B. 939; [1902] A. C. 465. And as between the attorney and his client, the former might be liable if he referred improperly, or against the will of the latter; and it was certainly inexpedient to refer at N. P. without the consent of parties. And where a party was an infant, *Biddell v. Dowse*, 6 B. & C. 255; or a lunatic, *Cummings v. Ince*, 17 L. J. Q. B. 105; 11 Q. B. 112; there was no adequate authority to refer, so as to bind that party.

By section 13 (1) of the Arbitration Act, 1889 (52 & 53 V. c. 49) (replacing J. Act, 1873, s. 56), "subject to rules of court and to any right to have particular cases tried by a jury, the court or a judge may refer any question arising in any cause or matter (other than a criminal proceeding by the crown) for inquiry or report to any official or special referee."

By sect. 14 (replacing and extending the powers of C. L. P. Act, 1854, s. 3, and J. Act, 1873, s. 57), "in any cause or matter (other than a criminal proceeding by the crown),—(a) if all the parties interested who are not under disability consent: or, (b) if the cause or matter requires any prolonged examination of documents or any scientific or local investigation which cannot in the opinion of the court or a judge conveniently be made before a jury or conducted by the court through its other ordinary officers: or, (c) if the question in dispute consists wholly or in part of matters of account; the court or a judge may at any time order *the whole cause or matter*, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator respectively agreed on by the parties, or before an official referee or officer of the court."

By Rules, 1883, O. xxxiii. r. 2, "the court or a judge may, at any stage of the proceedings in a cause or matter, direct any necessary inquiries or accounts to be made or taken, notwithstanding that it may appear that there is some special or further relief sought for, or some special issue to be tried, as to which it may be proper that the cause or matter should proceed in the ordinary manner."

By J. Act, 1873, s. 66, a judge may order any accounts to be taken or inquiries made in the office of a district registrar for report to the court.

Section 13 (1), *supra*, allows only a reference of such questions as have already arisen, or are certain to arise in the action. *Weed v. Ward*, 58 L. J. Ch. 454; 40 Ch. D. 555. It includes an inquiry by examination of witnesses. *Wenlock (Baroness) v. River Dee Co.*, 56 L. J. Q. B. 589; 19 Q. B. D. 155; decided under J. Act, 1873, s. 56. Section 14 expressly provides that in the cases mentioned therein, even the *whole cause* may be tried before a referee or arbitrator. It seems that "prolonged examination of documents" in sect. 14 (6), means an examination required by the judge to enable him to leave questions of fact to the jury, and not to determine the legal right. See *Ormerod v. Todmorden Mill Co.*, 51 L. J. Q. B. 348; 8 Q. B. D. 674, 677, *per Brett, L.J.* Under sect. 14 (c) an order may be made although in certain events it may become unnecessary to determine the matter of accounts; *Hurlbatt v. Barnett*, 62 L. J. Q. B. 1; [1893] 1 Q. B. 77; before making it, however, the court should be satisfied that there is a substantial dispute between the parties and not unlikely to be a matter of account; S. C., *Id.* 80, 81, following *Knight v. Coales*, 56 L. J.

Q. B. 486; 19 Q. B. D. 296. The judge may, under sects. 13, 14, refer any scientific question in issue to an expert agreed on by the parties, for experiment and report to him. *Badische Anilin und Soda Fabrik v. Levinstein*, 52 L. J. Ch. 704; 24 Ch. D. 156. See also *National Telephone Co. v. Baker*, 62 L. J. Ch. 699; [1893] 2 Ch. 186, 190.

Trial before a referee.] The Arbitration Act, 1889, s. 13, enables a judge to refer any question arising in any cause for inquiry or report to any official or special referee, whose report may be adopted wholly or partially by the court or a judge, and if so adopted may be enforced as a judgment or order to the same effect.

In certain cases defined by sect. 14, the judge may order the whole cause or any question of fact therein to be tried by a referee or arbitrator.

In such references the official or special referee or arbitrator shall be deemed to be an officer of the court, and shall have such authority, and shall conduct the reference in such manner, as may be prescribed by Rules of Court, and subject thereto as the court or judge may direct. This report or award shall, unless set aside by the court or a judge, be equivalent to the verdict of a jury. His remuneration shall be determined by the court or a judge (sect. 15).

By sect. 16, "the court or a judge shall, as to references under order of the court or a judge, have all the powers which are by this Act conferred on the court or a judge as to references by consent out of court." This section refers to sects. 9, 10, 11, which give power to enlarge the time for making the award, to remit the award, and to set it aside, and also, it seems, to sect. 12, by which "an award on a submission may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect."

Sect. 19 gives power to state a special case.

The rules in relation to such references are as follows: By O. xxxvi. r. 48, "where any cause or matter, or any question in any cause or matter, is referred to a referee, he may, subject to the order of the court or a judge, hold the trial at or adjourn it to any place which he may deem most convenient, and have any inspection or view, either by himself or with his assessors (if any), which he may deem expedient for the better disposal of the controversy before him. He shall, unless otherwise directed by the court or a judge, proceed with the trial *de die in diem*, in a similar manner as in actions tried with a jury." R. 49: Subject to any special order evidence is to be taken before a referee, and the attendance of witnesses may be enforced by subpoena; and the trial is to be conducted in the same manner as trials before a judge. Rr. 50, 51, give the referee the same authority with respect to discovery and production of documents, and in the conduct of any reference or trial, and the same power to direct that judgment be entered for any or either party, as a High Court judge, except the power to commit or enforce any order. R. 52 enables the referee, before the conclusion of any trial before him, or by his report under the reference made to him, to submit any question arising therein for the decision of the court, or state any facts specially, with power to the court to draw inferences therefrom; and the court has power to require any explanation or reasons from the referee, and to remit the cause or matter, or any part thereof, for re-trial or further consideration to the same or any other referee; or to decide the question referred to any referee on the evidence taken before him, either with or without additional evidence.

By O. lix. r. 3, "where a compulsory reference to arbitration has been ordered, any party to such reference may appeal from the award or certificate of the arbitrator or referee upon any question of law; and on the application of any party the court may set aside the award on any ground on which the court might set aside the verdict of a jury. Such appeal shall be to a divisional court who shall have power to set aside the award or certificate, or to remit all or any part of the matter in dispute to the arbitrator or

referee, or to make any order with respect to the award or certificate or all or any of the matters in dispute that may be just." The J. Act, 1884, s. 8, extends the provisions of the J. Act, 1873, s. 45, to such appeals, but not to an appeal after a trial before a referee by order under sect. 14. *Munday v. Norton*, 61 L. J. Q. B. 456; [1892] 1 Q. B. 403, C. A.

A referee has power to fix a peremptory appointment for the hearing. *Wenlock v. River Dee Co.*, 53 L. J. Q. B. 208; 49 L. T. 617. A report under sect. 13, requires confirmation, but one under sect. 14, can only be set aside, like a verdict, on the ground that it is against the weight of evidence. *Mansfield Union v. Wright*, 9 Q. B. D. 686, *per* Jessel, M.R. Where on a reference the referee has directed judgment for the plaintiff under O. xxxvi. r. 52, the court may on the evidence set it aside and enter judgment for the defendant. *Clark v. Sonnenschein*, 59 L. J. Q. B. 561; 25 Q. B. D. 226, 464. He is not bound to take accounts sent to him for report in the same way that a chief clerk usually takes them in the Chancery Div. *In re Taylor*; *Turpin v. Pain*, 59 L. J. Ch. 803; 44 Ch. D. 128. An award, made under a consent order to refer an action and all matters in difference is still final. *Darlington Wagon Co. v. Harding*, 60 L. J. Q. B. 110; [1891] 1 Q. B. 245. As to costs see *Minister v. Apperly*, 71 L. J. K. B. 452; [1902] 1 K. B. 643.

Power to compromise.] At common law the parties were bound by the "conduct" of the suit in court by their counsel or attorney: thus, in an action of trespass counsel might, in the absence of the parties, consent to the amount of damages; *per* Pollock, C.B., *Thomas v. Harris*, 27 L. J. Ex. 353; and in an action for malicious prosecution the defendant's counsel may also consent to withdraw all imputations against the plaintiff. *Matthews v. Munster*, 57 L. J. Q. B. 49; 20 Q. B. D. 141. So in an action for libel counsel may consent to the withdrawal of a juror. *Strauss v. Francis*, 35 L. J. Q. B. 133; L. R. 1 Q. B. 379. So, where the party was present and did not dissent from a compromise, he was bound thereby. *Chambers v. Mason*, 5 C. B. (N. S.) 59; 28 L. J. C. P. 10; *Rumsey v. King*, 33 L. T. 728. And generally, an attorney acting *bonâ fide*, reasonably, and skilfully, and not having express instructions not to compromise, was justified in doing so. *Per* Ld. Campbell, C.J., *Fray v. Voules*, 1 E. & E. 832; 28 L. J. Q. B. 232; *Chown v. Parrott*, 14 C. B. (N. S.) 74; 32 L. J. C. P. 197; *Prestwich (or Pristwick) v. Poley*, 18 C. B. (N. S.) 806; 34 L. J. C. P. 189; *Welsh v. Roe*, 87 L. J. K. B. 520. Where the plaintiff's attorney, in an action to recover the price of a piano, agreed to settle the action by the return of the piano and payment of costs, the court upheld the compromise. S. C. This principle applies to the solicitor's agent, whether country or London, on the record, although there is no privity between him and the lay client. *In re Newen*, 72 L. J. Ch. 356; [1903] 1 Ch. 812. So also if a solicitor is induced by his client's conduct to believe that he is authorised to compromise the action, and does compromise it, the client is bound, whether he in fact intended to give authority to the solicitor to do so or not, and whether he in fact understood the terms of the compromise. *Little v. Spreadbury*, 79 L. J. K. B. 1119; [1910] 2 K. B. 658. The power of counsel or attorney to compromise was much discussed on rules for attachment in the case of *Swinfen v. Swinfen*, 18 C. B. 485; 25 L. J. C. P. 303; 1 C. B. (N. S.) 364; 26 L. J. C. P. 97. In S. C. in Equity, it was held that neither counsel nor attorney could compromise the suit at N. P.; 24 Beav. 549; 2 De G. & J. 381; 27 L. J. Ch. 35, 491; though the L.J.J. in so deciding declined to lay down any general principle on the subject. See also *Green v. Crockett*, 34 L. J. Ch. 606. It was not suggested in *Matthews v. Munster*, *supra*, that the common law rules above stated were affected by the J. Act, 1873, s. 25 (11). Counsel has an implied authority to consent to a reference of the action. Consent given by counsel, by the authority of his client, to an order, there being no mistake or surprise, cannot be arbitrarily withdrawn, although the order has not been drawn up. *Harvey v. Croydon Sanitary Authority*, 53 L. J. Ch. 707; 26 Ch. D. 249.

A compromise may, however, be set aside, e.g., on the ground of mistake or fraud, *Wilding v. Sanderson*, 66 L. J. Ch. 684; [1897] 2 Ch. 534. See further *Neale v. Gordon Lennox*, 71 L. J. K. B. 939; [1902] A. C. 473. But a fresh action has been held necessary, where the order has been passed and entered, *Ainsworth v. Wilding*, 65 L. J. Ch. 432; [1896] 1 Ch. 673; but *semble*, not otherwise. *Id.* 680, *per* Romer, J. See, however, *Neale v. Gordon Lennox*, 71 L. J. K. B. 939; [1902] A. C. 473, *per* Ld. Lindley. The compromise will bind, although the solicitor of the party seeking to enforce it did not, when it was made, disclose to the opposite party all the material facts he knew: *Turner v. Green*, 64 L. J. Ch. 539; [1895] 2 Ch. 205. No compromise entered into by the next friend of an infant plaintiff is valid unless it be for the infant's benefit. Thus, an agreement not to appeal from a nonsuit on the terms of the defendant foregoing costs is invalid, the infant being impecunious. *Rhodes v. Swithenbank*, 58 L. J. Q. B. 287; 22 Q. B. D. 577. A solicitor has not, before action brought, implied authority to compromise a claim he has been instructed to make. *Macaulay v. Polley*, 66 L. J. Q. B. 665; [1897] 2 Q. B. 122.

As to what liability a counsel or solicitor incurs to his client by settling an action contrary to his client's wishes, see *Swinfen v. Chelmsford (Lord)*, 5 H. & N. 890; 29 L. J. Ex. 382; *Fray v. Voules*, 28 L. J. Q. B. 232; 1 E. & E. 832; and *Chown v. Parrott*, 32 L. J. C. P. 197; 14 C. B. (N. S.) 74.

Who is to begin.] It is often a subject of inquiry whether the plaintiff or the defendant is to open the facts and evidence to the jury. This may be an advantage, and is then claimed as a *right*; as where evidence is anticipated on the opposite side which will give a right to reply generally on the whole case; or it may be a *burden*; as where a party relies on the witness of his opponent, or on the difficulty of the proofs incumbent on him.

The right or obligation to begin generally depends on the nature of the issue, and also on the rules respecting the *onus probandi* at the commencement of the trial; and the test has been said to be not on which side the affirmative lies, but *which side will be entitled to a verdict if no evidence be given*. *Leete v. Gresham Insurance Co.*, 15 Jur. 1161; Best on Evid., 10th ed., § 268. Thus, where the plaintiff declared for unworkmanlike execution of a contract, and defendant pleaded that it was executed in a workmanlike way, and thereupon issue was joined, it was held that plaintiff was to begin; for it was not to be assumed that the work was bad. *Per* Alderson, B., *Amos v. Hughes*, 1 M. & Rob. 464. This test, however, is only another way of stating the common rule that he on whom the burden of proof lies must begin; for this must be ascertained before it can be determined which side is entitled to the verdict. As a general rule the proof lies on him who affirms, except in cases where the presumption of law or fact is in favour of the affirmative. It must, however, be borne in mind that regard must be had to the effect and substance of the issue and not to its grammatical form. *Soward v. Leggatt*, 7 C. & P. 615, *per* Ld. Abinger; *Amos v. Hughes*, *supra*.

The most general criterion that can be given as to the right to begin is, that "he begins who in the absence of proof on either side would substantially fail in the action." This includes those actions for unliquidated damages noticed below, in which the plaintiff must give some evidence in order to get substantial damages, although he would, if no evidence were given on either side, be entitled to a verdict for a nominal amount, for such a verdict would be a substantial failure. See 45 Law Times, pp. 196, 219, on *The Right to Begin*.

Where, in an action by indorser against acceptor, defendant pleaded that the bill was for the drawer's accommodation, and that plaintiff did not give any consideration to the drawer, to which plaintiff replied that it was indorsed to him by the drawer for a good consideration: held, that as a consideration is presumed, the defendant must begin by proving the want of it, or some suspicious circumstances to throw the proof on the plaintiff.

Mills v. Barber, 5 L. J. Ex. 204; 1 M. & W. 425; *Accord. Lewis v. Parker*, 5 L. J. K. B. 170; 4 Ad. & E. 838. In a declaration on a policy on a life, the plaintiff averred that the deceased had led a temperate life, which was denied by the plea; held that the *onus probandi*, and therefore the right to begin, was with the plaintiff, as he was bound to give some evidence that the life was insurable, though it was contended that intemperance was not to be presumed. *Huckman v. Fernie*, 7 L. J. Ex. 163; 3 M. & W. 505; *Accord. Rawlins v. Desborough*, 2 M. & Rob. 70. The same point was ruled in two other cases in which the issue raised on the plea was respecting the health of the insured; *Geach v. Ingall*, 15 L. J. Ex. 37; 14 M. & W. 95; *Ashby v. Bates*, 15 L. J. Ex. 349; 15 M. & W. 589; although the plea, alleging a specific complaint, ended with a verification in the last case. Where an issue on the sanity of a person was directed by Chancery, the court presumed that the person ordered to be plaintiff was to begin. *Frank v. Frank*, 2 M. & Rob. 314.

In general, if the affirmative of the issue lie on the defendant, and the plaintiff do not seek to recover unascertained damages within the rule on that subject presently noticed, the defendant's counsel begins (after the pleadings have been opened by the plaintiff), and has the general reply. *Cotton v. James*, M. & M. 275; *Jackson v. Hesketh*, 2 Stark. 518. So, where *lib. ten.* was pleaded, and no general issue. *Pearson v. Coles*, 1 M. & Rob. 206.

Where the defendant, a constable, being sued in trespass, pleaded a justification without the general issue, it was held, that his counsel, admitting a demand of a copy and perusal of the warrant (24 G. 2, c. 44), and the damages claimed, was entitled to begin. *Burrell v. Nicholson*, *Id.* 305. To trespass *q. c. f.* the defendant pleaded a right to a watercourse and entry to remove obstructions, the plaintiff traversed the right: held, that the judge might properly allow the defendant to begin, unless the plaintiff undertook to prove substantial damage. *Chapman v. Rawson*, 15 L. J. Q. B. 225; 8 Q. B. 673. So, where a defendant in replevin pleads property in a third person, A., and not in the plaintiff, to which the plaintiff replies that the property is not in A., but in the plaintiff, the defendant is entitled to begin. *Colstone v. Hiscolbs*, 1 M. & Rob. 301. And where, to an action of covenant for repayment of money, the defendant pleaded that the deed was given to secure money lost by gambling, it was ruled that the defendant was entitled to begin. *Hill v. Fox*, 1 F. & F. 136.

But where by order of court the defendant is under an obligation to admit the plaintiff's case, this does not necessarily deprive the plaintiff of his right to begin. *Thwaites v. Sainsbury*, 5 C. & P. 69. Nor does the admission by the defendant's counsel of all the facts, the proof of which are on the plaintiff, give the defendant the right to begin, where the admission of these facts might have been made in pleading. *Pontifex v. Jolly*, 9 C. & P. 202; *Price v. Seaward*, Car. & M. 23.

In many cases where damages, and not the decision of a mere right, have been the object of an action, defendants used so to plead as to take an affirmative issue on themselves, and thereby attempt to exclude the plaintiff's right to a general reply. The judges, however, came to a resolution that "In actions for libel, slander, and injuries to the person, the plaintiff shall begin, although the affirmative issue is on the defendant." *Mercer v. Whall*, 14 L. J. Q. B. 267; *per* Ld. Denman, C.J., 5 Q. B. 447, 462. The resolution, however, is not to be taken as confined to those actions, or introducing a new practice, but as declaratory of a principle applicable to other actions. See *Id.* 456, 463. The general rule, therefore, as laid down in this case, is, that wherever the record shows that something, even damages only, is to be proved by the plaintiff, he ought to begin, whether the action be in contract or tort. Where the damages are of *ascertained amount* or *must be nominal*, then it seems that the defendant may begin, if the pleading will admit of it. See *Id.* 455, 465. See further as to this resolution *Cannam v. Farmer*, 3 Ex. 698, and cases cited in *Mercer v. Whall*, *supra*. Thus, in covenant for dismissing a clerk, the defendant pleaded misconduct, and

plaintiff replied *de injuriâ*, &c.; held, that plaintiff ought to begin. S. C. So, in an action on a promissory note to which defendant pleads, *inter alia*, payment into court, and issue is joined as to damages *ultra*, the plaintiff is to begin, though other issues lie on the defendant. *Booth v. Mills*, 15 L. J. Ex. 354; 15 M. & W. 669. On a note by the defendant, to which she pleaded coverture when she made it, on which issue is joined, the defendant was to begin, although the plaintiff sought to recover interest, not mentioned on the note. *Cannam v. Farmer*, 3 Ex. 698. In replevin and avowry for rent, plaintiff pleaded discontinuance of receipt for 20 years, and no distress within 20 years after the right accrued: replication, distress within 20 years and issue: held, that plaintiff should begin, because he must show *when* the distress was made. *Collier v. Clarke*, 5 Q. B. 467. In trespass *q. c. f.*, where the defendant pleaded a custom to divert water, which was traversed by the plaintiff, the defendant was allowed to begin, though the plaintiff's counsel asserted his intention of asking for heavy damages. *Bastard v. Smith*, 2 M. & Rob. 129; and *per Tindal, C.J.*, "The plaintiff might have traversed the custom and new assigned excess, and then would have had a right to begin." *Id.* 132. Under the present practice the plaintiff, instead of new assigning, would amend his statement of claim, or reply specially. In a similar action the defendant was also held entitled to begin, as the plaintiff's counsel would not pledge himself to go in for substantial damage. *Chapman v. Rawson*, 15 L. J. Q. B. 225; 8 Q. B. 673. In *Cann v. Facey, cor. Gurney, B.*, Exeter Sum. Ass. 1835, in an action of trespass for shooting a dog, where a defendant justified to prevent it from trespassing, the plaintiff was held entitled to begin, though the defendant offered to admit the value of the dog; for, *per Cur.*, "the defendant may have damages beyond that amount"; and a similar ruling by Ld. Tenterden was cited. *Accord.* in a case of justification for shooting a mad dog; *Shapland v. Cockram*, Exeter Sum. Ass. 1844, *per Pattenon, J.*, after consulting Wightman, J. So, in *Mills v. Stephens*, Exeter Spring Ass. 1838, Bosanquet, J., held that plaintiff had a right to begin in a case of trespass for breaking into his house, where the issue was on a plea of leave and licence.

Where the damages sought to be recovered are unliquidated, yet if the defendant admit at the trial the amount claimed in the plaintiff's particulars, he will be entitled to begin, provided the material allegations in the defence are affirmative only. *Lacon v. Higgins*, 3 Stark. 178; *Morris v. Lotan*, 1 M. & Rob. 233; *Bonfield v. Smith*, 2 M. & Rob. 519; S. C., 3 C. & P. 463; *Woodgate v. Potts*, 2 Car. & K. 258; *Tindall v. Baskett*, 2 F. & F. 644, and 1 Taylor, Ev., 10th ed., § 383.

Where the affirmative of any one material issue is on the plaintiff, and he undertakes to give evidence upon it, he has a right to begin as to all; *Rawlins v. Desborough*, 2 M. & Rob. 328; *Collier v. Clarke*, 5 Q. B. 467; and it seems that judgment by default as to part has the same effect, though the defendant pleads affirmatively as to the residue. See *Wood v. Pringle*, 1 M. & Rob. 277. But where to an action on a bill and on an account stated, defendant pleaded payment to the first and non assumpsit to the second count, it was held that the plaintiff had no right to begin unless his counsel undertook to give some evidence of the account stated besides the bill. *Smart v. Rayner*, 6 C. & P. 721; *Mills v. Oddy, Id.* 728; overruling *Homan v. Thompson, Id.* 716, *omn. cor.* Parke, B.; *Frith v. McIntyre*, 7 C. & P. 44; *Oakeley v. Ooddeen*, 2 F. & F. 656; S. P. ruled by Cresswell, J., in *Lanyon v. Davey*, Bodmin Summer Ass. 1842. The plaintiff in replevin has the same right as in other actions, though both parties are actors. *Curtis v. Wheeler, M. & M.* 493.

In the Admiralty Division, in an action of damage by collision, the defendant begins when the *onus* is on him of rebutting a *prima facie* case of negligence. *The Merchant Prince*, [1892] P. 9.

On a proceeding in lieu of demurrer under O. xxv. r. 2, the party who by his pleading raises the point of law has the right to begin. *Stevens v.*

Chown, [1901] 1 Ch. 894; and on the argument of a special case stated by an arbitrator the burden is on the party who disputes the award, and it is for his counsel to begin. *Cavallotti v. Carruthers*, 33 T. L. R. 101.

Who is to begin in action for recovery of land.] In the now superseded action of ejectment the defendant might in some cases, by admitting a title in the plaintiff, entitle himself to begin, and the same principle will apply to the action for recovery of possession of land introduced by the J. Acts, notwithstanding the use of pleadings therein. Thus, where the plaintiff claims as heir-at-law, and defendant as devisee, it is a settled rule that the defendant, by admitting plaintiff's pedigree, and the dying seised, may entitle himself to begin and to reply. *Goodtitle d. Revett v. Braham*, 4 T. R. 497; *Acc. Fenn v. Johnson*, Adam's Eject., 2nd ed. 256, and *Mercer v. Whall*, 14 L. J. Q. B. 267; 5 Q. B. 447, 464, *per Cur.* And the same principle applies though one of the plaintiffs had, since the death of the testator, become assignee of an outstanding term in part of the land; for "the real question in dispute is the validity of the will." *Doe d. Smith v. Smart*, 1 M. & Rob. 476, *per Gurney, B.*, after conferring with Pattenon, J. For the same reason, where the plaintiff claimed as heir of C. and as devisee and heir of R., who was C.'s heir, and the defendant claimed as devisee of C., the defendant's counsel was permitted to begin on admitting that plaintiff was heir of C. and of R., and entitled to recover, *unless* defendant proved C.'s will. *Doe d. Wollaston v. Barnes*, *Id.* 386, *cor. Ld. Denman, C.J.* See observations on this case in *Doe d. Bather v. Brayne*, 17 L. J. C. P. 127; 5 C. B. 655. Where the plaintiff claims as devisee of A., and the defendant as devisee under a subsequent will of A., the defendant cannot, by admitting the seisin of A. and the *primâ facie* title of the plaintiff, entitle himself to begin. S. C., overruling *Doe d. Corbett v. Corbett*, 3 Camp. 368.

Generally, in order to entitle the defendant to begin by admitting the plaintiff's case, he must admit the *whole* without qualification. *Doe d. Pill v. Wilson*, 1 M. & Rob. 323. Therefore, where the plaintiff claims as the heir of A., and defendant under a conveyance by A. in his lifetime, the latter cannot deprive the plaintiff of the right to begin by only admitting the heirship of the plaintiff and seisin of A. *unless* defeated by the conveyance; *Doe d. Tucker v. Tucker*, M. & M. 536; for it is part of the plaintiff's case that A. died seised. So, where each party claimed as heir, and defendant admitted that plaintiff was entitled as heir *if* defendant were not legitimate: held, that he could not by so doing obtain a right to begin. *Doe d. Warren v. Bray*, *Id.* 166.

Direction of judge as to who is to begin.] An erroneous ruling of the judge as to the proper party to begin will not, as a matter of course, entitle the party to a new trial. *Bradford v. Freeman*, 20 L. J. Ex. 36; 5 Ex. 734; *Burrell v. Nicholson*, 1 M. & Rob. 304; *Bird v. Higginson*, 4 L. J. K. B. 124; 2 Ad. & E. 160. But a clear case of error, by which an undue advantage may have been given to the successful party, or injustice done, is ground of new trial; *Ashby v. Bates*, 15 L. J. Ex. 349; 15 M. & W. 589; *Edwards v. Matthews*, 16 L. J. Ex. 291; 4 D. & L. 721; and one was accordingly granted in *Doe d. Bather v. Brayne*, *supra*.

Right to reply.] In general, the party who begins has a right to the general reply when the opposite party calls witnesses. See *Clack v. Clack*, 75 L. J. K. B. 274; [1906] 1 K. B. 483. Where the defendant brings evidence to impeach the plaintiff's case, and also sets up an entirely new case, which again the plaintiff controverts by evidence, the defendant's reply is confined to the new case set up by him, for upon that relied on by the plaintiff the defendant's counsel has already commented in the opening of his own case; and the plaintiff is then entitled to the general reply. 1 Stark. Ev., 4th ed. 609 *et seq.* In strictness, Rules, 1883, O. xxxvi., r. 36, makes no difference in this respect, for it only enables the defendant to sum

up his case; but this rule is not closely adhered to. Where in a libel action against two defendants, one defendant called witnesses who gave evidence material to the cases of both defendants and the other defendant called no evidence, Bruce, J., held that the defendant who had not called witnesses had the right to address the jury after the plaintiff's concluding speech. *Ryland v. Jackson*, 18 T. L. R. 574.

Unless the defendant give evidence, the plaintiff is not entitled to reply, there being no new facts upon which his counsel can comment. Where the defendant, on being called on by the plaintiff to produce a document, interposes with evidence to show it is not in his possession, this gives no general reply. *Harvey v. Mitchell*, 2 M. & Rob. 366.

Where the counsel for the defendant opened material facts to the jury, which he called no witness to prove, it was in the discretion of the judge to permit the plaintiff's counsel to reply. *Crerar v. Sodo*, M. & M. 85. And, where the defendant's counsel in a crown case read a paper or made statements of material facts likely to have weight with the jury without attempting to prove them, both *Ld. Kenyon* and *Ld. Tenterden* permitted a general reply. *R. v. Bignold*, D. & Ry. N. P. 59. As, however, under O. xxxvii. r. 36, the defendant's counsel has to announce his intention to call witnesses at the close of the plaintiff's case, if he did not do so, he would not be allowed to open fresh facts in his speech, for it has been held that when he has allowed the plaintiff's counsel to sum up, he cannot afterwards change his mind. *Darby v. Ouseley*, 1 H. & N. 1; 25 L. J. Ex. 227.

[Where money is paid into court.] By R.S.C., O. xxii. r. 22, Nov., 1893, "Where a cause or matter is tried by a judge with a jury no communication to the jury shall be made until after the verdict is given, either of the fact that money has been paid into court, or of the amount paid in. The jury shall be required to find the amount of the debt or damages as the case may be, without reference to any payment into court." This rule is valid. *Williams v. Goose*, 66 L. J. Q. B. 345; [1897] 1 Q. B. 471.

[Arguments of counsel.] When points of law arise incidentally, all the counsel on both sides are usually heard by the court; and the leading counsel of the party making the objection, or submitting the point, alone replies. But, on the claim of a right to begin, *Ld. Denman* ruled that one counsel only was to be heard on each side. *Rawlins v. Desborough*, 2 M. & Rob. 70. This rule, however, is not always adhered to. See *Bastard v. Smith*, *Id.* 132. If the defendant's counsel apply for judgment for the defendant on a point of law, and the plaintiff's counsel answer it, the defendant's counsel has a right to reply upon the law only. *Arden v. Tucker*, 1 M. & Rob. 192.

The objection of a witness to a question which he considers himself not bound to answer is not a point on which counsel in the cause are heard. *R. v. Adey*, 1 M. & Rob. 94. Nor is his obligation to produce documents.

Where the party conducts his case, addresses the jury and examines witnesses in person, it is questionable whether counsel can be heard for him on a point of law. *Shuttleworth v. Nicholson*, 1 M. & Rob. 254; *Moscatti v. Lawson*, *Ib.* 454. In the latter case, *Alderson, B.*, said that, though there were many precedents, it was a very objectionable practice. It has been decided that a party, who conducts his own case, cannot on that account be excluded from giving evidence as a witness. *Cobbett v. Hudson*, 22 L. J. Q. B. 11; 1 E. & B. 11.

See Rules, 1883, O. xxv. r. 2, as to points of law. *

[Separate defence of co-defendants.] In an action for the price of goods, in which the defendants appeared and pleaded non assumpsit by separate attorneys and counsel, but relied on the same defence (*viz.* payment), it was ruled by *Gibbs, C.J.*, that the senior counsel could alone address the jury, and the witnesses were to be examined by the counsel successively, in the same manner as if the defence were joint and not separate: "It cannot be

left in the power of defendants, whose interests are the same, to make twenty cases out of one." *Chippendale v. Masson*, 4 Camp. 174. And, in ejectment, where the defendants defended in the same right, but by different attorneys and counsel, *Ld. Tenterden* ruled that only one counsel could address the jury. *Doe d. Hogg v. Tindal*, M. & M. 314. So in *Mason v. Ditchbourne*, 1 M. & Rob. 462, n., in debt on bond, plea *non est factum* and fraud, *Ld. Abinger* refused to allow two counsel to address the jury, "for there could not be a verdict for one, and against the other, defendant."

But, in an action *ex delicto*, where defendants have pleaded and appeared by separate attorneys and counsel, separate cross-examinations and addresses have been permitted by *Abbott, C.J.*; *King v. Williamson*, 3 Stark. 162; and by *Tindal, C.J.*, in *Massey v. Goyder*, 4 C. & P. 162, and in *Southey v. Tuff*, C. P. sittings after T. T. 1834, MS.; *Medley v. London United Tramways*, 26 T. L. R. 315; and even in *assumpsit*, under similar circumstances, the same course was allowed and was approved by the court in *banc* in *Ridgeway v. Philip*, 4 L. J. Ex. 14; 1 C. M. & R. 415; in which case, however, it appears, by another report, that one of the defences was misjoinder of defendants as partners. S. C., 3 Dowl. 154.

Where the defendants appear by the same solicitor and plead a joint defence, the practice is to hear one counsel only. So held in trover, plea, not guilty. *Perring v. Tucker*, M. & M. 392. And in debt, where the defence under plea of never indebted was that all the defendants were not parties to the contract, the court would not hear more than one counsel. *Nicholson v. Brooke*, 17 L. J. Ex. 229; 2 Ex. 213. It seems, however, to be a matter of discretion with the judge at N. P. S. C. A defendant does not, by appearing at the trial in person, acquire any right to address the jury, which he would not have if he appeared by counsel. *Perring v. Tucker*, *supra*. In *King v. Williamson*, *supra*, only one counsel was allowed to examine those witnesses who had been subpoenaed by both defendants. In cases where the defendants have no right to a separate address or examination, yet the counsel of any will be heard on a legal objection; as that there is no evidence against one of them; *per Tindal, C.J.*, in *Poole v. Sidden and another*, C. P. sittings after M. T. 1832, MS. (on the general issue to *indeb. assumpsit*).

When two were made defendants in an issue out of Chancery whose interests were at variance with each other, the counsel of each was allowed to address the jury and prove his case separately and in succession; the witnesses of each might be cross-examined by the co-defendant's as well as the plaintiff's counsel; and the plaintiff had the general reply. *Phillips v. Willetts*, 2 M. & Rob. 319, and *Wynne v. Wynne*, cited *Id.* 321. The order in which co-defendants shall examine and address seems to be in the judge's discretion. *Fletcher v. Crosbie*, *Id.* 417; see also *Medley v. London United Tramways*, *supra*.

Where it was ordered, on an issue out of Chancery, that a third party "should be at liberty to attend the trial," the counsel for such party might cross-examine and suggest points of law, but could not call witnesses or address the jury. *Wright v. Wright*, 7 Bing. 458.

As to practice where the plaintiff has joined defendants with the view of obtaining relief against them in the alternative, see *Child v. Stenning*, 47 L. J. Ch. 371; 7 Ch. D. 413.

Set-off and counter-claim.] Set-off and counter-claim are now in the same position as if they formed a statement of claim by the defendant against the plaintiff; and under Rules, 1883, O. xxi. r. 16, although the action is stayed, discontinued, or dismissed, the counter-claim may be proceeded with; and by r. 17 judgment may be given for the defendant for any balance found to be due to him. A counter-claim cannot be set up after discontinuance. *The Salybia*, 79 L. J. P. 31; [1910] P. 25.

Third party.] Where the defendant claims to be entitled to contribution

or indemnity over against any party not a party to the action, the defendant may bring him in under Rules, 1883, O. xvi. rr. 48—53. Under these rules the plaintiff may bring in such person to enforce indemnity against a claim raised by the defendant's counter-claim. *Levi v. Anglo-Continental Gold Reefs of Rhodesia*, 71 L. J. K. B. 789; [1902] 2 K. B. 481. The directions for trial given by the court or judge under r. 52, will regulate the manner in which the questions are to be tried, and under r. 53 the third party may have leave to defend the action. Under r. 54 the court or a judge has power to decide all questions of costs. R. 55 places a co-defendant against whom a defendant seeks contribution or indemnity in the same position as a third party. Under this rule contribution may be ordered between co-defendants. *Sawyer v. Sawyer*, 54 L. J. Ch. 444; 28 Ch. D. 595, 600.

Where the question of liability of the third party is ordered to be tried as soon as may be convenient after the trial of the action, the third party who has entered an appearance only, may attend the trial by counsel, and cross-examine the witnesses; and the question will be tried as soon as the trial of the action between the plaintiff and defendant is concluded. *Blore v. Ashby*, 58 L. J. Ch. 779; 42 Ch. D. 682.

Inspection of property by Judge.] By Rules, O. 1, r. 4, the jury may inspect any property or thing concerning which any question may arise in the cause or matter, but this rule does not entitle the judge to put a view in the place of evidence; a view is for the purpose of enabling the tribunal to understand the questions that are being raised, and to follow and apply the evidence. *London General Omnibus Co. v. Lavell*, 70 L. J. Ch. 17; [1901] 1 Ch. 135.

Direction of Judge—exception for misdirection.] The J. Act, 1875, s. 22, enacts that nothing in the J. Act, 1873, "nor in any rule or order made under the powers thereof or of this act shall take away or prejudice the right of any party to any action to have the issues for trial by jury submitted and left by the judge to the jury before whom the same shall come for trial with a proper and complete direction to the jury upon the law, and as to the evidence applicable to such issues. Provided also, that the said right may be enforced either by motion in the High Court of Justice, or by motion in the Court of Appeal, founded upon an exception entered upon or annexed to the record." Under the provisions of the J. Act, 1890, s. 1, the motion must be made in the Court of Appeal, and not in a Divisional Court. The Rules, 1883, O. lviii. r. 1, direct that all appeals to the Court of Appeal shall be by way of rehearing, and shall be brought by notice of motion in a summary way. As to the duty of the judge in directing the jury, see *Edmonds v. Prudential Assurance Co.*, 2 App. Cas. 487, 507, *per* Ld. Blackburn. The judge is bound to direct a verdict for the defendant, unless there is some evidence on which the jury may reasonably act; a mere scintilla of evidence is not sufficient. *Ryder v. Wombwell*, 38 L. J. Ex. 8; L. R. 4 Ex. 32, 39; *Giblin v. McMullen*, 38 L. J. P. C. 25; L. R. 2 P. C. 317, 335; *Steward v. Young*, 39 L. J. C. P. 85; L. R. 5 C. P. 122, 128; *Daniel v. Metropolitan Ry.*, 40 L. J. C. P. 121; L. R. 5 H. L. 45; *Jackson v. Metropolitan Ry.*, 46 L. J. C. P. 376; 2 C. P. D. 125; reversed in H. L., 47 L. J. C. P. 303; 3 App. Cas. 193. See further *Slattery v. Dublin, &c., Wicklow Ry.*, 3 App. Cas. 1155; *Davey v. L. & S. W. Ry.*, 11 Q. B. D. 213; 53 L. J. Q. B. 58; 12 Q. B. D. 70; *Wakelin v. L. & S. W. Ry.*, 56 L. J. Q. B. 229; 12 App. Cas. 41. The rule is, that if the evidence be such that the jury could conjecture only, not judge, it ought not to go to the jury, and the onus lies on the party offering the evidence; and if he offer only evidence consistent with either supposition of fact, he is not entitled to have it put to the jury; *per* Ld. Tenterden, C.J., referred to by Cresswell, J., in *Avery v. Bowden*, 26 L. J. Q. B. 3; 6 E. & B. 953, 974; 26 L. J. Q. B. 3, and cited by Willes, J., in *Phillipson v. Hayter*, 40 L. J. C. P. 14; L. R. 6 C. P. 38, 42, 43.

The judge may assist the jury, at their request, with his opinion on a question of fact, which he expressly left for them to decide. *Smith v. Dart*, 54 L. J. Q. B. 121; 14 Q. B. D. 105.

The judge cannot direct a verdict for the defendant on the opening of the plaintiff's counsel, without his consent, without hearing the evidence. *Fletcher v. L. & N. W. Ry.*, 61 L. J. Q. B. 24; [1892] 1 Q. B. 122.

Discontinuance.] By Rules, 1883, O. xxvi. r. 1, "save as in this rule otherwise provided, it shall not be competent for the plaintiff to withdraw the record or discontinue the action without leave of the court or a judge, but the court or a judge may, before, or at, or after the hearing or trial upon such terms as to costs, and as to any other action, and otherwise as may be just, order the action to be discontinued, or any part of the alleged cause of complaint to be struck out. The court or a judge may, in like manner and with the like discretion as to terms, upon the application of a defendant, order the whole or any part of his alleged grounds of defence or counter-claim to be withdrawn or struck out, but it shall not be competent to a defendant to withdraw his defence, or any part thereof, without such leave." This rule deprives the plaintiff of his common law right to elect to be nonsuited; and if he offer no evidence the defendant is entitled to a verdict. *Fox v. Star Newspaper Co.*, 69 L. J. Q. B. 117; [1900] A. C. 19. It may be observed that it does not in terms prohibit a defendant from withdrawing his counter-claim. By r. 2, a cause may be withdrawn by either party "upon producing to the proper officer a consent in writing signed by the parties."

The discontinuance of an action does not affect a counter-claim already set up.

Effect of opposite party not appearing at trial.] By Rules, 1883, O. xxxvi. r. 31, "if, when a trial is called on, the plaintiff appears, and the defendant does not appear, the plaintiff may prove his claim so far as the burden of proof lies upon him." If the burden of proof is on the defendant, the plaintiff need not, it seems, in this case have the jury sworn. See *Lane v. Eve*, *infra*.

By r. 32, "if, when a trial is called on, the defendant appears, and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such counter-claim so far as the burden of proof lies upon him." In the former case, the defendant need not have the jury sworn. *Lane v. Eve*, W. N., 1876, p. 86, *per* Denman, J. And judgment will be given under this rule dismissing the action. *Armour v. Bate*, 60 L. J. Q. B. 433; [1891] 2 Q. B. 233.

By r. 33, "any verdict or judgment obtained where one party does not appear at the trial may be set aside, by the court or a judge, upon such terms as may seem fit, upon an application made within six days after the trial. Such application may be made either at the assizes or in Middlesex." Where the default arises from inadvertence, the application will be granted on payment of the costs of the day, including all costs that have been wasted, and the costs of the application. *Burgoine v. Taylor*, 47 L. J. Ch. 542; 9 Ch. D. 1.

Where one party appears, but the opposite party does not appear, the former may proceed and obtain judgment without proving service of notice of trial. *James v. Crow*, 47 L. J. Ch. 200; 7 Ch. D. 410, following *Ex parte Lows*, 47 L. J. Bk. 24; 7 Ch. D. 160.

Amendment at Nisi Prius.] By Rules, 1883, O. xxviii. r. 1, "The court or a judge may, at any stage of the proceedings, allow either party to alter or amend his indorsement or pleadings, in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties." By r. 6, application for leave to amend may be made

“ to the judge at the trial of the action, and such amendment may be allowed upon such terms as to costs or otherwise as may be just.” By r. 12, “ the court or a judge may at any time, and on such terms as to costs or otherwise as the court or judge may think just, amend any defect or error in any proceedings, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.” An amendment may be allowed at the trial, so as to raise a new case requiring fresh evidence. *Budding v. Murdoch*, 45 L. J. Ch. 213; 1 Ch. D. 42; *King v. Corke*, 45 L. J. Ch. 190; 1 Ch. D. 57. See also *Roe v. Davies*, 2 Ch. D. 729. Where liberty to amend is given at the trial, the amendment should be specifically made to enable the C. A. to know what question has been tried and decided. *Hyams v. Stuart King*, 77 L. J. K. B. 794; [1908] 2 K. B. 696.

All amendments ought to be made that are necessary and proper, for the object of the rules is to meet cases in which, by mistake or oversight, the real matter in issue is not raised by the pleadings, and under it the matter may be put on the record which was not on it before, if it be shown to the satisfaction of the judge to be *the* existing matter in controversy. What that matter in controversy may be is a matter of fact to be determined by the judge upon the evidence and pleadings before him. See Maule, J., in *Wilkin v. Reed*, 15 C. B. 192; 23 L. J. C. P. 193; *Blake v. Done*, 7 H. & N. 465; 31 L. J. Ex. 100; *Kurtz v. Spence*, 36 Ch. D. 770, 773. Leave to amend should always be given, unless the judge is satisfied that the party applying is acting *malâ fide*, or that by his blunder he has done some injury to his opponent which cannot be compensated for by costs or otherwise. *Tildesley v. Harper*, 48 L. J. Ch. 495; 10 Ch. D. 393, 396, 397, *per* Bramwell, L.J.; *accord. per Cur.* in *Steward v. North Metropolitan Tramways*, 55 L. J. Q. B. 157; 16 Q. B. D. 556. See also *Laird v. Briggs*, 19 Ch. D. 22; *Cropper v. Smith*, 53 L. J. Ch. 891; 26 Ch. D. 710, 711, *per* Bowen, L.J.; *Aronson v. Liverpool Corporation*, 29 T. L. R. 325. An amendment should not be allowed for the purpose of trying a question which has arisen at the trial, but it is not that which the parties came to try. *Wilkin v. Reed*, *supra*; *Lucas v. Tarleton*, 3 H. & N. 116; 27 L. J. Ex. 246; *Ritchie v. Van Gelder*, 9 Ex. 762; *Ellis v. Manchester Carriage Co.*, 2 C. P. D. 13. Where the action was for fraudulently misrepresenting to the plaintiff the cause for which the defendant had discharged a servant from his service, and it turned out at the trial that the defendant had improperly suppressed the fact of the servant's dishonesty, but had truly stated the cause of his discharge, it was held that, as this suppression was not in fact the ground of the plaintiff's complaint, but only the supposed misrepresentation, which was negatived, the judge had rightly refused to amend by substituting a charge of fraudulent suppression. *Wilkin v. Reed*, *supra*. Leave to amend the defence by denying an allegation not denied by the defence was refused, where the defendant knew the facts all along. *Lowther v. Heaver*, 58 L. J. Ch. 482; 41 Ch. D. 248; affirmed in C. A. on the additional ground that the amendment would have been useless; *vide Id.* 262. See also *Edevain v. Cohen*, 41 Ch. D. 563; 43 Ch. D. 187.

No amendment will be allowed so as to prejudice the other party. The plaintiff ought at first to state his cause of action, if there were one, truly and in substance according to the facts, in order that the defendant may know whether he should object to their sufficiency in point of law, admitting the facts, or, denying them, go to trial. It would be better that there should be no trial at all, than that a plaintiff should be allowed to state one cause of action, and then, on any difficulty arising as to his maintaining it on the evidence, to amend so as to raise another and different cause of action. It would be far better to require no pleadings at all, than to allow pleadings which could only operate as a snare. *Bradworth v. Foshaw*. 10 W. R. 760. See also *Riley v. Baxendale*, 30 L. J. Ex. 87, 88, *per* Martin, B.; *Newby v. Sharpe*, 47 L. J. Ch. 617; 8 Ch. D. 39; *New Zealand, &c., Co. v. Watson*, 50 L. J. Q. B. 433; 7 Q. B. D. 374, 382;

Edevain v. Cohen, 41 Ch. D. 563; 43 Ch. D. 187; *Raleigh v. Goschen*, 67 L. J. Ch. 59; [1898] 1 Ch. 73, 81. An amendment was refused, the object of which was to throw the liability on a third party A., the right of action against A. having become barred by lapse of time. *Steward v. North Metropolitan Tramways*, 55 L. J. Q. B. 157; 16 Q. B. D. 178, 556.

Where a tenant in common brought an action of trespass and trover against his co-tenant for cutting and carrying away the whole produce of the common property, and the action was held not maintainable, the court refused to mould the action into one of account, on the ground that such an action was so distinct from the one stated in the declaration, that the amendment would not do justice between the parties. *Jacobs v. Seward*, 38 L. J. C. P. 252; L. R. 4 C. P. 328; 41 L. J. C. P. 221; L. R. 5 H. L. 464. If the amendment be to insert in the breach a claim on which the plaintiff can recover only nominal damages, and in respect of which defendant would probably not have defended the action, the judge will be justified in refusing it. *Times Insurance Co. v. Hawke*, 28 L. J. Ex. 317. See also *Spoor v. Green*, 43 L. J. Ex. 57; L. R. 9 Ex. 92, 99. Where the amendment would evade the real question in controversy, it should be refused. Thus, where the plaintiff claimed a larger easement than he proved at the trial, the judge would not allow him to limit it by amendment, if in fact the larger claim was the one really claimed and asserted by plaintiff and resisted by defendant. *Cawkwell v. Russell*, 26 L. J. Ex. 34.

In an action against the directors of a building society who had signed a loan note on behalf of the society, brought for the money lent, a count alleging breach of warranty of authority in the directors to borrow money for the society was added. *Richardson v. Williamson*, 40 L. J. Q. B. 145; L. R. 6 Q. B. 276. See also *Mountstephen v. Lakeman*, 39 L. J. Q. B. 275; L. R. 5 Q. B. 613, 614; 43 L. J. Q. B. 188; L. R. 7 H. L. 17.

An injury to the possession may be altered to an injury to the reversion. *May v. Footner*, 5 E. & B. 505; 25 L. J. Q. B. 32. In a count for falsely representing the value of defendant's business at £100 per month, the judge inserted the words "over the counter," that being the real question to be tried. *Roles v. Davis*, 4 H. & N. 484; 28 L. J. Ex. 287. In an action to recover instalments of an annuity, an amendment of the claim was allowed so as to include a later instalment due before action. *Knowlman v. Bluett*, 43 L. J. Ex. 29; L. R. 9 Ex. 1. But the plaintiff will not in general be allowed to amend by alleging fresh causes of action, which since writ issued have become barred by the Statute of Limitations. *Weldon v. Neal*, 56 L. J. Q. B. 621; 19 Q. B. D. 394. An amendment of the statement of claim may be allowed in an action of libel, on the ground of variance with the libel proved. *Rainy v. Bravo*, L. R. 4 P. C. 287.

In like manner the statement of defence may be amended at the trial, in order to meet the facts proved at it. *Mitchell v. Crasweller*, 13 C. B. 237; 22 L. J. C. P. 100. A plea of payment was added to other pleas in an action on a guarantee, in *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622. In an action for wrongful dismissal of the manager of defendants' business, a defence of plaintiff's dismissal for misconduct was added on the trial by Cresswell, J., though no misconduct was alleged in the other pleas. *Hobson v. Cowley*, 27 L. J. Ex. 205. In an action for false imprisonment the defendant was allowed to amend the grounds of suspicion alleged in his plea of justification. *Hailes v. Marks*, 7 H. & N. 56; 30 L. J. Ex. 389. A plea of "not guilty by statute" was amended by inserting the proper statutes in the margin. *Edwards v. Hodges*, 15 C. B. 477; 24 L. J. M. C. 81. So a defence raising a statutory ouster of jurisdiction has been allowed to be added by amendment. *Crosfield v. Manchester Ship Canal Co.*, 73 L. J. Ch. 345; [1904] 2 Ch. 123. A plea of payment into court has been allowed to a count added at the trial. *Robson v. Turnbull*, 1 F. & F. 365.

It seems that the time to apply for an amendment by either party is at the close of his case. See *Rainy v. Bravo*, L. R. 4 P. C. 287, 298. It is

not unusual for amendments to be made at the trial without imposing any condition of payment of costs, or of giving further time. Where, however, it will be evidently proper to give more time to the opposite party, the trial will be adjourned. See *Riding v. Hawkins*, 58 L. J. P. 48; 14 P. D. 56, 59, and the applicant will probably be made to pay the costs of the day. See *Edwards v. Hodges*, 24 L. J. M. C. 81; 15 C. B. 477, 492.

The courts are very unwilling to disturb decisions of judges made in the exercise of discretion vested in them. *Schuster v. Wheelright*, 8 C. B. (N. S.) 383; 29 L. J. C. P. 222; *Byrd v. Nunn*, 47 L. J. Ch. 1; 7 Ch. D. 284. And a new trial will not be directed upon the ground of surprise occasioned by an amendment at the trial, unless substantial injustice has been done. *White v. S. E. Ry.*, 10 W. R. 564.

A judge at *Nisi Prius* may amend an erroneous entry of the verdict. See *Baker v. Lawrence*, 18 W. R. 835. And even after a verdict, and upon argument on motion for judgment or new trial, the court has, of its own authority and without consent, so amended a plea as to make the issue correspond with that which was really tried at N. P. *Parsons v. Alexander*, 5 E. & B. 263. And in *Clough v. L. & N. W. Ry.*, 41 L. J. Ex. 17; L. R. 7 Ex. 26, a plea was added by the Ex. Ch. setting up matters that had arisen after action, and the plaintiff was considered to have taken issue on it.

It seems that this rule does not extend to proceedings made specially amendable under other rules, *e.g.*, those relating to the joinder of parties. *Wickens v. Steel*, 2 C. B. (N. S.) 488; 26 L. J. C. P. 241; *Holden v. Ballantyne*, 29 L. J. Q. B. 148; *Garrard v. Giubilei*, 11 C. B. (N. S.) 616; 31 L. J. C. P. 131; and in 13 C. B. (N. S.) 832; 31 L. J. C. P. 270.

Withdrawing a juror.] Sometimes a juror is withdrawn, or the jury discharged, by consent, either for the convenience of the parties or at the suggestion of the judge. In such cases each party pays his own costs; but, in the last-mentioned case, the action is not thereby determined. *Everett v. Youells*, 3 B. & Ad. 349. The jury may by consent, but not otherwise, be discharged from giving a verdict on certain issues. If the jury cannot agree at the close of the assizes, the judge may, in his discretion, and without consent, discharge them. *Newton's Case*, 13 Q. B. 716. Counsel had at common law a general authority to withdraw a juror. *Strauss v. Francis*, 35 L. J. Q. B. 133; L. R. 1 Q. B. 379. Now see J. Act, 1873, s. 25 (11). Where a juror has been withdrawn on terms, which the defendant afterwards refuses to carry out, such refusal does not terminate the action, and the court will grant a new trial. *Norburn v. Hillman*, 39 L. J. C. P. 183; L. R. 5 C. P. 129. In such cases the judge at N. P. may, where feasible, order a new trial to take place at the same assizes. *Thomas v. Exeter Flying Post Co.*, 56 L. J. Q. B. 313; 18 Q. B. D. 822.

Adjournment of trial.] By Rules, 1883, O. xxxvi. r. 34, "the judge may, if he think it expedient for the interests of justice, postpone or adjourn a trial for such time, and to such place and upon such terms, if any, as he shall think fit." The words in italics are new. At the trial of a cause copies of material documents, which had been found one day before the trial, too late for due service of notice to produce on plaintiff, were offered in evidence by defendant, and plaintiff objected to copies. Cockburn, C.J., adjourned the trial on the terms of paying the costs of the day by defendant, and re-summoning the same jury. At the subsequent sitting the judge read to the jury the notes of the preceding sitting, and the trial proceeded with defendant's case. *Cahill v. Dawson*, 1 F. & F. 291. Where a material witness of plaintiff did not appear on subpoena, and the judge thought he should be examined, he adjourned the cause on condition that defendant's costs of the day should be his costs in the cause. *Bikker v. Beeston*, per Martin, B.; *Id.* 685. As to costs, see *Lydall v. Martinson*, 5 Ch. D. 780.

Verdict of Jury.] The presence of a stranger in the room where the jury

are considering their verdict, even though he may not interfere with their deliberations, invalidates the verdict. *Goby v. Wetherill*, 84 L. J. K. B. 1455; [1915] 2 K. B. 674.

Where a jury has disagreed and the C. A. is satisfied that no twelve reasonable men could give a verdict for the plaintiff, it will enter judgment for the defendant. *Skeate v. Slaters*, 83 L. J. K. B. 676; [1914] 2 K. B. 429.

If the jury have given a general verdict, the judge is not entitled to put a further question to them for the purpose of effect being given to their answer. *Arnold v. Jeffreys*, 83 L. J. K. B. 329; [1914] 1 K. B. 512.

Damages.] By Rules, 1883, O. xxxvi. r. 58, "Where damages are to be assessed in respect of any continuing cause of action they shall be assessed down to the time of the assessment." A "continuing cause of action" is one arising from the repetition of a series of acts of the same kind, as in the case of the pollution of a stream. *Hole v. Chard Union*, 63 L. J. Ch. 469; [1894] 1 Ch. 293.

Injunction.] The right to an injunction is considered under the various causes of action in which it is usually applicable. Where under an agreement the defendant undertook not to do certain acts, and in case of breach was liable to liquidated damages, if on breach the plaintiff is entitled to an injunction, he must elect between that remedy and the damages. *General Accident Assurance Co. v. Noel*, 71 L. J. K. B. 236; [1902] 1 K. B. 377. An injunction will now be granted in a direct mandatory form where such form is appropriate. *Jackson v. Normanby Brick Co.*, 68 L. J. Ch. 407; [1899] 1 Ch. 438. Where there has been a breach of a statutory enactment as to which the sole remedy is provided, an injunction may be granted to prevent future breaches. *Carlton Illustrators v. Coleman*, 80 L. J. K. B. 510; [1911] 1 K. B. 771.

Order to enter judgment.] By Rules, 1883, O. xxxvi. r. 39, "the judge shall at or after trial, direct judgment to be entered as he shall think right, and no motion for judgment shall be necessary in order to obtain such judgment." (R. S. C., Feb. 1892, r. 1, which annulled the former r. 39).

By Rules, 1883, O. xxi. r. 17, "where in any action a set-off or counter-claim is established as a defence against the plaintiff's claim, the court or a judge may, if the balance is in favour of the defendant, give judgment for the defendant for such balance, or may otherwise adjudge to the defendant such relief as he may be entitled to upon the merits of the case." The "balance" is that which results on the hearing of the action. *Rolfe v. Maclaren*, 3 Ch. D. 106.

The rights of the parties as to costs are not affected by the entry of judgment for the defendant under this rule. *Shrapnel v. Laing*, 57 L. J. Q. B. 195; 20 Q. B. D. 334. Where the defendant denies liability and pays money into court as an alternative defence, and the defendant succeeds on the latter defence and fails on the former, the defendant is entitled to judgment in the action; *Wheeler v. United Telephone Co.*, 53 L. J. Q. B. 466; 13 Q. B. D. 597; but the plaintiff is entitled to judgment for costs against a co-defendant who had severed in pleading, and failed in his defence, not having paid money into court. *Penny v. Wimbledon Urban Council*, 68 L. J. Q. B. 704; [1899] 2 Q. B. 72.

Application to stay execution.] By Rules, 1883, O. xlii. r. 17, in the case of money or costs being payable under a judgment or order, execution by *fi. fa.* or *elegit* may be issued so soon as such money or costs shall be payable, but (a) not until the period within which the judgment required the money to be paid has expired; and (b) "the court or judge may, at or after the time of giving judgment or making an order, stay execution until such time as they or he shall think fit." The successful party is, therefore,

in the case of a judgment for money or costs, entitled to immediate execution; and if the other party desire delay, he must apply that the judgment should be for payment after a limited time, or that execution should be stayed.

By O. xlvi. r. 2, where the judgment is to recover possession of land, the plaintiff may "sue out a writ of possession on filing an affidavit showing due service of such judgment or order, and that the same has not been obeyed." Subject therefore to the requirements of this rule, the execution is immediate, and there seems no express power given to delay the execution; the same end may, however, be attained by the judge postponing the entry of judgment till after the lapse of a certain time.

Order for delivery of specific chattels.] Rules, 1883, O. xlvi. r. 1, allow a judgment for the delivery of specific chattels to be enforced by a writ of delivery, which the court or a judge may order to issue. It is not a necessary condition that the value of the goods should have been first assessed, *per* Collins, M.R., in *Hymas v. Ogden*, 74 L. J. K. B. 101; [1905] 1 K. B. 246. If the court orders the return of a chattel or payment of its value within a specified time, and the defendant fails to comply with the order within that time, the court may issue a warrant of delivery without giving the defendant any further option of paying the value. *Bailey v. Gill*, 88 L. J. K. B. 591; [1919] 1 K. B. 41.

Order as to costs.] By Rules, 1883, O. lxx. r. 1, "Subject to the provisions of the acts and these rules, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge provided that nothing herein contained shall deprive an executor, administrator, trustee, or mortgagee, who has not unreasonably instituted or carried on or resisted any proceedings, of any right to costs out of a particular estate or fund to which he would be entitled according to the rules hitherto acted upon in the Chancery Division; provided also that, where any action, cause, matter, or issue is tried with a jury, the costs shall follow the event, unless the judge by whom such action, cause, matter, or issue is tried, or the court, shall for good cause otherwise order."

By rule 2, amended by R. S. C. Jan. & July, 1902, "when issues in fact and law are raised upon a claim or counter-claim, the costs of the several issues respectively, both in law and fact, shall, unless otherwise ordered, follow the event. And an order giving a party costs, except so far as they have been occasioned or incurred by, or relate to, some particular issue or part of his proceedings, shall be read and construed as excluding only the amount by which the costs have been increased by such issue or proceedings: but the court or a judge, if the whole costs of the action or other proceeding are not intended to be given to the party, may wherever practicable, by the order direct taxation of the whole costs and payment of such proportion thereof as the court or judge shall determine."

Rule 1 governs the right to costs in every case in which the plaintiff is not deprived of them by the County Courts Acts, 1888, s. 116, or some subsequent statute. *Garnett v. Bradley*, 48 L. J. Ex. 186; 3 App. Cas. 944. But provisions relating to costs in statutes passed for the protection of *special classes of persons*, are not affected by rule 1. *Id.* 970, *per* Ld. Blackburn; *accord. In re Mills Estate*, 56 L. J. Ch. 60; 34 Ch. D. 24, 40, *per* Bowen, L.J.; *Hasker v. Wood*, 51 L. J. Q. B. 419. See also *Reeve v. Gibson*, 60 L. J. Q. B. 451; [1891] 1 Q. B. 652.

The rule has also been altered in special cases by subsequent statutes, *e.g.*, the Slander of Women Act, 1891 (54 & 55 V. c. 51).

By the J. Act, 1890, s. 5, subject to the J. "Acts and the rules of court made thereunder, and to the express provisions of any statute, whether passed before or after the commencement of this act, the costs of and incident to all proceedings in the Supreme Court, including the administration of estates and trusts, shall be in the discretion of the court or judge, and the court or

judge shall have full power to determine by whom and to what extent such costs are to be paid." But this section does "not alter the law with respect to the discretion of a judge as to costs, or with respect to the powers of the C. A. in dealing with that discretion;" *Civil Service Co-operative Society v. General Steam Navigation Co.*, 72 L. J. K. B. 933; [1903] 2 K. B. 756, 765, per Ld. Alverstone, C.J. Party and party costs are awarded as an indemnity only. If therefore a successful party is not liable to his solicitor to pay costs he cannot recover them from his opponent. *Gundry v. Sainsbury*, 79 L. J. K. B. 713; [1910] 1 K. B. 645.

Where the action is tried by a judge alone, the costs are absolutely in his discretion (which, however, must be exercised upon proper materials), and neither party can get them from the other without an order. But where an action was brought to enforce a legal right, and there had been no misconduct on his part, as to which *vide infra*, a successful plaintiff is entitled to an order for his costs under O. lxxv. r. 1. *Cooper v. Whittingham*, 49 L. J. Ch. 752; 15 Ch. D. 501. So in the case of a successful defendant. *Civil Service Co-operative Society v. General Steam Navigation Co.*, *supra*, and *King & Co. v. Gillard & Co.*, *infra*. "Where costs have been given to a person who has no right to them there is an appeal, but where there is no right, and they are in the discretion of the persons who have to award them, then there is no appeal except by leave." See J. Act, 1873, s. 49; *Minister v. Apperly*, 71 L. J. K. B. 452; [1902] 1 K. B. 643, 645. This applies where the whole of an action has been referred by order of court to an official referee without any directions as to costs. S. C. Where, however, a successful party has not been allowed his costs on a wrong principle an appeal lies. Thus, where the defendant was not allowed them on the ground that he had refused to consent to the case being decided by the judge as arbitrator to say what should be done; *Civil Service Co-operative Society v. General Steam Navigation Co.*, 72 L. J. K. B. 933; [1903] 2 K. B. 756, or that he had been guilty of improper conduct, e.g., a misrepresentation to the public, not connected with the issue between him and the plaintiff. *King v. Gillard*, 74 L. J. Ch. 421; [1905] 2 Ch. 7, the C. A. allowed them to him.

The defendant cannot be ordered to pay the whole costs of a plaintiff who has no right to sue. *Dicks v. Yates*, 18 Ch. D. 76; 50 L. J. Ch. 809; followed in *Foster v. Gt. W. Rly.*, 51 L. J. Q. B. 233; 8 Q. B. D. 515. In matters of equitable jurisdiction the judge may give costs as between solicitor and client; *Andrews v. Barnes*, 57 L. J. Ch. 694; 39 Ch. D. 133; and perhaps under J. Act, 1890, s. 5, *supra*, in other actions also. Express power is given in some statutes, e.g., 56 & 57 V. c. 61, s. 1 (d), in certain cases, to award such costs.

Where an action is tried by a jury, there is "good cause" for making an order under the proviso, "whenever it is fair and just as between the parties that it should be so." *Forster v. Farquhar*, 62 L. J. Q. B. 296; [1893] 1 Q. B. 564, 567. It may appear from the conduct of the parties prior to and conducing to the litigation. *Harnett v. Vise*, 5 Ex. D. 307; *Bostock v. Ramsey Urban Council*, 69 L. J. Q. B. 945; [1900] 2 Q. B. 616. So where the plaintiff supported an extravagant and extortionate demand by fraudulent statements, and, claiming £3,000, recovered £50 only, good cause was held to exist. *Hualey v. West London Extension Ry. Co.*, 58 L. J. Q. B. 305; 14 App. Cas. 26. See also *Roberts v. Jones*, 60 L. J. Q. B. 441; [1891] 2 Q. B. 194, and *Willey v. G. N. Ry. Co.*, 60 L. J. Q. B. 441; [1891] 2 Q. B. 194. So where the plaintiff used his right to name the place of trial in an oppressive manner, S. CC.; and even although the Court had refused to change it at the defendant's instance. S. C. In these two cases, Hawkins, J., made special orders as to the division of the costs between the parties. And the judge may even order a plaintiff who has recovered only a nominal sum to pay the defendant's costs. *Harris v. Petherick*, 48 L. J. Q. B. 521; 4 Q. B. D. 611. So where the plaintiff failed on three out of four distinct items of damage, involving separate evidence, though not technically distinct issues, he was ordered to pay the defendant's

costs of those in which he failed. *Forster v. Farquhar*, 62 L. J. Q. B. 296; [1893] 1 Q. B. 564. But letters or conversations "without prejudice" cannot be taken into consideration. *Walker v. Wilsher*, 58 L. J. Q. B. 501; 23 Q. B. D. 335. The judge may *ex mero motu* make an order to deprive the plaintiff of costs, though no application has been made to him on the part of the defendant. *Turner v. Heyland*, 48 L. J. C. P. 535; 4 C. P. D. 432; *Collins v. Welch*, 49 L. J. C. P. 260; 5 C. P. D. 27, C. A. The judge may make an order as to costs after the trial, and though it would seem he must make it within a reasonable time (see *Bowey v. Bell*, *infra*); yet an order depriving the plaintiff of costs on an application made to the judge five or six weeks after the trial was held good. *Huxley v. W. London, &c., Ry. Co.*, 58 L. J. Q. B. 305; 14 App. Cas. 26. The power to make such order is not affected by stat. 56 & 57 V. c. 61, s. 1 (b). *Bostock v. Ramsey Urban Council*, 69 L. J. Q. B. 945; [1900] 2 Q. B. 616. And *semble* the judge may in such case allow the defendant costs as between party and party only. S. C., [1900] 1 Q. B. 364, *per* Ld. Russell, C.J.

Where no application has been made to the judge an application may be made to a divisional court to deprive a successful party of his costs; *Myers v. Defries*, *Siddons v. Lawrence*, 48 L. J. Ex. 446; 4 Ex. D. 176; provided such application be made within a reasonable time; *Bowey v. Bell*; *Brooks v. Israel*, 48 L. J. Q. B. 161; 4 Q. B. D. 95; but not otherwise.

The jurisdiction of the judge or court to interfere, by order, with the rule of costs of an action tried with a jury, only arises where there is "good cause;" an appeal therefore lies from such order to the C. A. as to the existence of facts constituting good cause. *Jones v. Curling*, 53 L. J. Q. B. 373; 13 Q. B. D. 262; *Wright v. Shaw*, 19 Q. B. D. 396; *Huxley v. W. London, &c., Ry. Co.*, *supra*. It is not "good cause" that the defendant has succeeded only on a statutory defence, *e.g.*, the Gaming Acts. *Granville & Co. v. Firth*, 72 L. J. K. B. 152. A trustee is entitled to his costs unless he has been guilty of misconduct; whether he has been so guilty is a matter on which an appeal lies. *In re Knight's Will*, 53 L. J. Ch. 223; 26 Ch. D. 82. Where, however, the facts give the judge jurisdiction under this rule, no appeal lies from his discretion; *Huxley v. W. London, &c., Ry. Co.*, *supra*; unless he acted under some rule which he considered to exclude it. *Bew v. Bew*, 68 L. J. Ch. 659; [1899] 2 Ch. 467.

In any case in which there is but one issue between the parties no difficulty can arise as to the meaning of the term "event" in O. lxx. r. 1. Where there are several distinct causes of action on which the plaintiff and defendant respectively succeed, the term is to be taken distributively, and the defendant is entitled to the costs of the issues found for him. *Myers v. Defries*, 48 L. J. Ex. 446; 4 Ex. D. 176, 180; *Hoyes v. Tate*, [1907] 1 K. B. 656; *Ingram & Royle v. Services Maritimes, &c. (No. 2)*, 83 L. J. K. B. 1128; [1914] 3 K. B. 28 (where *Slatford v. Erlebach*, 81 L. J. K. B. 372; [1912] 3 K. B. 155, was distinguished as having been decided not on the language of the judgment as drawn up, but on the way in which it ought to have been drawn up, having regard to the certificate of the official referee). In *Reid, Hewitt & Co. v. Joseph*, 88 L. J. K. B. 1; [1918] A. C. 717 (where the earlier decisions are considered), it was decided in the H. L. that the expression "the costs which follow the event" means that the party who on the whole succeeds in the action gets the general costs of the action, but that, where the action involves separate issues whether arising under different causes of action or under one cause of action, the costs of any particular issue go to the party who succeeds upon it. If the judgment as drawn up does not deal with the costs of particular issues the taxing master cannot go behind the judgment and deal with the costs of those issues. *Ingram & Royle v. Services Maritimes, &c. (No. 2)*, (*supra*). The judgment should in every case contain a direction as to the costs to which each party is entitled. *Bush v. Rogers*, 84 L. J. K. B. 686; [1915] 1 K. B. 707. As to what is an "issue," Buckley, L.J., in *Howell v. Dering*, 84 L. J. K. B. 198; [1915] 1 K. B. 54, said that it was that which if

decided in favour of the plaintiff will in itself give a right to relief, or would but for some other consideration in itself give a right to relief; and if decided in favour of the defendant will in itself be a defence. An issue need not go to the whole cause of action; it includes any issue which has a direct and definite effect in defeating the claim to judgment in whole or in part. *Reid, Hewitt & Co. v. Joseph, supra.* See also *Bird v. Standard Oil Co.*, 85 L. J. K. B. 935. Where the defendant, in an action for unliquidated damages, has paid money into Court with a denial of the cause of action, and the plaintiff proves it, but recovers less than the amount paid in, but enough to carry costs, he is entitled to the whole costs of the action down to the time of the payment into court, and to the subsequent costs of the issue on which he has succeeded, although the defendant receives the general costs of the action, for the liability and the amount of damages are distinct issues. *Goutard v. Carr*, 53 L. J. Q. B. 467 n.; 13 Q. B. D. 598, n.; *Wagstaffe v. Bentley*, 71 L. J. K. B. 55; [1902] 1 K. B. 824; *Powell v. Vickers, &c.*, 76 L. J. K. B. 122; [1907] 1 K. B. 71. And this rule applies where in an action by several plaintiffs suing in different interests, a sum of money was paid into court without appropriation. See *Benning v. Ilford Gas Co.*, 76 L. J. K. B. 681; [1907] 2 K. B. 290. So even where the issue on which the plaintiff succeeds does not go to the whole cause of the action. *Hubback v. British N. Borneo Co.*, 73 L. J. K. B. 654; [1904] 2 K. B. 473.

Where the defendant succeeds on a simple set-off, or on a counter-claim founded on matters that would have been a defence prior to the J. Acts, and to an amount not less than the plaintiff's claim, he has a complete defence to the action, and is therefore entitled to his costs. See *Lund v. Campbell*, 54 L. J. Q. B. 281; 14 Q. B. D. 821; *Stooke v. Taylor*, 49 L. J. Q. B. 857; 5 Q. B. D. 569, 576 *et seq.*, *per* Cockburn, C.J.; *Baines v. Bromley*, 50 L. J. Q. B. 465; 6 Q. B. D. 691, 694, *per* Brett, L.J.; *Lowe v. Holme*, 52 L. J. Q. B. 270; 10 Q. B. D. 286; *Chatfield v. Sedgwick*, 4 C. P. D. 459. But the plaintiff is entitled to the costs of the issues on which he has succeeded. *Lund v. Campbell, supra.*

Where, however, the counter-claim is in the nature of a cross action and the plaintiff is successful on his claim, and the defendant also on his counter-claim, the plaintiff is entitled to the costs of his claim, less the costs of the issues on which he has failed, and the defendant is entitled to the costs of the counter-claim, less the costs of the issues on which he has failed, as if the claim and counter-claim had been separate actions. *Shrapnel v. Laing*, 57 L. J. Q. B. 195; 20 Q. B. D. 334; and see *Atlas Metal Co. v. Müller*, 67 L. J. Q. B. 815; [1898] 2 Q. B. 500. Where the claim and counter-claim are both dismissed with costs, the costs of each will be ordered to be taxed and paid by the losing party with a set-off. *James v. Jackson*, 79 L. J. Ch. 418; [1910] 2 Ch. 92.

It should be observed that the rights of the parties as to costs may be seriously affected by an incorrect entry of the judgment. See *Baines v. Bromley*, 50 L. J. Q. B. 465; 6 Q. B. D. 691. The assessment of damages by a jury where judgment has been signed against the defendant by default, is not within the proviso, and the costs do not follow the event. *Gath v. Howarth*, W. N. 1884, 99, Field, J.

By Rules, 1883, O. xvi. r. 1, "the defendant, though unsuccessful, shall be entitled to his costs occasioned by" joining under that rule, "any person who shall not be found entitled to relief, unless the court or a judge, in disposing of the costs, shall otherwise direct." See *D'Hormusgee v. Grey*, 52 L. J. Q. B. 192; 10 Q. B. D. 13. Where under *Id.* r. 4 relief is claimed by the plaintiff S., against co-defendants B. & H., in the alternative, and he succeeds against B. and fails against H., the court may order B. to pay the costs of H., and then add those costs to the costs which B. is ordered to pay S. *Sanderson v. Blyth Theatre Co.*, 72 L. J. K. B. 761; [1903] 2 K. B. 533; *Bullock v. London General Omnibus Co.*, 76 L. J. K. B. 127; [1907] 1 K. B. 264. But when two defendants are sued in the alternative

not because of any doubt entertained by the plaintiff as to the facts but as to the law, such an order is, it seems, improper. *Poulton v. Moore*, [1913] W. N. 349.

The Public Authorities Protection Act, 1893, 56 & 57 V. c. 61, s. 1, now regulates the defendant's costs in an action brought for any act done in pursuance or execution, or intended execution of an Act of Parliament, or any public duty or authority, or in respect of any alleged neglect or default in execution of such duty or authority.

Order as to costs of or occasioned by third party.] Where a third party, C., has been brought in under Rules, 1883, O. xvi. rr. 48—53, rule 54 provides that "the court or a judge may decide all questions of costs as between a third party and the other parties to the action, and may order any one or more to pay the costs of any other or others, or give such direction as to costs as the justice of the case may require;" and by rule 55, a co-defendant against whom a defendant seeks contribution or indemnity is in the same position as a third party. Thus, costs have been ordered to be paid to C. by the plaintiff; *Witham v. Vane*, 28 W. R. 812; or, by the defendant; *Beynon v. Godden*, 48 L. J. Ex. 80; 4 Ex. D. 246, 347, *cor.* Huddleston, B.; *Dawson v. Shepherd*, 49 L. J. Ex. 529; or, C. has been allowed to bear his own costs. *Williams v. S. E. Ry.*, 96 W. R. 352. So again, C. has been ordered to pay to an unsuccessful defendant the costs payable by him to the plaintiff; *Hornby v. Cardwell*, 51 L. J. Q. B. 89; 8 Q. B. D. 329; or, to pay the plaintiff the costs occasioned by his defence. *Piller v. Roberts*, 21 Ch. D. 198; *Edison Electric Light Co. v. Holland*, 58 L. J. Ch. 524; 41 Ch. D. 28. Where in an action for specific performance the defendant was held liable on his contract, which he had denied, and C. liable to indemnify him, C. was ordered to pay the costs of the third party proceedings, but not of the action, as the defence was for the defendant's benefit alone. *Blore v. Ashby*, 58 L. J. Ch. 779; 42 Ch. D. 682. Many of these orders were made under Rules, 1875, O. lv. r. 1, which was similar in terms to Rules, 1883, O. lxx. r. 1; and O. xvi. r. 54, *supra*, is explicit on the matter. The liability of C. to costs is not affected by the County Courts Act, 1888, s. 116.

Order for costs on higher scale.] Under Rules, 1883, O. lxx. r. 8, costs are in general to be allowed on the "lower scale," given in *Id.*, App. N.; but by rule 9, the court or a judge may at the trial or hearing or further consideration of the cause or matter or at the hearing of any application therein, on special grounds arising out of the nature and importance or the difficulty or urgency of the case, order, either generally in any cause or matter, or as to the costs of any particular application made or business done therein, that the costs shall be allowed on the "higher scale." In an action against a port and harbour authority for damages to a ship from the nature of the bed on which she grounded in the harbour, an order was made under rule 9 for costs on the higher scale, on the ground that "the case was special in its nature. It has involved the calling of a number of scientific witnesses, the preparation of plans, and the case has been presented so as greatly to facilitate its trial." *The Robin*, [1892] P. 95. See also as to this latter ground, *Davies v. Davies*, 56 L. J. Ch. 962; 36 Ch. D. 359, 374.

There must, however, be something special in the case to justify the order. The mere largeness of the sum recovered is not sufficient. *The Horace*, 53 L. J. P. 64; 9 P. D. 86. So where the action was for the establishment of a valuable right, involving difficult questions of law and fact, and took five days to try, the C. A. held there were no special grounds for an order. *Williamson v. N. Staffordshire Ry.*, 55 L. J. Ch. 938; 32 Ch. D. 399. *Rivington v. Garden*, 70 L. J. Ch. 282; [1901] 1 Ch. 561. So, in an action for infringement of a patent where the evidence was not scientific. *American Braided Wire Co. v. Thomson*, 59 L. J. Ch. 425; 44 Ch. D. 274,

296. In an action for the fraudulent misrepresentation of the value of a public house, the trial of which lasted seven days, the defendant succeeded; the judge ordered costs on the higher scale, but the C. A. set aside his order, on the ground that the case was not within rule 9; *Paine v. Chisholm*, 60 L. J. Q. B. 413; [1891] 1 Q. B. 531; for an appeal lies on the question whether there were special grounds empowering the judge to make the order; but not, if they exist, as to the manner in which he has exercised his discretion. S. C.

Certificate or order for costs under the County Courts Act, &c.] The County Courts Act, 1919 (9 & 10 G. 5, c. 73), s. 11, re-enacting with alterations the County Courts Act, 1888 (51 & 52 V. c. 43), s. 116, provides that in any action brought in the High Court which could have been commenced in a county court, the following provisions shall apply:—

If in an action founded on contract the plaintiff shall recover a sum less than £40, he shall not be entitled to any costs of the action, and if he shall recover a sum of £40 or upwards, but less than £100, formerly £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; and

If in an action founded on tort the plaintiff shall recover a sum less than £10, he shall not be entitled to any costs of the action; and, if he shall recover a sum of £10 or upwards, but less than £50, he shall not be entitled to any more costs than he would have been entitled to if the action had been brought in a county court; but in any such action, whether founded on contract or on tort, the court or a judge if satisfied that there was sufficient reason for bringing the action in that court, may allow costs on the High Court scale. Provided that, if in any action founded on contract the plaintiff shall, within 21 days after the service of the writ, or within such further time as may be allowed by the court or a judge, obtain an order under Order xiv. of the Rules of the Supreme Court empowering him to enter judgment for a sum of £20 or upwards, he shall be entitled to costs according to the scale for the time being in use in the Supreme Court, unless otherwise ordered.

By sects. 56, 57 of the Act of 1888, the county court has jurisdiction in all personal actions unless the title "to any toll, fair, market, or franchise shall be in question," where the claim does not exceed £100, whether on balance of account or otherwise, or after an admitted set-off of any debt or demand claimed or recoverable by the defendant from the plaintiff, but it has no original jurisdiction in any action for libel or slander, seduction, or breach of promise of marriage. By sect. 58 it has jurisdiction to recover a demand not exceeding £100, "formerly £50," whether the whole or part of the unliquidated balance of a partnership account, or the share under an intestacy or legacy under a will. By sects. 56, 59, 60, its powers of trying actions of ejectment and those in which the title to corporeal or incorporeal hereditaments comes into question, are limited to those in which the annual value or rent of the lands, tenements, or hereditaments in dispute does not exceed £100, "formerly £50," or, in the case of an easement, where neither the dominant nor servient tenement exceeds that value. By sect. 67, in cases within the equitable jurisdiction of the county court, the limit of value is £500. To fall within sect. 57, it seems sufficient that the set-off should be admitted by the plaintiff only. *Lovejoy v. Cole*, 64 L. J. Q. B. 120; [1894] 2 Q. B. 861, dissenting from *Hubbard v. Goodley*, 59 L. J. Q. B. 285; 25 Q. B. D. 156. "Hereditaments" in sect. 56 includes every estate in land. *Tomkins v. Jones*, 58 L. J. Q. B. 222; 22 Q. B. D. 599. As to when the title to such hereditaments comes into dispute see *Howorth v. Sutcliffe*, 64 L. J. Q. B. 729; [1895] 2 Q. B. 358. "Franchise" includes letters patent for an invention. *Reg. v. Halifax County Court Judge*, 60 L. J. Q. B. 550; [1891] 2 Q. B. 263. The county court cannot entertain an action for an injunction to restrain an infringement of a registered trade mark. *Bow v. Hart*, 74 L. J. K. B. 341; [1905] 1 K. B. 592.

By the J. Act, 1873, s. 89, the county court can in all causes within its jurisdiction grant relief and give effect to defence and counter-claim as fully as the High Court of Justice could have done.

Money paid into court under a defence of payment into court is *recovered* within the meaning of the County Courts Act, 1888, s. 116; *Boulding v. Tyler*, 3 B. & S. 472; 32 L. J. Q. B. 95; *Parr v. Lillicrap*, 1 H. & C. 615; 32 L. J. Ex. 150; *Hewitt & Co. v. Cory*, 39 L. J. Q. B. 279; L. R. 5 Q. B. 418; but it is otherwise where the defence is tender. *James v. Vane*, 2 E. & E. 883; 29 L. J. Q. B. 169. As to cases in which the payment of money into court and the recovery at the trial are in respect of different causes of action, see *Palmer v. Garrett*, I. R. 5 C. L. 412, C. P.; *Byrne v. M'Evoy*, Id. 568; *Leonard v. Brownrigg*, I. R. 6 C. L. 161, Q. B., and cases there cited.

Sect. 116 referred both to the "character of the action and the amount really involved"; so, however large was the amount claimed, that which the plaintiff substantiated was alone to be considered. *Solomon v. Mulliner*, 70 L. J. K. B. 165; [1901] 1 Q. B. 76, 83. Where the plaintiff's claim was proved to be £114 and the defendant's set-off to be £109, it was held, that as the county court had no jurisdiction to entertain the plaintiff's claim, he was not deprived of his costs. *Potter v. Chambers*, 48 L. J. C. P. 274; 4 C. P. D. 457; *Neale v. Clarke*, 4 Ex. D. 286; *Goldhill v. Clarke*, 68 L. T. 414. Though it would have been otherwise if the set-off had been admitted. See *Lovejoy v. Cole*, 64 L. J. Q. B. 120; [1894] 2 Q. B. 861. Sect. 116 applies to the plaintiff's costs against the defendant from whom he has recovered less than £100 although he has recovered a larger sum against another defendant, see *Duxberry v. Barlow*, 70 L. J. K. B. 478; [1901] 2 K. B. 23.

Where the plaintiff proved a claim of £35 for rent and damages, and the defendant a counter-claim of £20 for damages, the plaintiff was held entitled to recover the costs of his claim and the defendant the costs of his counter-claim. *Stooke v. Taylor*, 49 L. J. Q. B. 857; 5 Q. B. D. 569; not following *Staples v. Young*, 2 Ex. D. 324, where it was held that if the plaintiff proved a claim and the defendant proved a counter-claim of less amount, the plaintiff *recovered* the balance only. The provisions of the County Courts Act, 1888, s. 116, do not affect the right to costs of a defendant who has succeeded on a counter-claim. *Blake v. Appleyard*, 3 Ex. D. 195; *Chatfield v. Sedgwick*, 4 C. P. D. 383, 459. Hence in the same action the plaintiff, though successful, may be deprived of his costs on his claim, while the defendant recovers costs on his counter-claim. S. C.; *Ahrbecker v. Frost*, 55 L. J. Q. B. 477; 17 Q. B. D. 606. Nor does the section apply where the defendant succeeds on a counter-claim against a third party. *Bates v. Burchell*, W. N. 1884, 108; see also *Lewin v. Trimming*, 21 Q. B. D. 230. Nor does it apply to the plaintiff's costs of a counter-claim on which he has succeeded, although he has recovered less than £50 on his claim. *Amon v. Bobbett*, 58 L. J. Q. B. 219; 22 Q. B. D. 543.

To decide whether an action is founded on contract or on tort, the substantial nature of the action alone, and not its form, is to be considered; see *Kelly v. Metropolitan Ry.*, 64 L. J. Q. B. 568; [1895] 1 Q. B. 944, 946, *per* Id. Esher, M.R. The principle for determining such nature, in the case of negligence or breach of duty, is, after some conflicting decisions, now settled to be as follows, viz.—Where the cause of action falls within the common law liability arising from the relation between the parties, although such relation was established by contract, the action is one of tort, if it does not, and the plaintiff must rely on the breach of some particular stipulation in the contract, the action is one of contract. *Sachs v. Henderson*, 71 L. J. K. B. 392; [1902] 1 K. B. 612, following *Turner v. Stallibrass*, 67 L. J. Q. B. 52; [1898] 1 Q. B. 56, 59, 60. Thus an action founded on the common law liability of a bailee is one of tort. S. C. So is an action by a passenger against a railway company for personal injury caused by negligence of their servants. *Kelly v. Metropolitan Ry. Co.*, 64 L. J. Q. B. 568; [1895] 1 K. B.

944. So is an action by the consignor against the carrier for delivering the goods to the consignee, after the consignor has given a notice to stop them *in transitu*. *Pontifax v. Midland Ry.*, 47 L. J. Q. B. 28; 3 Q. B. D. 23. So is an action for the detention of goods; *Bryant v. Herbert*, 47 L. J. C. P. 670; 3 C. P. D. 389; *Du Pasquier v. Cadbury, Jones, & Co.*, 72 L. J. K. B. 78; [1903] 1 K. B. 104; or for the removal by the landlord of fixtures from a house agreed to be let by him to the plaintiff. *Sachs v. Henderson, supra*; or for negligence by a dentist. *Edwards v. Mallam*, 77 L. J. K. B. 608; [1908] 1 K. B. 1002. The section does not apply to an action, which though brought nominally in respect of a tort, in respect of which less than £10 is recovered, includes a successful claim for an injunction as the main part of the relief sought. *Keates v. Woodward*, 71 L. J. K. B. 325; [1902] 1 K. B. 532.

The plaintiff is, it would seem, in ordinary cases, entitled to a certificate, under the section, that there was sufficient reason for bringing the action in the High Court, where the defendant is abroad, and could not therefore be served with county court process. See *Mendelssohn v. Hoppe*, W. N. 1884, 31. Where in an action of contract, the plaintiff claimed £48, and obtained an order under Rules, 1883, O. xiv., to sign judgment for £45, and on proceeding to trial recovered £3 more, he was entitled, under the proviso in sect. 116, to all the costs of the action on the High Court scale. *Barker v. Hempstead*, 58 L. J. Q. B. 369; 23 Q. B. D. 8.

The judge was not bound to certify, although the plaintiff had commenced a suit in the county court, which the defendant stayed by proceedings under 19 & 20 V. c. 108, s. 39, now replaced by 51 & 52 V. c. 43, s. 62. *Flitters v. Alfrey*, 44 L. J. C. P. 10, n.; L. R. 10 C. P. 29. The order of a judge under sect. 116, allowing costs on the High Court scale, is made under a discretionary power, and therefore by reason of J. Act, 1873, s. 49, no appeal lies therefrom. *Bazett v. Morgan*, 59 L. J. Q. B. 44; 24 Q. B. D. 48.

Where an action is referred to an arbitrator "with all the powers of certifying of a judge at N. P.," he cannot certify after his award has been made. *Bedwell v. Wood*, 46 L. J. Q. B. 725; 2 Q. B. D. 626. But where an action has been referred, costs to abide the event, a judge at chambers may certify after award made. *Hyde v. Beardsley*, 56 L. J. Q. B. 81; 18 Q. B. D. 244.

Order to disallow unnecessary costs.] By Rules, 1883, O. lxv. r. 27 (20), "The court or judge may, at the hearing of any cause or matter" . . . "and whether the same is objected to or not, direct the costs of any indorsement on a writ of summons, pleading, summons, affidavit, evidence," &c., "or other proceeding, or any part thereof, which is improper, vexatious, unnecessary, or contains vexatious or unnecessary matter, or is of unnecessary length, or caused by misconduct or negligence, to be disallowed, or may direct the taxing officer to look into the same, and to disallow the costs thereof, or of such part thereof as he shall find to be improper, unnecessary, vexatious, or to contain unnecessary matter, or to be of unnecessary length, or caused by misconduct or negligence."

Order as to costs occasioned by refusal to admit.] By Rules, 1883, O. xxi. r. 9, "Where the court or a judge shall be of opinion that any allegations of fact, denied or not admitted by the defence, ought to have been admitted, the court or judge may make such order as shall be just with respect to any extra costs occasioned by their having been denied or not admitted."

It seems to be reasonable to refuse to admit a document which the party called upon has no opportunity of inspecting or verifying. *Rutter v. Chapman*, 11 L. J. Ex. 178; 8 M. & W. 388, 391.

Order of costs for shorthand writers' notes.] Apart from agreement between the parties, costs of shorthand writers' notes of the trial will not be allowed on taxation, unless a special direction to that effect is given in

the judgment. Applications for such directions must be made at the hearing, or before the judgment is drawn up. *De la Warr, Earl, v. Miles*, 19 Ch. D. 80. The mere fact that it has been agreed that a joint note be taken and a transcript made for the use of the judge does not involve that the cost of the note will be allowed as costs in the cause in the absence of any direction of the judge. *Seal v. Turner*, 84 L. J. K. B. 1658; [1915] 3 K. B. 194.

Order for costs of proving original will.] Where an original will is produced and proved, the judge shall order by which party the costs of the production and proof shall be paid. 20 & 21 V. c. 77, s. 65.

Certificate of costs for special jury.] By 6 G. 4, c. 50, s. 34, the party who has obtained the special jury shall bear the costs thereof, and shall not on taxation be allowed the extra costs thereby caused, "unless the judge before whom the cause is tried shall, immediately after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

Where this certificate is necessary, it must be applied for immediately after the verdict or nonsuit unless there are special circumstances which prevent the certificate being then applied for or granted, in which case it must be obtained at the first reasonable opportunity. *Barker v. Lewis*, 82 L. J. K. B. 843; [1913] 3 K. B. 34 (where the cases on similar words in other statutes are discussed). But the judge may expressly reserve his decision and grant the certificate at a later date, when he has made up his mind, *nunc pro tunc*. S. C.

PART II.

EVIDENCE IN PARTICULAR ACTIONS.

Effect of the Judicature Acts.

By the J. Act, 1873, effect is to be given by every division to equitable estates, interests, and principles, in the same way as they were previously recognized by the courts of equity; mortgagees and assignees of choses in action may in general sue in their own names; stipulations as to time, &c., are not to be considered of the essence of a contract where they were not so in equity, and in general equity rules are to prevail.

ACTION ON SALE OF REAL PROPERTY.

VENDOR AGAINST VENDEE.

In an action by the vendor of real property on the purchaser's default in completing the contract, the plaintiff may be called upon by the defence to prove the contract; the performance by himself of all conditions precedent; and the defendant's default.

Proof of the Contract—*Stat. of Frauds, s. 4.*] Where an offer to sell is accepted by letter, the vendor is bound from the time of posting the letter. *Potter v. Sanders*, 6 Hare, 1. So, an offer to sell, made and accepted by letter, binds both parties from the time the acceptance was posted; *Adams v. Lindsell*, 1 B. & A. 681; even though the letter was never received. *Household Insur. Co. v. Grant*, 4 Ex. D. 216. And "where the circumstances of the case are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted." *Henthorn v. Fraser*, 61 L. J. Ch. 373; [1892] 2 Ch. 27, 33. *Accord. Bruner v. Moore*, [1904] 1 Ch. 305. As to the distinction between an offer to sell and a mere quotation, see *Harvey v. Facey*, 62 L. J. P. C. 127; [1893] A. C. 552; *Boyers v. Duke*, [1905] 2 Ir. R. 617; *Philip v. Knoblauch*, [1907] S. C. 994. As to the distinction between an agreement for sale and an agency agreement, see *Livingstone v. Ross*, 70 L. J. P. C. 58; [1901] A. C. 327; and *Kelly v. Enderton*, 82 L. J. P. C. 57; [1913] A. C. 191.

If an offer be made to buy within a certain time, the offer may be retracted before acceptance; *Routledge v. Grant*, 4 Bing. 653; *Head v. Diggon*, 3 M. & Ry. 97; but the offer remains open until the other party has received notice of retraction thereof. *Stevenson v. McLean*, 5 Q. B. D. 346;

Henthorn v. Fraser, *supra*. It is insufficient to post a letter of retraction which is not in the ordinary course of post received till after a letter accepting the offer has been posted. S. C.; *Byrne v. Van Tienhoven*, 5 C. P. D. 344. Notice acquired by A., although informally, of sale to B. amounts to retraction of an offer to sell to A. *Dickinson v. Dodds*, 45 L. J. Ch. 777; 2 Ch. D. 463; *Cartwright v. Hoogstoel*, 105 L. T. 628. If a person who makes an offer dies, the offer cannot be accepted after he is dead. *Dickinson v. Dodds*, *supra* (per Mellish, L.J.). If the offer be refused by letter, but the refusal be withdrawn and the offer accepted in a subsequent letter, the vendor is not bound by his offer, though he had not expressly withdrawn his original offer. *Hyde v. Wrench*, 3 Beav. 334. When the offer is made by an agent of the vendor, and the acceptance is notified by letter to such agent, the principal is bound, though the agent has neglected to notify to him. *Wright v. Bigg*, 15 Beav. 592. As to the distinction between a mere quotation and an offer to sell, see *Boyers v. Duke*, [1905] 2 Ir. R. 617.

"The liability of a principal on a contract entered into by his agent within the terms of his authority cannot be affected by the unknown motives by which the agent was actuated in making the contract." *Hambro v. Burnand*, [1904] 2 K. B. 10, 26. When an offer to purchase land was made by A. to B., who acted as agent to the owner C., but had no authority to sell, and was accepted by B., but withdrawn by A. before ratification by C., which did not take place till after action for specific performance brought by C., it was held that there was relation back to B.'s acceptance, and a contract which bound A. *Bolton Partners v. Lambert*, 41 Ch. D. 295, followed in *Ex pte. Badman*, 45 Ch. 16. *Sed quare*. See strictures thereon in Fry on Specific Performance, 5th ed., p. 781, note A; and *Fleming v. Bank of New Zealand*, [1900] A. C. 577, 587. But a contract must, at any rate, be ratified within a reasonable time after acceptance by an unauthorized person, and cannot be ratified after the date fixed for performance to begin. *Met. Asylums Board v. Kingham*, 6 T. L. R. 217. See also *Dibbins v. Dibbins*, [1896] 2 Ch. 348. Where a contract is made by R., who does not profess to act as agent, but is intending to contract on K.'s behalf, though without his authority, K. cannot ratify it. *Keighley, Maaxted & Co. v. Durant*, 70 L. J. K. B. 662; [1901] A. C. 240.

As to the authority of an estate agent to contract to sell land, see *Chadburn v. Moore*, 61 L. J. Ch. 674.

By the Stat. of Frauds (29 C. 2, c. 3), s. 4, no action shall be brought whereby to charge any person [upon any agreement made] upon any contract, or sale of lands, tenements, or hereditaments, or any interest in, or concerning them, unless the agreement upon which such an action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. The words in brackets occur in a preceding part of the clause, and seem to belong to this part also. See Sugd. V. & P., 14th ed. 123.

A defence under this statute must now be pleaded specially. Rules 1883, O. xix. r. 20. When it is so pleaded it will be necessary to prove a contract in writing. A contract by deed seems not to be within the statute, and therefore requires no signature.

What is an interest in land within Stat. of Frauds, s. 4. A question often arises as to what is an "interest in or concerning" land, &c., within this section. Where crops sold are of grass or growing fruit, and the terms of the sale imply the grant of an interest in the land, and not of a mere easement or right of entry, then the contract is within sect. 4. *Crosby v. Wadsworth*, 6 East, 602; *Jones v. Flint*, 10 Ad. & E. 753; *Rodwell v. Phillips*, 9 M. & W. 501. But if the crops be not natural, as grass, but industrial, as wheat, and are fit to cut when sold, the sale is not an interest in land within sect. 4, though it might have been within sect. 17 (now replaced by the Sale of Goods Act, 1893, s. 4); and it is immaterial whether

the cutting is to be by the buyer or seller. *Evans v. Roberts*, 5 B. & C. 829; *Parker v. Staniland*, 11 East, 362. Where timber is sold as such, to be cut by either the seller or the buyer, it has been held to be the sale of a chattel. *Smith v. Surman*, 9 B. & C. 561; *Marshall v. Green*, 1 C. P. D. 35. See, further, 1 Wms. Saund. 277 c (f). But a contract for the sale of "the building materials" of a standing house, to be taken down and cleared off the ground within two months, after which date any materials then not cleared will be deemed a trespass and become forfeited, and the purchaser's right of access to the ground shall absolutely cease, is within the section. *Lavery v. Pursell*, 39 Ch. D. 508.

Where the contract relates to an interest in land, any collateral contract, such as to provide additional furniture, cannot be enforced if the agreement be not in writing. *Mechelen v. Wallace*, 7 Ad. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766. So, on an oral contract to give up a house and fixtures for a certain sum, payment of the sum agreed cannot be enforced, although the house has been given up pursuant to the agreement. *Kelly v. Webster*, 12 C. B. 283; 21 L. J. C. P. 163. But where there was an agreement between landlord and tenant that the landlord, at the expiration of the tenancy, would take at a valuation the fixtures, which the tenant had power to remove during his term, this was held not within the statute. *Hallen v. Runder*, 1 C. M. & R. 266; *Lee v. Gaskell*, 1 Q. B. D. 700. An agreement to take furnished lodgings or a furnished flat is within sect. 4. *Inman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 C. & J. 391; *Thursby v. Eccles*, 70 L. J. Q. B. 91. In those cases the contract, if carried out, would have amounted to a demise, and the occupier could have maintained trespass or ejection; but if the contract be merely for board and lodging as an inmate of the house, although the inmate is to have a separate room, such contract is not within sect. 4. *Wright v. Stavert*, 2 E. & E. 721; 29 L. J. Q. B. 161. Nor, it would seem, is a contract to take as lodger, and not as under-tenant, certain defined rooms within sect. 4. See *Allan v. Liverpool*, L. R. 9 Q. B. 191, 192, and cases cited, *post*, *sub tit. Actions for Illegal Distress*. Nor is an agreement to build a house, though it implies a licence to go on the land. *Wright v. Stavert*, *supra*, *per* Crompton, J. See also *Wells v. Kingston-upon-Hull*, L. R. 10 C. P. 402. A grant of a right to shoot over land and take away part of the game killed is within sect. 4. *Webber v. Lee*, 9 Q. B. D. 315. So is a contract to retire from a partnership, part of the property of which consists of land. *Gray v. Smith*, 43 Ch. D. 208. So is a contract to retire from a milk-walk in favour of the defendant, and to give up the premises occupied by the plaintiffs and stock to him. *Smart v. Harding*, 15 C. B. 652; 24 L. J. C. P. 76. So, on an oral agreement to give up a brickyard and bricks on it to the plaintiff at a valuation, defendant undertaking to pay to the landlord the rent then due, though plaintiff has taken possession and paid for the bricks, he cannot sue defendant for not paying the landlord, the contract and consideration being entire. *Hodgson v. Johnson*, E. B. & E. 685; 28 L. J. Q. B. 88; *Sanderson v. Graves*, L. R. 10 Ex. 234. For although the plaintiff's part of the agreement be performed, it cannot be enforced against the defendant if not in writing. *Cocking v. Ward*, 1 C. B. 858. See, however, *Pulbrook v. Lawes*, 1 Q. B. D. 284. And an agreement as to land, if entirely performed on both sides, may be given in evidence, though not in writing, for a collateral purpose: thus, under an oral agreement that plaintiff should pay £37 for defendant's interest in premises, defendant to return £10 if plaintiff were refused a licence to use the premises as a slaughter-house, the plaintiff had possession of the premises and paid the defendant the £37; it was held that the plaintiff could recover the £10 on the licence being refused. *Green v. Saddington*, 7 E. & B. 503.

A contract relating to the expenses of investigating the title to land is not within this section. *Jeakes v. White*, 6 Ex. 873. Nor is it clear that an agreement relating to an easement on land is within it; such contract, however, if it professes to grant an easement, must be by deed. See Sugd.

V. & P., 14th ed. 123, and *post*, *tit. Trespass to land—Defence of licence*. A share in a mine actually in work was held to be within sect. 4. *Boyce v. Green*, Batty, 608. But in *Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53, an oral sale of shares in an unincorporated mine company in Cornwall, formed on the "cost-book" principle, was held good. *Accord. Powell v. Jessop*, 18 C. B. 336; 25 L. J. C. P. 199. These decisions are founded on the principle that a shareholder has an interest, not in the land, but in the adventure and profits thereof. If he be a co-tenant, in law or equity, of the land, the case would be different. The same principle applies to all joint stock companies possessing land, in which, even although unincorporated, the shareholders have no direct interest in the land necessarily occupied for carrying on the business, but only a right to the profits of the business itself, as has been frequently decided under the Mortmain Act; *Myers v. Perigal*, 2 D. M. & G. 599; 22 L. J. Ch. 431; *Edwards v. Hall*, 6 D. M. & G. 74; 25 L. J. Ch. 82; *Attree v. Hawe*, 9 Ch. D. 337, C. A.; and in appeal cases from the revising barristers; *Bulmer v. Norris*, 9 C. B. (N. S.) 19; 30 L. J. C. P. 25; *Bennett v. Blain*, 15 C. B. (N. S.) 578; 33 L. J. C. P. 63; *Freeman v. Gainsford*, 18 C. B. (N. S.) 185; 34 L. J. C. P. 95; *Robinson v. Ainge*, L. R. 4 C. P. 429; *Watson v. Black*, 16 Q. B. D. 270. But debentures issued by a company owning leasehold property which charged its undertaking and property as a floating security, with liberty to the company to dispose of the property in the course of business, the principal money secured to become payable if the company created any specific charge on its freehold or leasehold property in priority to the debentures, and reserving power to the debenture holders on default of payment, or in the case of a winding-up to appoint a receiver who may sell the property, is within the section. *Driver v. Broad*, [1893] 1 Q. B. 539, 744. So are bonds issued by commissioners secured by a covering deed mortgaging lands under a statutory power. *Toppin v. Lomas*, 16 C. B. 145; 24 L. J. C. P. 144. A contract by the defendant to get for the plaintiff a lease of land, in which the defendant has no interest, is within the section. *Horsey v. Graham*, L. R. 5 C. P. 9. But a collateral agreement to do something not relating to land, in consideration that one of the parties shall sign a contract relating to land, is not within the section. *Morgan v. Griffith*, L. R. 6 Ex. 70; *Erskine v. Adeane*, L. R. 8 Ch. 756; *Manri v. Nunn*, 43 L. J. C. P. 241; *Angell v. Dulce*, L. R. 10 Q. B. 174; *acc. Boston v. Boston*, 73 L. J. K. B. 17; [1904] 1 K. B. 124. So where in such case the agreement was a warranty as to an existing fact. *De Lassalle v. Guildford*, 70 L. J. K. B. 533; [1901] 2 K. B. 215.

What is a sufficient note within Stat. of Frauds, s. 4.] The note or memorandum must be a memorandum of an agreement complete when the memorandum is made. *Munday v. Asprey*, 13 Ch. D. 855. An affidavit of the defendant in prior proceedings, or a recital in his deed, may be sufficient. See *Barkworth v. Young*, 26 L. J. Ch. 153; 4 Drew. 1, and *In re Holland*, 71 L. J. Ch. 518; [1902] 2 Ch. 360. The memorandum must specify the terms; for otherwise all the danger of perjury, which the statute intended to guard against, would be let in. *Sngd. V. & P.*, 14th ed. 134. Thus, where an auctioneer's receipt for the deposit was set up as an agreement, it was rejected because it did not state the price to be paid for the estate; *Blagden v. Bradbear*, 12 Ves. 466; but had the receipt referred to the conditions of sale, so as to have entitled the court to look at them for the terms, it might have been enforced as an agreement. S. C. The agreement cannot be enforced, unless both the contracting parties are named in it. *Williams v. Jordan*, 6 Ch. D. 517; *Williams v. Byrnes*, 1 Moo. P. C. (N. S.) 154; *Williams v. Lake*, 2 E. & E. 349; 29 L. J. Q. B. 1. Subject, terms, and names of the parties must appear. S. C. The signature of the defendant may supply his name. *Stokell v. Niven*, 61 L. T. 18. And it is sufficient if the names appear by certain description; thus, where the property was described "as belonging to the late A. B.," and the sale

was stated to be by direction of the executors; *Hood v. Barrington* (Lord), L. R. 6 Eq. 218; or was stated to be sold "by direction of the proprietor"; *Sale v. Lambert*, L. R. 18 Eq. 1; *Rossiter v. Miller*, 3 App. Cas. 1124; or by a trustee selling under a trust for sale; *Catling v. King*, 5 Ch. D. 660; or it appear that the sale is by a company in possession; *Commins v. Scott*, L. R. 20 Eq. 11; the confirmation of the auctioneer or vendor's solicitor "as agent for the vendors," was held to satisfy this rule. See also *Carr v. Lynch*, 69 L. J. Ch. 345; [1900] 1 Ch. 613; *Stokes v. Whicher*, 89 L. J. Ch. 198; [1920] 1 Ch. 411. And the name of an agent contracting for an undisclosed principal was held in *Filby v. Hounsell*, [1896] 2 Ch. 737, to be sufficient, but that decision was criticised in *Lovesey v. Palmer*, 85 L. J. Ch. 481; [1916] 2 Ch. 233, where it was laid down by Younger, J., that, if the agent is not liable as one of the contracting parties, the principal can sue only if his name appears in the memorandum or his identity from the description therein appearing cannot fairly be disputed. The point was not taken in *Jarrett v. Hunter*, 34 Ch. D. 182. The term "vendor" without further description is insufficient. *Potter v. Duffield*, L. R. 18 Eq. 4; *Thomas v. Brown*, 1 Q. B. D. 714.

A general description of the property sold is sufficient, the property being identified by extrinsic evidence. Thus "Mr. O.'s house," *Ogilvie v. Foljambe*, 3 Mer. 53; "the property in Cable Street," *Bleakley v. Smith*, 11 Sim. 150; "24 acres of land freehold at T. in the parish of D.," *Plant v. Bourne*, [1897] 2 Ch. 281. And a memorandum, "The property duly sold to A. S., and deposit paid at close of sale," coupled with a receipt, "Pinxton, Mar. 29, 1880. Received of A. S. the sum of £21 as deposit on property purchased at £420, at the Sun Inn, Pinxton, on the above date. C., owner," have been held sufficient. *Shardlow v. Cottrell*, 20 Ch. D. 90; *Auerbach v. Nelson*, 88 L. J. Ch. 493; [1919] 2 Ch. 383.

It is not necessary that the names or terms should appear in any single paper. The contract may be collected from several connected papers. *Kennedy v. Lee*, 3 Meriv. 441; *Warner v. Willington*, 3 Drew. 523; 25 L. J. Ch. 662; *Ridgway v. Wharton*, 6 H. L. C. 238; 27 L. J. Ch. 46; *Nene Valley Drainage Commrs. v. Dunkley*, 4 Ch. D. 1; *Baumann v. James*, L. R. 3 Ch. 508; *Dewar v. Mintoft*, 81 L. J. K. B. 885; [1912] 2 K. B. 373. So, if a letter, properly signed, does not contain the whole agreement, yet if it actually refer to a writing that does, it will be sufficient, though the latter writing is not signed; and oral evidence is admissible to identify the writing referred to. *Allen v. Bennet*, 3 Taunt. 169; *Oliver v. Hunting*, 44 Ch. D. 205; see *Clinan v. Cooke*, 1 Sch. & Lef. 33. And a written contract stating "the land is sold subject to the conditions of the Halifax Incorporated Law Society," was held to be sufficient on proof of what those conditions were at the date of the contract. *Pickles v. Sutcliffe*, [1902] W. N. 200. Where a contract in writing exists which binds one party to the contract under the statute, any subsequent note, signed by the other, is sufficient to bind him, provided it either contains the terms or refers to any other writing that contains them; *Dobell v. Hutchinson*, 3 Ad. & E. 355; *Rossiter v. Miller*, *supra*; even though the subsequent note is written to request a rescission of the contract. *Coupland v. Arrowsmith*, 18 L. T. 755; *Dewar v. Mintoft*, *supra*. The connection ought to appear on the papers, and not by extrinsic oral evidence only. *Boydell v. Drummond*, 11 East, 152; *Taylor v. Smith*, [1893] 2 Q. B. 65. But it need not be by express or specific description of one paper in the other. *Dart's V. & P.*, 7th ed. 246; *Long v. Millar*, 4 C. P. D. 450; *Stokes v. Whicher*, 89 L. J. Ch. 198; [1920] 1 Ch. 411; *Warner v. Willington*, *Oliver v. Hunting*, and other cases, cited *supra*. The name of one of the parties may be supplied by the indorsement on the envelope in which a letter which contained the other terms of the contract was proved to have been enclosed. *Pearce v. Gardner*, 66 L. J. Q. B. 457; [1897] 1 Q. B. 688; *Last v. Hucklesby*, 58 S. J. 431. Where a contract is sought to be gathered from several letters, the whole of the correspondence must be considered, and

although two early letters appear to constitute a complete contract, the later ones may be referred to to show that such contract was not within the contemplation of the parties. *Hussey v. Horne Payne*, 4 App. Cas. 311; *May v. Thomson*, 20 Ch. D. 705, C. A.; *Bristol, &c., Bread Co. v. Maggs*, 44 Ch. D. 616. See hereon *Bellamy v. Debenham*, 45 Ch. D. 481; affirmed in C. A. on other grounds, [1891] 1 Ch. 412. But if the letters of offer and acceptance contain all the terms agreed on at the date of the acceptance, the complete contract then arrived at cannot be affected by subsequent negotiation. *Perry v. Suffields*, 85 L. J. Ch. 460; [1916] 2 Ch. 187. A letter, "I agree to let to A. the stables in G. for the same rent, and subject to the same conditions that I hold them myself," accepted by writing signed by A., is not sufficient, as it does not state the duration of the term. *Bayley v. Fitzmaurice*, 8 E. & B. 664; 27 L. J. Q. B. 143; 9 H. L. C. 78. So, the memorandum is insufficient if it do not appear therefrom when the term is to begin; *Marshall v. Berridge*, 19 Ch. D. 233; there is no inference that the term begins on its date. S. C. Where it appears from the agreement that the lease is to begin at the date of possession being given, evidence of the date when possession was given is admissible. *In re Lander & Bagley's Contract*, [1892] 3 Ch. 41. Where the letter signed by the defendant, the lessor, contained terms, to some of which the plaintiff did not agree, it was held there was no agreement in writing between the parties; *Marshall v. Berridge, supra*. So, the acceptance of an offer, signed by the purchaser, must be unconditional in order to bind him; thus, where the vendors, in answer to an offer of purchase, wrote referring thereto "which offer we accept and now hand you two copies of conditions of sale," and enclosing agreement with special conditions, it was held that the acceptance was conditional only. *Crossley v. Maycock*, L. R. 18 Eq. 180; *Smith v. Webster*, 3 Ch. D. 49; *Jones v. Daniel*, [1894] 2 Ch. 332. See *Bristol, &c., Bread Co. v. Maggs*, and *Bellamy v. Debenham, supra*. Where the terms are to be settled by a third person; *Stanley v. Dowdeswell*, L. R. 10 C. P. 102; or a formal contract is to be prepared and signed by the parties; *Chinnock v. Mchs. of Ely*, 4 D. J. & S. 638; *Winn v. Bull*, 7 Ch. D. 29; *Von Hatzfeldt-Wildenburg v. Alexander*, 81 L. J. Ch. 184; [1912] 1 Ch. 284; *Coope v. Ridout*, 90 L. J. Ch. 61; [1921] 1 Ch. 291; *Rossdale v. Denny*, 90 L. J. Ch. 204; [1921] 1 Ch. 57; there is no agreement till that has been done; and such condition cannot be waived by one party alone. *Lloyd v. Nowell*, [1895] 2 Ch. 744. But, unless it clearly appear that the signature of a formal contract is a condition precedent to there being a binding bargain, the acceptance by letter will bind. *Bonnewell v. Jenkins*, 8 Ch. D. 70; *Rossiter v. Miller*, 3 App. Cas. 1124; *Lewis v. Brass*, 3 Q. B. D. 667; *Gray v. Smith*, 43 Ch. D. 208. Whether there is such a condition precedent is a question of construction of the evidence. *Von Hatzfeldt-Wildenburg v. Alexander, supra*. And the intention to execute a formal instrument may be waived by the conduct of the parties. *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666. It seems, notwithstanding the decisions in *Hudson v. Buck*, 7 Ch. D. 683, and *Hussey v. Horne Payne*, 8 Ch. D. 670, that a term in the contract that the title is to be approved by the vendee's solicitor is not a condition, but merely implies that the title is to be investigated. S. C., 4 App. Cas. 312, 322, *per* Ld. Cairns, C.; *Bolton Partners v. Lambert*, 41 Ch. D. 295. A letter written by the defendant to his own agent containing the terms of the agreement is sufficient to bind him. *Smith v. Watson*, Bunn. 55; *Gibson v. Holland*. L. R. 1 C. P. 1. The recital in a will of the agreement is sufficient to bind the testator's estate. *In re Hoyle*, [1893] 1 Ch. 84.

An agreement, good under the Stat. of Frauds, can be wholly rescinded, but cannot be varied by a subsequent oral agreement. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1.

Signature of Note.] With regard to the *signing*, it has been held that a printed name is sufficient (*Saunderson v. Jackson*, 2 B. & P. 238 (decided

on sect. 17)), if recognized by, or brought home to, the party, as having been printed by his authority; *Schneider v. Norris*, 2 M. & S. 288; and it is immaterial in what part of the agreement the name is signed. *S. C.*; *Johnson v. Dodgson*, 2 M. & W. 653; *Knight v. Crockford*, 1 Esp. 190; Cox's note to 1 P. Wms. 771. Thus, "A. B. agrees with J. R. B. to take the property situate, &c., for £248," in J. R. B.'s writing, is sufficient signature by him as vendor. *Bleakley v. Smith*, 11 Sim. 150. So, "Messrs. E. bought of A. B." in the writing of Messrs. E.'s agent, binds them. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337. So, a memorandum of agreement between the plaintiff and the defendant H. M. & Co., in the form of a letter from the plaintiff to the defendant headed "H. M. & Co.," written by the defendant's agent by their authority and presented to the plaintiff for signature, and signed by him, was held to bind the defendant. *Evans v. Hoare*, [1892] 1 Q. B. 593. But an offer to purchase land written on paper containing the printed name and address of the vendor, but not signed by him, was held not a sufficient memorandum, unless it was written at his dictation. *Hucklesby v. Hook*, 82 L. T. 117. But the mere drawing of an instrument with the name of the defendant put as one of the contracting parties by his agent is not sufficient if the instrument is evidently incomplete, as where it ends with "witness our hands," without any further signature following. *Hubert v. Treherne*, 3 M. & Gr. 743. The signature must be introduced so as to govern every material and operative part of the instrument. *Caton v. Caton*, L. R. 2 H. L. 127. A minute of a contract entered in accordance with the Companies Act, 1862, s. 67, and signed by the chairman, is sufficient to bind the company. *Jones v. Victoria Graving Dock Co.*, 2 Q. B. D. 314. A signing as witness has been held sufficient, if the party signing be cognisant of the contents of the instrument. *Welford v. Beazeley*, 3 Atk. 503; *Harding v. Crethorn*, 1 Esp. 57; *Coles v. Trecothick*, 9 Ves. 234. But this doctrine was doubted in *Gosbell v. Archer*, 2 Ad. & E. 500, unless the person signing as a witness be a principal, or be expressly acting as agent of the principal. In *Wallace v. Roe*, [1903] 1 Ir. R. 32, the vendor was bound by the signature of the auctioneer, who purported to sign as witness, but was duly authorized by the vendor to sell. Nor is it clear that the signature of a solicitor approving of a draft agreement is sufficient to bind his client. *Thornbury v. Beville*, 1 Y. & C., C. C. 554. See *Smith v. Webster*, 3 Ch. D. 49; distinguished in *North v. Loomes*, 88 L. J. Ch. 217; [1919] 1 Ch. 378, where it was held that the solicitor had authority to bind his client. The signature of counsel to a pleading may bind the client. *Grindell v. Bass*, 89 L. J. Ch. 591; [1920] 2 Ch. 487. If a solicitor is merely employed to put the contract into shape, he is not authorised to sign a memorandum within sect. 4. *Bowen v. D'Orléans (Duc)*, 16 T. L. R. 226. But the signature of a draft proposed contract by the principal, preceded by the word "approved," may amount to a sufficient signature. *Brogden v. Metropolitan Ry. Co.*, 2 App. Cas. 666. A letter from the purchaser's solicitor enclosing and referring to a draft conveyance which recites the agreement is insufficient. *Munday v. Asprey*, 13 Ch. D. 855. An affidavit or other statement containing a statement of an oral contract, signed and filed by the defendant in proceedings prior to the action on the contract, is sufficient. *Barkworth v. Young*, 4 Drew. 1; 26 L. J. Ch. 153; *Daniels v. Trefusis*, 83 L. J. Ch. 579; [1914] 1 Ch. 788. So a recital of such contract in a deed of the defendant. *In re Holland*, 71 L. J. Ch. 518; [1902] 2 Ch. 360. So a defence signed by counsel may be a sufficient memorandum. *Grindell v. Bass*, *supra*.

Where a person cannot write, a signature by mark, if properly identified, is sufficient; and no inquiry can be made as to whether the person can write or not. *Baker v. Dening*, 3 Ad. & E. 94. Hence a signature by initials is sufficient. *In re Blewitt*, 5 P. D. 116.

The statute requires the agreement to be signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized. It is

good as against him, though only signed by the party to be charged, and not by the other party. *Seton v. Slade*, 7 Ves. 275; *Laythoarp v. Bryant*, 2 Bing. N. C. 735; and the cases collected Sugd. V. & P., 14th ed. 129 (b). See also *Saunderson v. Jackson*, 2 B. & P. 238 (on sect. 17); and the important observations on this point in a note to *Sweet v. Lee*, 3 M. & Gr. 462. And it is good, although the agreement purported to be *inter partes*, and the party suing on it had orally accepted, but had never signed it; *Liverpool Banking Co. v. Eccles*, 4 H. & N. 139; 28 L. J. Ex. 122; *Smith v. Neale*, 2 C. B. (N. S.) 67; 26 L. J. C. P. 143; so, a proposal in writing signed by the party to be charged and accepted orally is sufficient; *Reuss v. Picksley*, L. R. 1 Ex. 342; even although it is one of two alternative proposals that has been accepted. *Lever v. Koffler*, 70 L. J. Ch. 395; [1901] 1 Ch. 543. Recognition of a previous signature is sufficient; thus, where a proposal signed by A. is made to B. and altered by B., if A. assent to the alteration he will be bound, and oral evidence is admissible as to the state of the document when he gave his assent, and thereby converted the proposal into an agreement. *Stewart v. Eddowes*, L. R. 9 C. P. 311 (on sect. 17).

With regard to the person authorized by the party to sign, it is settled that such person need not be authorized in writing. *Coles v. Trecothick*, 9 Ves. 250; *Emmerson v. Heelis*, 2 Taunt. 38; nor specially to sign a record of the contract. *Griffiths Cycle Cor. v. Humber & Co.*, 68 L. J. Q. B. 959; [1899] 2 Q. B. 414; reversed on facts, [1901] W. N. 110, no opinion being expressed on point decided in C. A. A subsequent recognition of the authority of the agent by the principal is sufficient. *Maclean v. Dunn*, 4 Bing. 722. A telegram sent by the defendant may be sufficient; the instructions for sending the telegram are a mandate to the company or government officer to sign for the sender. *Godwin v. Francis*, L. R. 5 C. P. 295. The plaintiff's written offer to buy land was in this case accepted by a telegram: it was assumed that the original instructions for the telegram furnished by the defendant to the company, and the copy actually delivered by the company's servant to the plaintiff, were in evidence. S. C. See also *Coupland v. Arrowsmith*, 18 L. T. 755. The sender of a message is not liable for a mistake made by a telegraph clerk. *Hénkel v. Pape*, L. R. 6 Ex. 7.

A sale by auction is within the Stat. of Frauds; *Blagden v. Bradbear*, 12 Ves. 466; and the auctioneer is for this purpose the agent for both vendor and vendee, and his writing down the name of the highest bidder in the auctioneer's book or catalogue is sufficient signature; *Emmerson v. Heelis*, *supra*; *White v. Proctor*, 4 Taunt. 209; but this is not a sufficient memorandum if the conditions of sale are not attached to the book. *Kenworthy v. Schofield*, 2 B. & C. 945; 2 L. J. (O. S.) K. B. 175; or if the purchaser's name is not stated as such. *Dewar v. Mintoft*, 81 L. J. K. B. 885; [1912] 2 K. B. 373. Where the defendant at an auction bid for one lot by mistake for another, and on discovering his mistake refused to sign the contract, whereupon the auctioneer signed it as his "agent," it was held that the auctioneer had no authority to sign, and that the defendant was not bound. *Van Praagh v. Everidge*, 72 L. J. Ch. 260; [1903] 1 Ch. 434. If the highest bidder be agent for another, the writing of the auctioneer of the agent's name as purchaser binds the principal; *Id.* 948, *per* Holroyd, J.; *White v. Proctor*, *supra*; in the latter case the principal was present, though his agent bid. But the agency of the auctioneer ceases and does not apply to a memorandum signed by him several days after the auction; *Bell v. Balls*, 66 L. J. Ch. 397; [1897] 1 Ch. 663; nor to a sale by him *after* the auction; *Mews v. Carr*, 1 H. & N. 484; 26 L. J. Ex. 39. The agent must be a third person, and not one of the parties; *Wright v. Dannah*, 2 Camp. 203; therefore, if the action is brought against the purchaser by the auctioneer himself, the signing of the defendant's name by the auctioneer is insufficient to satisfy the statute. *Farebrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, 40 L. J.

Q. B. 312; L. R. 6 Q. B. 720 (on sect. 17). But the signature by the auctioneer's clerk is sufficient in such action, where the clerk, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in a book. *Bird v. Boulter*, 4 B. & Ad. 443. So where the purchaser otherwise signified his assent. *Sims v. Landray*, 63 L. J. Ch. 535; [1894] 2 Ch. 318. Apart from some mark of assent, however, the clerk has no authority to sign for the purchaser. *Bell v. Balls*, *supra*. Where the auctioneer's clerk signed the contract, "Witness T. N.," without more, this was held not to be a signing by an agent of the vendor, though the deposit was paid over to the vendor's attorney, who wrote a letter to vendee's attorney advising the purchase to be relinquished; for such facts did not amount to a ratification of the agency of T. N. or of the contract, even supposing the signature as witness to be sufficient. *Gosbell v. Archer*, 2 Ad. & E. 500.

A bidding at an auction may be retracted before the hammer is down. *Payne v. Cave*, 3 T. R. 148; see *Routledge v. Grant*, 4 Bing. 653, 660. And it is very doubtful if the usual condition against retracting biddings could in the case of an ordinary sale by auction, be enforced. *Sugden, V. & P.*, 14th ed. 14; *Jones v. Nannev*, 13 Price, 99. An auctioneer has an implied authority to sell without reserve; *Rainbow v. Howkins*, 73 L. J. K. B. 641; [1904] 2 K. B. 322; *MacManus v. Fortescue*, 76 L. J. K. B. 393; [1907] 2 K. B. 1.

Instructions to a house and estate agent to procure a purchaser and to negotiate a sale of land do not authorize the agent to bind his principal by a contract to sell it. *Chadburn v. Moore*, 61 L. J. Ch. 674; *Thuman v. Best*, 97 L. T. 239. It has, however, been held to be otherwise where the instructions are to sell, with an agreement to pay the agent a commission on the price accepted. *Rosenbaum v. Belson*, 69 L. J. Ch. 569; [1900] 2 Ch. 267.

When an oral contract within Stat. of Frauds can be enforced.] The courts of equity were in the habit of granting specific performance of contracts falling within the provisions of the Stat. of Frauds, s. 4, where there had been a part performance of the contract, although there was no written note or memorandum of the agreement as required by the section; see *Maddison v. Alderson*, 8 App. Cas. 420, 475, 476, *per* Ld. Selborne, C.; and under Cairns' Act (21 & 22 V. c. 27) those courts were in such cases further empowered to award damages for the breach of the contract so partially performed. By the J. Act, 1873, s. 24, all the Divisions of the High Court can exercise all the powers previously exercised by the Court of Chancery only. The jurisdiction to award damages is not affected by the repeal of Cairns' Act, *supra*, by 46 & 47 V. c. 49. *Sayers v. Collyer*, 28 Ch. D. 103. But damages can only be awarded in cases in which judgment for specific performance could be given. *Lavery v. Pursell*, 39 Ch. D. 508.

The general rule as to what amounts to such part performance is that the parties must, by reason of the Act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract. *Dale v. Hamilton*, 5 Hare, 381. Thus, the fact of the purchaser being in possession of the vendor's land without liability to an action of trespass, shows unequivocally the existence of a contract between the parties. S. C. See *Dickinson v. Barrow*, 73 L. J. Ch. 701; [1904] 2 Ch. 339. A continuance of possession by a tenant, unequivocally referable to an unsigned lease, is an act of part performance, although the taking of possession was antecedent to the making of the lease or the commencement of the tenancy. *Biss v. Hygate*, 87 L. J. K. B. 1101; [1918] 2 K. B. 314. Where a purchase is for the benefit of a third person, possession taken by that third person in pursuance of the contract is part performance, which takes the case out of the statute. *Hohler v. Aston*, 90 L. J. Ch. 78; [1920] 2 Ch. 420. Hence, acceptance

of possession is sufficient part performance of the purchaser against his vendor; *Morphett v. Jones*, 1 Swans. 172; *Surcome v. Pinniger*, 3 D. M. & G. 571; *Ungley v. Ungley*, 5 Ch. D. 887; and, similarly, delivery of possession by the vendor is sufficient as against his purchaser. *Buckmaster v. Harrop*, 13 Ves. 456. See also *Coles v. Pilkington*, L. R. 19 Eq. 174. So, if a tenant in possession, in pursuance of the terms of an oral agreement for a lease, pay the increased rent to be reserved by the lease; *Nunn v. Fabian*, L. R. 1 Ch. 35; *Miller & Aldworth v. Sharp*, 68 L. J. Ch. 322; [1899] 1 Ch. 622; but part payment of rent is not, unless the tenant is in possession, such a part performance as to take the case out of the operation of the section. *Thursby v. Eccles*, 70 L. J. Q. B. 91; *Chaproniere v. Lambert*, 86 L. J. Ch. 726; [1917] 2 Ch. 356. If, however, the tenant lay out money which, in the event of there being no such agreement, he could not recover back from his landlord, there is part performance. *Mundy v. Jolliffe*, 9 L. J. Ch. 95; 5 Myl. & Cr. 187. See also *Williams v. Evans*, L. R. 19 Eq. 547. In these cases the court will endeavour to find out what was the oral contract between the parties, and then give it effect. *Mundy v. Jolliffe*, *supra*. So, where the parties have for a long time acted on the assumption of there being a contract. *Blachford v. Kirkpatrick*, 6 Beav. 232. See further the judgments in *Maddison v. Alderson*, 52 L. J. Q. B. 737; 8 App. Cas. 467. An oral agreement for an easement over land is within this principle. *McManus v. Cooke*, 35 Ch. D. 681. See further *Id.* 697.

As has been often observed, however, the court will enforce, but cannot make contracts. Where, therefore, the contract is incomplete; *Thynne (Lady) v. Glengall (Earl)*, 2 H. L. C. 131, 158; or its terms are uncertain; *Reynolds v. Waring*, You. 346; *Price v. Griffith*, 1 D. M. & G. 80; the court cannot decree specific performance. It must not only appear what the terms of the agreement are, but the acts of part performance must be referable to that agreement alone. *Price v. Salusbury*, 32 Beav. 446, 459; *affirm.* by L.J.J., see *Id.* 461, n. And an act which, though done in performance of a contract, admits of explanation without supposing a contract, will not in general take the case out of the statute, *e.g.*, payment of the alleged purchase-money. *Dale v. Hamilton*, 5 Hare, 381. See also *Maddison v. Alderson*, 52 L. J. Q. B. 737; 8 App. Cas. 467, and *Humphreys v. Green*, 10 Q. B. D. 148, C. A. It may be observed that, where marriage is the consideration for an oral contract, the entering into the marriage is not a part performance for the purpose of specific performance. *Caton v. Caton*, L. R. 1 Ch. 137.

The specific performance of a written agreement with a subsequent oral variation stands on the same footing as that of an original independent oral agreement. See *Price v. Dyer*, 17 Ves. 356, and *Van v. Corpe*, 3 Myl. & K. 269, 277. But a plaintiff seeking to enforce a written contract, could not, in general, formerly, in equity, any more than he could at law, on the ground of fraud, surprise, or mistake, vary its terms by oral evidence; *Price v. Dyer*, *supra*; *Townshend (Marquis) v. Stangroom*, 6 Ves. 328; *May v. Platt*, [1900] 1 Ch. 616; except, perhaps, where the fraud consists in a refusal to accede to a promised variation on the faith of which the plaintiff entered into a written agreement. *Pember v. Mathers*, 1 Bro. C. C. 52, 54; *Sugd. V. & P.*, 14th ed. 174. It seems, however, that, under the Judicature Act, 1873, s. 24 (7), the plaintiff may obtain both rectification of the contract on the ground of common mistake, and also specific performance of the rectified contract. See *Olley v. Fisher*, 34 Ch. D. 367, and *Forgione v. Lewis*, 89 L. J. Ch. 510; [1920] 2 Ch. 326.

On the ground that the statute is not to be made an instrument of fraud, the courts, following the old rules of equity, will enforce the contract where the absence of a written memorandum is caused by the fraud of the other party, or where the memorandum has been fraudulently drawn up so as not to express the real intention of the parties. See note to *Pym v. Blackburn*, 3 Ves. 38.

See further on this subject Sugden's V. & P., 14th ed., cap. iv., s. 7; and Dart's V. & P., 7th ed., cap. xvii.

An agent, A., who has been employed to buy land, cannot retain the land himself and rely on the Statute of Frauds, ss. 7, 8, on the ground of the absence of a written agreement between himself and his principal; *Heard v. Pilley*, 38 L. J. Ch. 718; L. R. 4 Ch. 548; *Rochefoucauld v. Boustead*, 66 L. J. Ch. 74; [1897] 1 Ch. 196.

Performance of conditions precedent.] When the defendant relies on the non-performance by the plaintiff of conditions precedent, he must plead the defence specially. Rules, 1883, O. xix. r. 15. The record, therefore, sufficiently indicates the proofs necessary at N. P. Certain conditions are, by the Vendor and Purchaser Act, 1874 (37 & 38 V. c. 78), ss. 1, 2, now incorporated in all contracts of sale of land, unless the contrary is stipulated; such of these provisions as are likely to be important at Nisi Prius will be found below.

Proof of title.] If the title of the plaintiff be put in issue, he must prove it. In the absence of stipulation to the contrary, the vendor was formerly obliged to deduce a good title commencing not later than 60 years back, but the Vendor and Purchaser Act, 1874, s. 1, has reduced this period to 40 years; in the cases, however, in which the period of 60 years was insufficient (as to which see Sugd. V. & P., 14th ed., pp. 366, 367), earlier title than 40 years may now be required. Where abstracts of title are delivered, the refusal to complete the purchase is generally preceded by some communication between the parties in which a specific objection has been pointed out, and the title thereby admitted to be in other respects unexceptional. See *Laythoarp v. Bryant*, 1 Bing. N. C. 421, *per* Tindal, C.J. It is sufficient if the contract show a good equitable title in the vendor, with power to get in the legal estate under the Trustee Act, without showing where the outstanding legal estate may be. *Camberwell, &c., Building Society v. Holloway*, 13 Ch. D. 754. The defendant may insist upon any defect, whether legal or equitable, in the title deduced. *Maberley v. Robins*, 5 Taunt. 625; *Elliot v. Edwards*, 3 B. & P. 181; *Jeakes v. Wright*, 6 Ex. 873; 21 L. J. Ex. 265; *Stevens v. Austen*, 3 E. & E. 685; 30 L. J. Q. B. 212. Where the vendor has no power of sale, he cannot compel the purchaser to enter into a fresh contract with some one else who has the power. *In re Bryant & Barningham's Contract*, 44 Ch. D. 218. Where the contract expressly provides that a good title shall be deduced, evidence that the purchaser knew of the existence of covenants which rendered the title unmarketable is inadmissible. *Cato v. Thompson*, 9 Q. B. D. 616; see also *May v. Platt*, 69 L. J. Ch. 357; [1900] 1 Ch. 616. It is, however, otherwise where there is no such express stipulation. See *In re Gloag and Miller's Contract*, 23 Ch. D. 320, 327. In an open contract such evidence must be adduced at the trial of the action; it is not admissible on the inquiry as to title after decree for specific performance. *McGrory v. Alderdale Estate Co.*, 87 L. J. Ch. 435; [1918] A. C. 503. A contract for "possession" means possession with a good title. *Tilley v. Thomas*, L. R. 3 Ch. 61. The vendor cannot require the vendee to make the title good by accepting it, and thereby avoiding a prior voluntary conveyance. *Clarke v. Willott*, L. R. 7 Ex. 313; *In re Briggs and Spicer*, [1891] 2 Ch. 127.

By the Vendor and Purchaser Act, 1874, s. 2, r. 2: "Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of parliament, or statutory declarations 20 years old at the date of the contract shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions." Rule 3: "The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title, shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the

production of such documents." The recital in a deed 20 years old that the then vendor was seised in fee simple was held by Malins, V.C., to be evidence thereof under rule 2, and unless disproved to dispense with production of any earlier title. *Bolton v. L. School Board*, 47 L. J. Ch. 461; 7 Ch. D. 766. This decision has, however, been generally disapproved by text-writers, whose comments were approved by Swinfen Eady, J., in *In re Wallis & Grout's Contract*, 75 L. J. Ch. 519; [1906] 2 Ch. 206.

The plaintiff is held to strict proof of his derivative title. *Crosby v. Percy*, 1 Camp. 30. In the sale of leaseholds more than 60 years old, in the absence of a condition to the contrary, the lease itself must be produced. *Frend v. Buckley*, L. R. 5 Q. B. 213. A contract for the sale of leasehold property is not satisfied by an underlease, unless the contract gives the purchaser notice that the property is held under a derivative lease. *Camberwell, &c., Building Soc. v. Holloway*, 13 Ch. D. 754.

In the absence of a stipulation to the contrary, there was formerly, in every contract for the sale of a lease, an implied undertaking to make out the lessor's title to demise, as well as the title of the vendor to the lease; *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & Gr. 410; and see *Stranks v. St. John*, L. R. 2 C. P. 376. But, by the Vendor and Purchaser Act, 1874, s. 2, r. 1. "Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold"; and now by the Conveyancing Act, 1881 (44 & 45 V. c. 41), ss. 3 (1), 13 (1), on a contract to sell and assign, or to grant a lease for a term of years to be derived out of a leasehold interest, the intended assignee or lessee has not the right to call for the title to the leasehold reversion, i.e., the reversion to the leasehold interest out of which the sub-lease has been or is to be created. *Gosling v. Woolf*, [1893] 1 Q. B. 39. The title to that leasehold interest must be proved. S. C. And if the intended assignee or vendee can show defects in the lessor's title, he may insist on those defects. *Jones v. Watts*, 43 Ch. D. 574. See also *Shepherd v. Keatley*, 1 C. M. & R. 117. See also *Sellick v. Trevor*, 11 M. & W. 722, and *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159. But where the contract contained a similar clause, and the defendant agreed to sell to the plaintiff the lease "as he held the same," it was held that the plaintiff could not raise any objection to the lessor's title. *Spratt v. Jeffery*, 10 B. & C. 249. So, where the condition was that the "lessor's title will not be shown and shall not be inquired into." *Hume v. Bentley*, 5 De G. & S. 520; 21 L. J. Ch. 760. See also *Best v. Hamand*, 12 Ch. D. 1; 48 L. J. Ch. 503; and *Scott v. Alvarez*, 64 L. J. Ch. 821; [1895] 2 Ch. 603. But where the title is had specific performance will not be decreed unless, perhaps, when the condition is very definite. S. C. It has, however, been held that, notwithstanding such a condition, the purchaser may raise any objection to the title which the vendor himself discloses. *Smith v. Robinson*, 13 Ch. D. 148. Where the contract provided that it should form no objection to the title that the indenture was an underlease, and no requisition or inquiry should be made respecting the title, the purchaser was held to be at liberty to show *aliunde* that the lessor was mortgagor only, and had no power to grant the lease. *Waddell v. Wolfe*, L. R. 9 Q. B. 515. See also *Harnett v. Baker*, L. R. 20 Eq. 50. There is no implied contract for title on the sale of an agreement for a lease; for this is only a sale of the vendor's interest such as it is. *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J. Ex. 287. So, on a sale of a patent right, there is no implied warranty of valid letters patent. *Hall v. Conder*, 2 C. B. (N. S.) 22; 26 L. J. C. P. 138; *Smith v. Neale*, 2 C. B. (N. S.) 67; 26 L. J. C. P. 143. See, however, *Chanter v. Leese*, 5 M. & W. 698.

In a sale of leaseholds, where the licence of the lessor is, by the terms of the lease, required for an assignment, the vendor must obtain the required licence. *Winter v. Dumergue*, 14 W. R. 281, 282. As to the time when such licence must be produced, see *Ellis v. Rogers*, 29 Ch. D. 661. Where

land is taken by a railway company, under their parliamentary powers, the necessity for such licence is taken away by the operation of the Act. *Slipper v. Tottenham, &c., Ry. Co.*, L. R. 4 Eq. 112. See also *Bailey v. De Crespigny*, L. R. 4 Q. B. 180.

If the vendor stipulate that he shall not be bound to produce title prior to the last conveyance, if he produce an earlier title had on the face of the abstract, the vendee may reject it. *Sellick v. Trevor*, 11 M. & W. 722. So, if the vendor agree to sell a "freehold" residence, under a similar condition, and the title deed produced show that the property is encumbered with a condition or covenant, the vendee may reject it, as he bargained for an unencumbered freehold. *Phillips v. Caldcleugh*, L. R. 4 Q. B. 159.

Where the property consisted of several parcels sold by auction in distinct lots to one vendee, *Ld. Kenyon* is said to have held that the vendor, having made out a title to a single lot only, the whole contract might be rescinded, considering the purchase of the several lots as having been made with a view to a joint concern. *Chambers v. Griffiths*, 1 Esp. 150. But, where several lots are knocked down to a bidder at an auction, and his name is marked against them in the catalogue, a separate contract arises on each lot. *Roots v. Dormer (Lord)*, 4 B. & Ad. 77. See the cases collected and discussed in *Casamajor v. Strode*, 2 Myl. & K. 706, 724; and *Chambers v. Griffiths, supra*, cannot be maintained as an authority, except where it can be shown that there was an agreement that the purchaser was not to take any of the lots unless he should obtain them all. See also *Holliday v. Lockwood*, 86 L. J. Ch. 556; [1917] 2 Ch. 47, where it was said that the purchase of each lot is a separate contract. Therefore, where the purchaser of two lots rescinds the contract as regards one lot, owing to an innocent misrepresentation by the vendor, he cannot claim rescission of the other unless the two lots are so interdependent that the transaction is in effect one contract, or unless the misrepresentation as to the one has influenced the purchase of the other. In *Dykes v. Blake*, 4 Bing. N. C. 463, the vendee was allowed to repudiate two lots, bought separately, because they were made the subject of one entire contract by a written agreement signed at the auction.

An alleged delivery of an "abstract" is not satisfied by proof of a delivery of the deeds themselves. *Horne v. Wingfield*, 3 M. & Gr. 33. But an alleged delivery of a "full and sufficient abstract of title" is satisfied by a delivery of a full abstract of all the vendor's title deeds, and of the facts deducing the title to himself or a trustee for him (known as a *perfect abstract*), though they may not constitute a good title; *Blackburn v. Smith*, 2 Ex. 783; and, if any condition refer to the delivery of the abstract, this, in any question as to time, means the delivery of a perfect abstract. S. C.; *Hobson v. Bell*, 2 Beav. 17; *Gray v. Fowler*, L. R. 8 Ex. 249, 279. It is the duty of the purchaser to apply for the abstract, as well as of the vendor to deliver it. *Guest v. Homfray*, 5 Ves. 818.

When an abstract is delivered by the vendor, he must be able to verify it by the title deeds in his possession; *Cornish v. Rowley*, 1 Selw. N. P., 13th ed. 219; *Berry v. Young*, 2 Esp. 640, n.; which deeds must be duly stamped. *Whiting to Loomes*, 17 Ch. D. 10. The vendee may rescind the contract where the vendor can neither convey nor enforce a conveyance from other proper parties. *Ferrer v. Nash*, 35 Beav. 167; *Brewer v. Broadwood*, 22 Ch. D. 105; *Bellamy v. Debenham*, [1891] 1 Ch. 412. As to the time within which the vendor must make out his title, *vide infra*.

Where the contract "is subject to the approval of the title by the vendee's solicitor," it cannot be enforced if he *bonâ fide* disapprove of the title. *Hudson v. Buck*, 7 Ch. D. 683. See also *Hussey v. Horne Payne*, 8 Ch. D. 670; 4 App. Cas. 311.

Where, without a stipulation in the contract to that effect, the purchaser takes possession before completion with knowledge that there are defects in the title which the vendor cannot remove, the purchaser waives his right to have those defects removed or to repudiate the contract. *In re Gloag and*

Miller's Contract, 23 Ch. D. 320. *Secus*, where the defects are removable by the vendor. See S. C.

Time for completion, &c., when material.] When a day is fixed for completion, unless the vendor make out a good title by that day, the purchaser was, at law, entitled to rescind the contract; *Cornish v. Rowley and Berry v. Young*, *supra*; *Noble v. Edwardes*, 5 Ch. D. 378; even though it appeared that the purchaser was not ready to pay the purchase money. *Clarke v. King*, Ry. & M. 394. If no time be mentioned for the vendor to make out a good title, he must be allowed a reasonable time; *Samson v. Rhodes*, 6 Bing. N. C. 261; but *Ld. St. Leonards* [V. & P., 14th ed. 259 (l)] adds *sed quære*.

But although, at law, the time of completion was of the essence of the contract, in equity this was in general otherwise, if there were nothing in the express stipulations between the parties, the nature of the property, or the surrounding circumstances which would make it inequitable to interfere with and modify the legal right. *Roberts v. Berry*, 3 D. M. & G. 284, 291, *per Turner*, L.J.; *Tilley v. Thomas*, L. R. 3 Ch. 61, 67, *per Ld. Cairns*, L.J. The equity rule never applied to cases in which the stipulation as to time could not be disregarded without injustice to the parties. A vendor who had put it out of his own power to complete the contract, or had by his conduct lost the right to specific performance, had no equity to restrain proceedings at law based on the non-performance of the stipulation as to time. *Per Ld. Parker in Stickney v. Keeble*, 84 L. J. Ch. 259; [1915] A. C. 386. By the J. Act, 1873, s. 25 (7), the rule of equity prevails; see the effect of this sub-section considered in *Stickney v. Keeble*, *supra*. *Howe v. Smith*, 27 Ch. D. 89, 96, 103. See *Cornwall v. Henson*, 69 L. J. Ch. 581; [1900] 2 Ch. 298. A court of equity proceeded on the principle that, having regard to the nature of the subject, time was immaterial to the value, and was urged only by way of pretence and evasion. *Doloret v. Rothschild*, 1 Sim. & St. 590. So if land is to be paid for in part on execution, and the balance by instalments at specified dates, and the agreement contains a clause of forfeiture both of the agreement and of all part instalments, if default is made in the punctual payment of any one instalment, time being of the essence of the contract, the condition of forfeiture will be treated as a penalty from which, where default has been made in payment of an instalment, relief will be given on payment of the balance of the amount due with interest. *In re Dagenham Thames Dock Co.*; *Hulse's Claim*, 43 L. J. Ch. 261; L. R. 8 Ch. 1022; *Kilmer v. British Columbia Orchard Lands*, 82 L. J. P. C. 77; [1913] A. C. 319. This principle, however, does not apply where the property fluctuates in value from day to day, as in the case of foreign stock. *Doloret v. Rothschild*, *supra*. So, in the case of a life annuity; see *Withy v. Cottle*, Turn. & R. 78. Or, of a reversion; see *Newman v. Rogers*, 4 Bro. C. C. 391; *Spurrier v. Hancock*, 4 Ves. 667; *Patrick v. Milner*, *infra*. So, where property is bought for the purpose of residence; *Tilley v. Thomas*, L. R. 3 Ch. 61; or, of trade, as in the case of a grant of a mining lease; *Parker v. Frith*, 1 Sim. & St. 199, n.; or, of the sale of a public-house as a going concern; *Cowles v. Gale*, L. R. 7 Ch. 12. In this latter case the vendor is bound only to have a valid licence, and to indorse it, to enable the purchaser to apply at once for interim protection. *Tadcaster Tower Brewery Co. v. Wilson*, [1897] 1 Ch. 705. Time is of the essence of the contract in equity where the vendors are a fluctuating body, and beneficially interested, as in the case of an ecclesiastical corporation. *Carter v. Ely (Dean)*, 7 Sim. 211. In such cases, however, if the conditions of sale provide for the possibility of delay in completion, it seems that time is not of the essence of the contract. *Patrick v. Milner*, 2 C. P. D. 342.

If either party has been guilty of delay, then, although time was not originally of the essence of the contract in equity, the other party may make it so by giving notice to complete within a reasonable time limited by such

notice. *Stewart v. Smith*, 6 Hare, 222, n.; *Benson v. Lamb*, 9 Beav. 502; *Green v. Sevin*, 13 Ch. D. 589, 599, 600; *Stickney v. Keeble*, 84 L. J. Ch. 259; [1915] A. C. 386. What is a reasonable time depends on the circumstances of each case, the state of the title, &c., and it is impossible to lay down any definite rule as to what the length of the notice must be. See *Sugd. V. & P.*, 14th ed., 268, 269; *Dart. V. & P.*, 6th ed., 487, 488; *Green v. Sevin. supra*; *Compton v. Bagley*, [1892] 1 Ch. 313.

So, conversely, although time may have been originally of the essence of the contract, or made so by subsequent notice, this may be waived by the conduct of the other party. *Hudson v. Bartram*, 3 Madd. 440; *Cutts v. Thodey*, 13 Sim. 206. Thus, if the purchaser proceed with the purchase after the expiration of the time fixed. *King v. Wilson*, 6 Beav. 124; *Webb v. Hughes*, L. R. 10 Eq. 281. And the same principle applies to a vendor. See *Pegg v. Wisden*, 16 Beav. 239.

Where the contract fixes a day for completion, and provides for the payment of interest from that day till completion, time is not so much of the essence of the contract that the purchaser can at once repudiate the contract, if it be not completed on the day from a defect of conveyance, and not of title; the purchaser must first give the vendor notice to remove the defect within a reasonable time. *Hatten v. Russell*, 38 Ch. D. 334.

If the purchaser have not made an application for the title before the commencement of the action, and no time is fixed for completing the contract, it is said to be sufficient if the plaintiff can show a good title in himself at the time of trial. *Thompson v. Miles*, 1 Esp. 185. And where time is not of the essence of the contract, and the delay originates in the state of the title, it is sufficient if, on an action being brought by the vendor for specific performance, he make out a good title at the time of the judgment. *Sugd. V. & P.*, 14th ed. 264.

Readiness to convey.] An averment of readiness to convey, if traversed, is negated by proof of a defective title; for it negatives ability to convey. *De Medina v. Norman*, 9 M. & W. 820. The plaintiff is not bound to tender a conveyance where (as is usual) it is to be prepared by and at the cost of the vendee. *Wilmot v. Wilkinson*, 6 B. & C. 506. An averment of readiness at the steward's office, on a certain day, to complete the conveyance of copyhold by surrender, &c., is proved by the plaintiff's readiness to go to the office, though he omitted to do so, because the defendant had just before that day told him that he should not be ready. *Perry v. Smith*, Car. & M. 554. See, further, *Smith v. Butler*, 69 L. J. Q. B. 521; [1900] 1 Q. B. 694. As to the right of the vendee to require separate conveyances of parcels, see *Egmont (Earl) v. Smith*, 6 Ch. D. 469.

By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 8 (1), "On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor."

The purchaser might at common law have refused to take a conveyance executed under a power of attorney; for it multiplies his proofs, and there is the risk of express or implied revocations. *Anon.*, cited 1 Esp. 116; *Richards v. Barton*, *Id.* 269. Under the Conveyancing Act, 1882 (45 & 46 V. c. 39), ss. 8, 9, a power of attorney may be made irrevocable, in favour of a purchaser, and the 44 & 45 V. c. 41, s. 48 (1, 4, 6), provides a means of proving it by an office copy. There is no provision under sect. 8, *supra*, that the purchaser may provide a witness to the execution of the power, and it is very doubtful if the above sections would oblige a purchaser to accept a conveyance executed under a power. If the vendee did not attend to complete, it was no objection that the vendor's solicitor had not a formal authority to receive the purchase money. See *Cox v. Watson*, 7 Ch. D. 196.

Claim on an account stated.] Where the contract is not in writing as required by the Stat. of Frauds, plaintiff may sometimes recover on a claim for an account stated by proving an acknowledgment of money due. *Cocking v. Ward*, 1 C. B. 858; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 43.

Damages.] Where the action is brought before conveyance, the defendant having taken possession and dispensed with the execution of the conveyance, the plaintiff cannot recover the whole purchase money, but only damages; for the land continues to belong to him. *Laird v. Pim*, 7 M. & W. 474. This rule applies in the case of land compulsorily taken under the provisions of the Lands Clauses Consolidation Act, 1845. *E. London Union v. Metropolitan Ry. Co.*, L. R. 4 Ex. 309. The plaintiff may recover his bill of costs without proving that it has been paid. *Richardson v. Chasen*, 10 Q. B. 756.

The conditions of sale usually provide that if the purchase be not completed by the appointed day "from any cause whatever other than wilful default on the part of the vendor," the vendee is to pay interest from that day on the purchase money. As to what amounts to "wilful default," see the judgment in *Bennett v. Stone*, 72 L. J. Ch. 240; [1903] 1 Ch. 509, where the recent decisions thereon are summarized.

The conditions of sale usually also provide for the payment of a deposit by the purchaser, which is to be forfeited to the vendor, on default of the former in complying with the other conditions. Where the purchaser fails to make the agreed deposit, the vendor, on default made by the purchaser in completion, is entitled to recover the amount of the deposit. *Wallis v. Smith*, 21 Ch. D. 243. The forfeiture of the deposit does not, however, prevent the vendor from recovering general damages on the purchaser's refusal to complete. *Icely v. Grew*, 6 Nev. & M. 467; *Essex v. Daniell*, L. R. 10 C. P. 538. But, where the vendor resells the property under a usual condition of sale, and does so at a loss, he must, in suing the vendee for such loss and for the expenses, give him credit for the amount of the deposit paid. *Ockenden v. Henley*, E. B. & E. 485; 27 L. J. Q. B. 361. On a breach by the purchaser, the measure of damages recoverable by the vendor is the difference between the contract price and the selling price if realised within a reasonable time of the breach, and not the selling price if realised slowly and advantageously as would be done if the property were nursed by a speculative builder. *Keck v. Faber*, 60 S. J. 253, applying *Jamal v. Moola Dawood*, 85 L. J. P. C. 29; [1916] 1 A. C. 175. Where the contract contains a variety of stipulations and one sum is stated to be payable on breach of any one of them, the question frequently arises whether that sum, although called liquidated damages, is not in reality a penalty, and therefore that the actual damage sustained is alone recoverable. In *Dunlop Pneumatic Tyre Co. v. New Garage Motor Co.*, 83 L. J. K. B. 1574; [1915] A. C. 79, Lord Dunedin laid down the following propositions on the subject: (1) The use of the expression "liquidated damages" is not conclusive that the sum is to be treated as such; the court must find out whether the sum stipulated is in truth a penalty or liquidated damages; (2) the essence of a penalty is a payment of money stipulated as *in terrorem* of the offending party; the essence of liquidated damages is a genuine covenanted pre-estimate of damages—*Clydebank Engineering Co. v. Don Jose, &c., y Castaneda*, 74 L. J. P. C. 1; [1905] A. C. 6; (3) whether the sum stipulated is a penalty or liquidated damages is in each case a question depending upon all the circumstances of the contract, judged of as at the time of the making of the contract, not as at the time of the breach—*Public Works Commissioner v. Hills*, 75 L. J. P. C. 69; [1906] A. C. 368; and *Webster v. Bosanquet*, 81 L. J. P. C. 205; [1912] A. C. 394; (4) the sum will be held to be a penalty if it is extravagant and unconscionable in amount in comparison with the greatest loss which could conceivably be proved to have followed from the breach; (5) it will be held to be a penalty if the breach consists only in not paying a sum of

money, and the sum stipulated is a sum greater than that which ought to have been paid—*Kemble v. Farren*, 7 L. J. (O. S.) C. P. 258; 6 Bing. 141; (6) there is a presumption (but no more) that it is a penalty when “a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious, and others but trifling damage” (*per* Lord Watson in *Elphinstone v. Monkland Iron &c., Co.*, 11 App. Cas. 332); (7) it is no obstacle to the sum stipulated being a genuine pre-estimate of damage that the consequences of the breach are such as to make precise pre-estimation almost an impossibility; on the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties—*Clydebank Case* (*supra*) and *Webster v. Bosanquet* (*supra*). See further *Magee v. Lavell*, L. R. 9 C. P. 107; *Pye v. British Automobile Syndicate*, 75 L. J. K. B. 270; [1906] 1 K. B. 425; *Law v. Redditch Local Bd.*, 61 L. J. Q. B. 172; [1892] 1 Q. B. 127; *In re Newman*, 4 Ch. D. 724; *Willson v. Love*, [1896] 1 Q. B. 626; *Strickland v. Williams*, [1899] 1 Q. B. 382; *Diestel v. Stevenson*, 75 L. J. K. B. 797; [1906] 2 K. B. 345; *De Soysa v. De Pless Pol*, 81 L. J. P. C. 126; [1912] A. C. 194.

Accidental deterioration after the date of the contract is a loss which must fall on the vendee. *Robertson v. Skelton*, 12 Beav. 260; 19 L. J. Ch. 140. Hence, it seems that such loss may be claimed as part of the plaintiff's damages occasioned by the defendant's non-completion. Loss arising from the vendor's neglect of care in preserving the property falls on him. Damages may be granted in lieu of specific performance notwithstanding the repeal of Cairns' Act (21 & 22 V. c. 27, s. 2) by 46 & 47 V. c. 49, s. 3. See *Chapman v. Auckland Union*, 23 Q. B. D. 294; *Sayers v. Collyer*, 23 Ch. D. 103; and *Hipgrave v. Case*, *Id.* 356.

Defence.

By Rules, 1883, O. xix. r. 15, the defendant must allege in his statement of defence all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise. Rule 17, provides that a plaintiff shall not deny generally the allegations in the statement of claim. See *Byrd v. Nunn*, 5 Ch. D. 781; 7 Ch. D. 284.

Denial of Contract.] By Rules, 1883, O. xix. r. 20, a bare denial of a contract alleged in any pleading shall be construed only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether in reference to the Stat. of Frauds or otherwise. This rule requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under the statute. *Clark v. Callow*, 46 L. J. Q. B. 53.

Fraud—Misdescription.] Fraud must be specially pleaded. Rules, 1883, O. xix. r. 15.

It is a defence that a misdescription has been wilfully introduced into the conditions of sale to make the land appear more valuable. *Norfolk (Duke) v. Worthy*, *infra*; and see *Vernon v. Keys*, 12 East, 637. The result of the decisions on this point is thus stated by Tindal, C.J., in *Flight v. Booth*, 1 Bing. N. C. 376 :—“All the cases concur in this, that where the mis-statement is wilful or designed, it amounts to fraud, and such fraud, upon general principles of law, avoids the contract altogether. But with respect to mis-statements which stand clear of fraud, it is impossible to reconcile all the cases; some of them laying it down that no mis-statements which originate in carelessness, however gross, shall avoid the contract, but shall form the subject of compensation only; *Norfolk (Duke) v. Worthy*, 1 Camp. 340; *Wright v. Wilson*, 1 M. & Rob. 207, whilst other cases lay

down the rule that a misdescription in a material point, although occasioned by negligence only, not by fraud, will vitiate the contract of sale. *Jones v. Edney*, 3 Camp. 284; *Waring v. Hoggart*, Ry. & M. 39; *Stewart v. Alliston*, 1 Mer. 26. In this state of discrepancy between the decided cases, we think it is at all events a safe rule to adopt, that where the misdescription, although not proceeding from fraud, is in a material and substantial point so far affecting the subject-matter of the contract that it may reasonably be supposed that, but for such misdescription, the purchaser might never have entered into the contract at all, in such case the contract is avoided altogether and the purchaser is not bound to resort to the clause of compensation. Under such a state of facts the purchaser may be considered as not having purchased the thing which was really the subject of the sale, as in *Jones v. Edney*, *supra*, where the subject-matter of the sale was described to be a free public-house, while the lease contained a proviso that the lessee and his assigns should take all the beer from a particular brewery, in which case the misdescription was held to be fatal." *Accord*. *In re Fawcett and Holmes*, 42 Ch. D. 150; *Jacobs v. Revell*, 69 L. J. Ch. 879; [1900] 2 Ch. 858, *In re Puckett and Smith's Contract*, 71 L. J. Ch. 666; [1902] 2 Ch. 258; and *Lee v. Rayson*, 86 L. J. Ch. 405; [1917] 1 Ch. 613. See also *Pulsford v. Richards*, 17 Beav. 96. So where the land is without the knowledge of the purchaser subject to restrictive covenants, *In re Nisbet and Pott's Contract*, 75 L. J. Ch. 238; [1906] 1 Ch. 386; or to a party-wall notice and award under the London Building Act, 1894 (57 & 58 V. c. ccxiii.), ss. 90, 91, *Carlsh v. Salt*, 75 L. J. Ch. 175; [1906] 1 Ch. 335. An innocent misrepresentation may be such as to preclude a judgment for specific performance, although it is not ground for rescinding the contract. See *Hope v. Walter*, 69 L. J. Ch. 166; [1900] 1 Ch. 257.

Where premises were *malâ fide* described as "a substantial brick building," which were not such, and a plot of land mentioned in the particulars did not exist at all, the sale was held voidable. *Robinson v. Musgrove*, 2 M. & Roh. 92. So, where they were described as an "eligible investment"; and they were, in fact, liable to be taken under a local public Act: held that the purchaser might rescind the contract, and that the Act, though public, was not notice *per se*. *Ballard v. Way*, 1 M. & W. 520; 5 L. J. Ex. 207. Where the premises, including a yard, were said to be held under a term of 23 years, when, in truth, the yard, which was an essential part, was held under a yearly tenancy, the purchaser was allowed to rescind the sale, though a lease of the yard for the same term was afterwards procured by the seller, and though there was a clause in the conditions for compensation in the case of erroneous description, and a provision that the contract should not be annulled by it. *Dobell v. Hutchinson*, 3 Ad. & E. 355; 4 L. J. K. B. 201. Where an agreement for sale contains a clause similar to the one in the last case, the court will not decree specific performance where the acreage varies very largely from that represented. *Durham (Earl) v. Legard*, 34 Beav. 611; 34 L. J. Ch. 589, and cases there cited. Where an estate was represented to contain 1,530 acres, when in fact it contained only 1,100 acres, it was held that a condition that the estate as to extent of acreage should be taken to be conclusively shown by certain deeds, was a mere conveyancing condition as to identity, and that, coupled with the representation as to the acreage, it did not estop the purchaser from rescinding on the ground of deficiency in acreage. *Aberaman Ironworks v. Wickens*, L. R. 4 Ch. 101. But, where it was provided by the conditions of sale, that "if any mistake should be made in the description of the premises, or if any other material error should appear in the particulars of sale, such mistake or error should not annul the sale, but a compensation should be made," the vendee was held not to be released from the contract by reason of a misdescription in the particulars of sale obvious on sale of the premises, unless such misdescription were wilful and designed. *Wright v. Wilson*, 1 M. & Roh. 207. So, specific performance for the purchase of a meadow was decreed, where a visible footpath went across it, of which no notice was

given. *Oldfield v. Round*, 5 Ves. 508; see Sugd. V. & P., 14th ed. 328; and *Shepherd v. Croft*, 80 L. J. Ch. 170; [1911] 1 Ch. 521. Where building ground was sold, as such, without notice of a right of way reserved across it by a lease of another portion of it, held that the contract was voidable; and the purchaser was permitted to avoid it as to two lots separately bought at an auction, though the defect applied only to one lot; the seller having afterwards united both in a single contract of sale at an entire sum. *Dykes v. Blake*, 4 Bing. N. C. 463; *Shackleton v. Sutcliffe*, 1 De G. & Sm. 609. See also *Heywood v. Mallalieu*, 53 L. J. Ch. 492; 25 Ch. D. 357; and *Nottingham Brick and Tile Co. v. Butler*, 54 L. J. Q. B. 545; 15 Q. B. D. 261. As to the effect of a misleading conveyancing condition, see *In re Banister*, 48 L. J. Ch. 837; 12 Ch. D. 131; *In re Marsh and Earl Granville*, 52 L. J. Ch. 189; 24 Ch. D. 11. A vendee of land described as copyhold is not compellable to accept freehold, notwithstanding a provision that errors in description should not vitiate the sale. *Ayles v. Cox*, 16 Beav. 23. See *Turquand v. Rhodes*, 37 L. J. Ch. 830. An agent employed to find a purchaser has authority to describe the property, and state any fact or circumstance relating to the value, so as to bind the vendor. *Mullens v. Miller*, 52 L. J. Ch. 380; 22 Ch. D. 194. See also *Brett v. Clowser*, 5 C. P. D. 376.

When more than one person is employed by the vendor to bid at a sale by auction this will be deemed a fraud. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. And the employment of a single puffer when the sale is "without reserve," avoided it at law. *Thornett v. Haines*, 15 M. & W. 367; 15 L. J. Ex. 230. Where the sale is not advertised as "without reserve," the employment of a single puffer, unknown to the bidders, is evidence for the jury to sustain the defence of fraud. *Green v. Baverstock*, 14 C. B. (N. S.) 204; 32 L. J. C. B. 181. But a sale is not avoided by the fictitious bidding of a mere stranger. *Union Bank of London v. Munster*, 57 L. J. Ch. 124; 37 Ch. D. 51. By 30 & 31 V. c. 48, s. 4, the rule in equity is made the same as at law; see also sects. 5 and 6, *infra*. It seems that an auctioneer who advertises a sale "without reserve," and without disclosing his principal's name, is liable to an action, if he knock down the lot to the principal's bidding after that of the plaintiff. *Warlow v. Harrison*, 1 E. & E. 309; 29 L. J. Q. B. 14. But where a reference was made by name to the solicitor of the mortgagee by whose direction the sale was represented to be made, the auctioneer was held not to be liable. *Main-price v. Westley*, 5 B. & S. 420; 34 L. J. Q. B. 229. See, however, *Woolfe v. Horne*, 46 L. J. Q. B. 534; 2 Q. B. D. 355; and *Rainbow v. Howkins*, 73 L. J. K. B. 641; [1904] 2 K. B. 322.

By 30 & 31 V. c. 48, s. 5, it is enacted, "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or subject to a reserved price, or whether a right to bid is reserved; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person." By sect. 6, where the sale is declared "to be subject to a right for the seller to bid, it shall be lawful for the seller, or any one person on his behalf, to bid at such auction in such manner as he may think proper." Where the conditions state that the sale is subject to a reserved bidding, this Act renders it illegal for the vendor to employ a person to bid up to the reserved price, unless the right to do so is expressly stipulated for. *Gilliat v. Gilliat*, L. R. 9 Eq. 60; 39 L. J. Ch. 142.

Sale of leaseholds.] The purchaser is not bound to complete a contract for the purchase of a lease, if subject to onerous covenants of an unusual character, unless, prior to the contract, he had an opportunity of ascertaining the terms of the covenants. *Molyneux v. Hawtrey*, 72 L. J. K. B. 873; [1903] 2 K. B. 487. So in the case of a contract to take an underlease. *Hyde v. Warden*, 47 L. J. Ex. 121; 3 Ex. D. 72.

VENDEE AGAINST VENDOR.

If the vendor refuse, or is unable to complete his contract, the purchaser may either sue for damages for such breach of contract; or in case he has made a deposit or paid part of the purchase money and has not taken possession, may sue to recover it back as money had and received. So, if a fraud have been practised on him by the vendor to induce him to buy, the vendee may rescind the contract, and sue for the deposit. *Thornet v. Haines*, 15 M. & W. 367; 15 L. J. Ex. 230.

In a special action on the contract by the purchaser, he must prove the contract, if denied; and by other defences he may be put to prove the performance of conditions precedent, and all other matters traversed by the defendant. The vendee is entitled to have a good title—the court not forcing upon him a title where there is a probability that it will be questioned with a practical chance of success, *In re Handman and Wilcox*, 71 L. J. Ch. 263; [1902] 1 Ch. 599; *In re Douglas and Powell's Contract*, 71 L. J. Ch. 850; [1902] 2 Ch. 296—but this right is lost by failure to take objections to that disclosed on the abstract within the time limited by the contract. *Rosenberg v. Cook*, 51 L. J. Q. B. 170; 8 Q. B. D. 162. In this case the vendee was held entitled to delivery of possession, only, of the land by the vendor. When the defendant's title, as stated in the abstract, is objected to, it will not be enough to prove that the title has been deemed by conveyancers to be insufficient; the defect must be pointed out; *Camfield v. Gilbert*, 4 Esp. 212; and the plaintiff cannot, at the trial, insist upon any objection to the title, as stated therein, which he neglected to take at the time of rescinding the contract, and which might have been remedied by the vendor if taken before. *Todd v. Hoggart*, M. & M. 128. The vendor may compel delivery of particulars of every matter of fact relied upon as an objection; but not of matter of law. *Roberts v. Rowlands*, 3 M. & W. 543; 7 L. J. Ex. 182. If no particulars have been given, and the pleadings are general, the vendee will be at liberty to prove any infraction of the conditions of sale. *Squire v. Tod*, 1 Camp. 293.

Where the sale is subject to a condition that if the purchaser make any requisition which "the vendor should be unable or unwilling to remove or comply with," the right to rescind thereunder must be exercised reasonably. *In re Starr-Bowkett Building Society and Sibun's Contract*, 58 L. J. Ch. 651; 42 Ch. D. 375. It arises as soon as the requisition is made. S. C. The vendor is not bound to state his reasons for rescission. S. C. After rescission, the contract is at an end, and the subsequent withdrawal by the purchaser of his requisitions has no effect. *In re Dames and Wood*, 54 L. J. Ch. 771; 29 Ch. D. 626. See further, as to rescission under such a condition, *Gray v. Fowler*, 42 L. J. Ex. 161; L. R. 8 Ex. 249; *Woolcott v. Peggie*, 59 L. J. P. C. 44; 15 App. Cas. 42; *In re Arbib and Glass's Contract*, 60 L. J. Ch. 263; [1891] 1 Ch. 601; *In re Quigley and M'Clay's Contract*, [1918] 1 I. R. 347.

After the purchaser has recovered the deposit only, from the auctioneer, he may, in a special action against the vendor, recover interest and the expenses of investigating the title. *Farquhar v. Farley*, 7 Taunt. 592. The expenses of investigating the title cannot be recovered under a claim for money paid. *Camfield v. Gilbert*, 4 Esp. 221.

As a general rule, the vendee is bound to tender a conveyance to the vendor for execution by him. *Poole v. Hill*, 6 M. & W. 835; 10 L. J. Ex. 81. Yet, even when he is bound by the express terms of the contract to tender one, if a bad title be produced, he may maintain an action for the recovery of his deposit without tendering it. *Seaward v. Willcock*, 5 East, 198, 202; *Lowndes v. Bray*, Sugd. V. & P., 14th ed. 364 (b). So, where the vendor has, by selling the estate, incapacitated himself from executing a conveyance to the purchaser, further trouble and expense on the plaintiff's part are unnecessary, and he may sustain an action without tendering a conveyance,

or the purchase money. *Lovelock v. Franklyn*, 8 Q. B. 371; 15 L. J. Q. B. 146.

After the completion of the conveyance the purchaser may, if he were induced to enter into the agreement by fraud, maintain an action to set aside the agreement and recover his purchase money. *Roddy v. Williams*, 3 J. & L. 1; or for damages, *vide Action for Deceit and Misrepresentation, post*. Where he was induced to enter into it by an innocent material misstatement, he may maintain an action to set it aside, and to recover his purchase money; but he cannot, in the absence of a special term in the agreement of purchase that he shall be allowed compensation, maintain an action for damages. *Clayton v. Leech*, 41 Ch. D. 103; *Besley v. Besley*, 9 Ch. D. 103; *Brett v. Clowser*, 5 C. P. D. 376; *Joliffe v. Baker*, 52 L. J. Q. B. 609; 11 Q. B. D. 255; *Heilbut, Symons & Co. v. Buckleton*, 82 L. J. K. B. 245; [1913] A. C. 30. Where, however, there is such special term in the agreement, it is not, for this purpose, merged in the conveyance, and the purchaser may recover damages thereon. *Palmer v. Johnson*, 53 L. J. Q. B. 348; 13 Q. B. D. 351; following *Bos v. Helsham*, 36 L. J. Ex. 20; L. R. 2 Ex. 72; *In re Turner and Skelton*, 49 L. J. Ch. 114; 13 Ch. D. 130. But the usual term as to compensation does not apply to defect in the vendor's title. *Debenham v. Sawbridge*, 70 L. J. Ch. 525; [1901] 2 Ch. 98. A representation made by the vendor at the time of completion may amount to a collateral warranty for breach of which the purchaser can sue him. See *De Lassalle v. Guildford*, 70 L. J. K. B. 533; [1901] 2 K. B. 215; whether the representation does or does not amount to a warranty can only be deduced from the totality of the evidence. *Heilbut, Symons & Co. v. Buckleton, supra*.

Where the vendor keeps possession till completion he is a trustee for the purchaser, and is bound to take reasonable care to preserve the property; *R. Bristol Permanent Building Society v. Bomash*, 56 L. J. Ch. 840; 35 Ch. D. 390; *Clarke v. Ramuz*, 60 L. J. Q. B. 679; [1891] 2 Q. B. 456; and where damage of which neither the vendor nor the vendee knew at the time of completion has arisen from such want of care, the execution of the conveyance is no bar to its recovery. S. C.

An auctioneer is not liable at the suit of a disappointed bidder for withdrawing lots from an advertised sale. *Harris v. Nickerson*, 42 L. J. Q. B. 171; L. R. 8 Q. B. 286. A vendor, B., is liable in damages to J., to whom the property was knocked down at the auction, if, although J. complies with the conditions of sale, B. refuses to allow him to sign a contract, and the Statute of Frauds is no defence. *Johnston v. Boyes*, 68 L. J. Ch. 425; [1899] 2 Ch. 73. The deposit must be paid in cash if the vendor so require. S. C.

Claim for deposit.] To enable the purchaser to maintain an action for money had and received to recover the deposit, the contract must be disaffirmed *ab initio*. If the purchaser have taken possession of the premises under the contract, he has adopted the contract, and cannot disaffirm it afterwards by quitting the premises, as the parties cannot be put in the same situation in which they before stood. *Hunt v. Silk*, 5 East, 449. See also *In re Gloag and Miller's Contract*, 52 L. J. Ch. 654; 23 Ch. D. 320. His remedy is then on the contract itself. *Blackburn v. Smith*, 2 Ex. 783; 18 L. J. Ex. 187. If the purchaser repudiate the contract, *Ex pte. Barrell*, 44 L. J. Bk. 138; L. R. 10 Ch. 512; or fail to complete it within a reasonable time, *Howe v. Smith*, 53 L. J. Ch. 1055; 27 Ch. D. 89; *Hall v. Burnell*, 81 L. J. Ch. 46; [1911] 2 Ch. 551; he cannot recover the deposit, though there be no clause of forfeiture in the contract. See also *Smith v. Butler*, 69 L. J. Q. B. 521; [1900] 1 Q. B. 694. A payment expressly made not as a deposit but in part payment of the purchase price, stands on a different footing from a deposit and may be recovered by the purchaser although the contract goes off by his default. *Harrison v. Holland and Hannen and Cubitts*, [1921] W. N. 235. Even if the contract be oral only, the purchaser

cannot, by repudiating it, after he has obtained the abstract and sent requisitions thereon, entitle himself to recover the deposit. *Thomas v. Brown*, 45 L. J. Q. B. 811; 1 Q. B. D. 714. It seems that the purchaser cannot recover the deposit if he would get a good holding title, even although it is not one which the court would force on him. See *Nottingham Patent Brick and Tile Co. v. Butler*, 55 L. J. Q. B. 280; 16 Q. B. D. 778. Where the vendee, A., has accepted the title, and the vendor, B., has forfeited the deposit under a clause in the contract for non-completion, A. cannot afterwards recover it on the ground that the title was bad. *Soper v. Arnold*, 59 L. J. Ch. 214; 14 App. Cas. 429. See further as to right to recover deposit on the ground of want of title, *Want v. Stallibrass*, 42 L. J. Ex. 108; L. R. 8 Ex. 175.

When the plaintiff seeks to recover the deposit, he must prove payment of it to the defendant. A payment to the agent of the vendor is, in law, a payment to the principal; and in an action against the latter for the recovery of the money, it is immaterial whether it has actually been paid over to him or not. *Norfolk (Duke) v. Worthy*, 1 Camp. 337. And even where after an auction the deposit has been paid to the solicitor, J., of the vendor, G., as his agent, the action must be against G. and not against J. *Ellis v. Goulton*, 62 L. J. Q. B. 232; [1893] 1 Q. B. 350. But if the deposit has been paid to the auctioneer, an action for it will lie against him *before* payment over to his principal, for he is in the nature of a stakeholder; *Burrough v. Skinner*, 5 Burr. 2639; or, if he has paid it over after notice of the defect in the title; *Edwards v. Hodding*, 5 Taunt. 815; and even, it should seem, *after* payment over to the principal without notice; for he ought to keep the deposit until the sale is complete, and it appears to whom it ought to be paid. *Gray v. Gutteridge*, 1 M. & Ry. 614. No notice to the auctioneer previous to the action being brought against him as stakeholder is necessary. *Duncan v. Cafe*, 2 M. & W. 244; 6 L. J. Ex. 81. Interest on the deposit cannot, in general, be recovered in such action. *Lee v. Munn*, 8 Taunt. 45; *Farquhar v. Farley*, 7 Taunt. 594. But it may be given by the jury under 3 & 4 W. 4, c. 42, s. 28, as damages, if a demand for the repayment of the money has been made with a notice that interest will be claimed. Where an auctioneer does not disclose the name of principal, an action will lie against himself for damages for the breach of contract. *Hanson v. Roberdeau*, Peake, 120; *Simon v. Motivos*, 3 Burr. 1921. See also *Woolfe v. Horne*, 46 L. J. Q. B. 534; 2 Q. B. D. 355; *Rainbow v. Howkins*, 73 L. J. K. B. 641; [1904] 2 K. B. 322.

Damages.] Where the contract is oral the vendee can recover the deposit only, for he cannot sue upon the special contract. *Walker v. Constable*, 1 B. & P. 306. In other cases the purchaser may recover, in a special action against the vendor, the deposit with interest, and the expenses of investigating the title, searching for judgments, &c. *Hodges v. Lichfield (Earl)*, 1 Bing. N. C. 492; *Turner v. Beaurain*, Sugd. V. & P., 14th ed. 362; *Farquhar v. Farley*, 7 Taunt. 592. And such expenses as a solicitor's bill may be recovered under an averment that plaintiff "had been put to great expenses, to wit, &c., in and about investigating the title," &c., although not actually paid. *Richardson v. Chasen*, 10 Q. B. 756; 16 L. J. Q. B. 341. If the purchase money has been lying ready without any interest being made of it, and it was reasonable to keep it so lying, interest may be recovered as damages. *Sherry v. Oke*, 3 Dowl. 349. But a person who has agreed to advance a sum on a mortgage, cannot recover interest on it where the negotiation fails for want of title, unless there be a special contract to pay it. *Sweetland v. Smith*, 1 Cr. & M. 585; 2 L. J. Ex. 190.

The purchaser cannot recover expenses incurred previously to entering into the contract; nor the expenses of a survey of the estate made before he knows the title; nor the expense of a conveyance drawn in anticipation; nor the extra costs of a suit for specific performance brought by the vendor; nor losses on the re-sale of stock prepared for the farm. *Hodges v. Lichfield*

(Earl), 1 Bing. N. C. 492. So where the vendee filed a bill for specific performance, which was dismissed in consequence of the defective title, he was not permitted to recover these costs in an action against the vendor for breach of contract. *Malden v. Fyson*, 11 Q. B. 292; 17 L. J. Q. B. 85. Nor can the vendee recover any expenses incurred in preparing a conveyance after the defect in title was discovered; *Pounsett v. Fuller*, 17 C. B. 660; 25 L. J. C. P. 145; or in further fruitless negotiations. *Sikes v. Wild*, 1 B. & S. 587; 30 L. J. Q. B. 325; 4 B. & S. 421; 32 L. J. Q. B. 375. Where a lessee, with power to alter and improve, had an option to purchase, and, after laying out money in improvements, elected to purchase, and the title proved bad, he was held entitled only to damages for the breach of contract, but not for expense of improvements. *Worthington v. Warrington*, 8 C. B. 134; 18 L. J. C. P. 350. Where the defendant agreed to demise lands to the plaintiff, and to deduce a good title thereto, and the plaintiff had formed a company to establish certain works on it, and the title proved to be a bad one, it was held that the plaintiff might recover the expenses of the agreement, of investigating the title and endeavouring to procure a good one and to obtain the lease; but not the expense of raising the purchase-money with interest, or of forming, establishing, and registering the company, nor the profits that would have accrued either to the company from the lease, or to the plaintiff as their solicitor, in carrying their project into effect; the latter heads of expense being either premature or speculative. *Hanslip v. Padwick*, 5 Ex. 615; 19 L. J. Ex. 372.

The purchaser is not in general entitled to recover compensation for the fancied goodness of his bargain, where the vendor is, without fraud, incapable of making a title. *Flureau v. Thornhill*, 2 W. Bl. 1078; *Bain v. Fothergill*, 43 L. J. Ex. 243; L. R. 7 H. L. 158. In such case the purchaser can only by an action for deceit recover any damages beyond the expenses he has incurred. S. C., *per* Ld. Chelmsford. So a purchaser who has obtained judgment for specific performance cannot in general recover damages for delay in completion. *Rowe v. London School Board*, 57 L. J. Ch. 179; 36 Ch. D. 619. A contract to grant an easement is for this purpose equivalent to a contract to sell land. S. C. Where, however, on the sale of a lease, the vendor did not do his best to obtain the consent of the lessor, as required by the lease, and the sale went off because the consent was refused, the vendee was held entitled to recover damages for the loss of his bargain. *Day v. Singleton*, 68 L. J. Ch. 593; [1899] 2 Ch. 320. And where the sale does not go off for want of title, but by reason of the refusal of the vendor to take the necessary steps to give possession to the vendee, the plaintiff can recover, as such damages, the difference between the contract price and the value at the time of the breach. *Engel v. Fitch*, 38 L. J. Q. B. 304; L. R. 4 Q. B. 659; *In re Daniel*, 87 L. J. Ch. 69; [1917] 2 Ch. 405; *Braybrooks v. Whaley*, 88 L. J. K. B. 577; [1919] 1 K. B. 435. The price at which the estate was afterwards sold is *primâ facie* evidence of its then value. *Engel v. Fitch*, *supra*; and see *Godwin v. Francis*, 39 L. J. C. P. 121; L. R. 5 C. P. 295. Where A. agreed to let premises to B., knowing his intention to carry on a trade thereon, B. was held entitled to recover from A., for the breach of this agreement, damages for the loss of anticipated business during the time he necessarily occupied in getting other premises. *Jaques v. Millar*, 47 L. J. Ch. 544; 6 Ch. D. 153. So loss of rent may be recovered as damages. *R. Bristol Permanent Building Society v. Bomash*, 56 L. J. Ch. 840; 35 Ch. 390. See also *Jones v. Gardiner*, 71 L. J. Ch. 93; [1902] 1 Ch. 191.

ACTION FOR USE AND OCCUPATION.

This action is grounded on stat. 11 G. 2, c. 19, s. 14, by which it is enacted that it shall be lawful for landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendants, in an action on *the case* for the use and occupation of what was so held or enjoyed; and, if on the trial of such action, any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff shall not therefore be nonsuited, but may make use thereof as evidence of the quantum of damages to be recovered. But, the action of *debt* for rent on a contract for use and occupation lies at common law and not upon this statute. *Egler v. Marsden*, 5 Taunt. 25; *Gibson v. Kirk*, 1 Q. B. 850; 10 L. J. Q. B. 297; and *per Bramwell, B.*, in *Churchward v. Ford*, 26 L. J. Ex. 354; 2 H. & N. 446. It may be observed that since the abolition of real actions by stat. 3 & 4 W. 4, c. 42, *debt* for a rentcharge in fee will lie against the freehold tenant in possession of the land; *Thomas v. Sylvester*, 42 L. J. Q. B. 237; L. R. 8 Q. B. 368; *Searle v. Cooke*, 59 L. J. Ch. 259; 43 Ch. D. 519; even although the rentcharge may be also recoverable under 44 & 45 V. c. 41, s. 44. S. C.; and it exceeds the profits of the land. *Pertwee v. Townsend* 65 L. J. Q. B. 659; [1896] 2 Q. B. 129. And against a mortgagee in fee although he has never been in possession. *Cundiff v. Fitzsimmons*, 80 L. J. K. B. 422; [1911] 1 K. B. 513; and against a road authority as the true tenants of a road vested in them under the Public Health Act. *Foley's Charity Trustees v. Dudley Corporation*, 79 L. J. K. B. 410; [1910] 1 K. B. 317. It will not, however, lie against a tenant for years in occupation of the land; *In re Herbage Rents, Greenwich*, 65 L. J. Ch. 871; [1896] 2 Ch. 811; nor against the official liquidator of a company in whom the land out of which the rentcharge issues has been vested by order of the court. *Graham v. Edge*, 57 L. J. Q. B. 406; 20 Q. B. D. 683. By 54 & 55 V. c. 17, s. 5 (2), where any yearly or other periodical payment has been made in respect of any land to or for the benefit of any charity or charitable purposes for 12 consecutive years, such payment shall be deemed *primâ facie* evidence of the perpetual liability of such land to such payment, without proof of the origin thereof.

Plaintiff's title.] If the defendant have come in under the plaintiff, or have acknowledged his title by the payment of rent to him or otherwise, he will not be permitted to impeach it at the trial; *Sullivan v. Stradling*, 2 Wils. 208; *Cooke v. Loxley*, 5 T. R. 4; *Phipps v. Sculthorpe*, 1 B. & A. 50; and it is not material in such case that the plaintiff should have the legal estate. *Hull v. Vaughan*, 6 Price, 157. Thus, if *cestui que trust* demise, he is the person to sue for the rent, and not the trustee, though the latter may have given notice to defendant to pay to him. *Churchward v. Ford*, 2 H. & N. 446; 26 L. J. Ex. 354. But, unless the defendant came in under the plaintiff, or had recognized his title, the plaintiff could only recover rent from the time that the legal estate vested in him. *Cobb v. Carpenter*, 2 Camp. 13, n. It seems, however, that since the J. Acts it is sufficient if the plaintiff has a right in equity to receive the rents as such. Tenants in common may join in this action on a parol yearly tenancy, if the tenant has always paid the rent to a joint agent of the plaintiff's; for this is evidence of a joint letting. *Last v. Dinn*, 28 L. J. Ex. 94. Where a person, after letting defendant into possession on an agreement for a future lease, mortgaged the premises to the plaintiff, who gave notice to the defendant of the mortgage, it was held that the plaintiff might recover in this form of action rent accruing due for a half-year subsequent to the mortgage, and during the currency of which the notice was given. *Rawson v. Eicke*, 7 Ad. & E. 451; 7 L. J. Q. B. 17. A defendant, whose tenancy began under A., and who has since paid rent to the *cestui que trust* under

A.'s will, cannot set up the want of the legal estate to an action for use and occupation by *cestui que trust*, though the fact is disclosed by the plaintiff's evidence. *Dolby v. Iles*, 11 Ad. & E. 335; 9 L. J. Q. B. 51. The assignee of the landlord of A., who holds under a parol lease, may sue A. in this action, although there has been no recognition of 'tenancy or promise as between him and the assignee; at least where the grant by the assignor was "for himself and assigns." *Standen v. Christmas*, 10 Q. B. 135; 16 L. J. Q. B. 265. There is a distinction between the case where a person has actually received possession from one who has no title, and the case where he has merely attorned by mistake to one who has title; in the former case the tenant cannot, except under very special circumstances, dispute the title; in the latter he may. *Per Bayley, J.*, in *Cornish v. Searell*, 8 B. & C. 475; *Rogers v. Pitcher*, 6 Taunt. 202; *Gravenor v. Woodhouse*, 1 Bing. 38; and see the cases cited, *sub tit. Replevin—Tenancy of Plaintiff*. Thus, where a tenant took "premises from A. and B., for and on behalf of the trustees of the joint estate of C. and D.," and it appeared at the trial, on the evidence of the plaintiffs (who described themselves in the declaration as joint trustees), that they were trustees of C. only; it was held that the tenant was estopped from taking advantage of this variance. *Fleming v. Gooding*, 10 Bing. 549; 3 L. J. C. P. 214. So, where A. hired apartments by the year from B., and B. afterwards let the entire house to C., who sued A. for use and occupation, it was held that A. could not impeach C.'s title. *Rennie v. Robinson*, 1 Bing. 147. But a payment on a mistaken supposition that the claimant was personal representative of the tenant's deceased landlord will not estop the tenant. *Knight v. Cox*, 18 C. B. 645. So, a payment made under a supposed legal obligation (which did not in fact exist) is nothing more than a voluntary payment which does not estop the party paying from setting up his true title. *Batten-Poole v. Kennedy*, 76 L. J. Ch. 162; [1907] 1 Ch. 256. Where land, belonging to a parish, was occupied by A., and he paid rent to the churchwardens, who executed a lease of the same land for a term of years to B., and gave A. notice of the lease; in an action for use and occupation by B. against A., it was held that A. was not precluded from disputing B.'s title, for that B. could not derive a valid title from the churchwardens. *Phillips v. Pearce*, 5 B. & C. 433.

An estoppel must be mutual; therefore, if the landlord is not estopped, neither is the tenant. *Bac. Abr. Leases (O.)*; *Brereton v. Evans*, Cro. Eliz. 700. Thus, where a husband and wife joined in leasing, by deed, land to the defendant, of which the husband alone was seised, it was held that, in an action of debt for rent, brought by the wife after her husband's death, the defendant was not estopped from showing that the plaintiff had no interest in the land, because the wife could not be estopped by the lease. *S. C.* So, where husband and wife demised land, the legal estate of which was in trustees for the wife, it was held that the husband could not, after his wife's death, distrain for the subsequent rent, as there was no estoppel. *Howe v. Scarrot*, 4 H. & N. 723; 28 L. J. Ex. 325.

In general, the title of the plaintiff is established by the production of a writing or agreement, which is proved in the usual manner; but if there be no actual lease or agreement, the plaintiff's title may be established by evidence of the defendant having paid rent to him, or submitted to a distress by him. *Panton v. Jones*, 3 Camp. 372. Notice to produce the receipts for rent, or the notice of distress, if any, should in such cases be given by the plaintiff. Where the defendant occupied the plaintiff's land under the powers of a local Act, and, upon a dispute respecting the right of the plaintiff to demand rent, a decree for payment was made in an amicable suit in Chancery, in which the defendant acquiesced for several years, it was held that he could not afterwards dispute his liability to rent in an action for use and occupation. *Allason v. Stark*, 9 Ad. & E. 255; 8 L. J. M. C. 13. Payment of an annual sum by defendant and his predecessors, occupiers, to the overseers of the parish for a century, as for "rent

of common lands," is evidence of a rent-service, and not a rent-charge, especially if the defendant have his title deeds in court and decline to produce them. *Hardon v. Hesketh*, 4 H. & N. 175; 28 L. J. Ex. 137. See, however, *Doe d. Whittick v. Johnson*, Gow, 173, in which Holroyd, J., held that such payment is evidence only of a right to the rents, and not to the land, and that the presumption is that they were quit rents; this case was not cited in *Hardon v. Hesketh*, *supra*. If it appear from the plaintiff's witnesses that the defendant holds under a written agreement not produced, or which, when produced, cannot be read for want of a stamp, the plaintiff will not be allowed to give oral evidence of the holding. *Brewer v. Palmer*, 3 Esp. 213; *Ramsbottom v. Mortley*, 2 M. & S. 445. But, if the plaintiff have made out a *prima facie* case, and the defendant seek to show that he holds under a written agreement, he must produce the instrument duly stamped, or his objection is untenable. *Fielder v. Ray*, 6 Bing. 332; 8 L. J. (O. S.) C. P. 65; *R. v. Padstow*, 4 B. & Ad. 208; 2 L. J. M. C. 15. A parol demise for all the residue of the lessor's term, it being the intention of the parties to create the relation of landlord and tenant, will operate as a lease, so as to enable the lessor to maintain an action for use and occupation, or debt for rent. *Poulteney v. Holmes*, 1 Str. 405; *Baker v. Gostling*, 1 Bing. N. C. 19; 3 L. J. C. P. 292; *Pollock v. Stacy*, 9 Q. B. 1033; 16 L. J. Q. B. 132. Such demise, however, operates as an assignment. *Beardman v. Wilson*, 38 L. J. C. P. 57; L. R. 4 C. P. 57. Where A. lets land to B. as tenant from year to year, and B. by deed assigns his interest in the land to C., and A. assigns his reversion to D., who does not accept C. as his tenant, D. cannot sue B. for the rent, there being no privity of estate or contract between them. *Allcock v. Moorhouse*, 9 Q. B. D. 366. One joint tenant, or tenant in common, can demise his interest at a rent, to another joint tenant, or tenant in common. *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J. Q. B. 187; *Leigh v. Dickeson*, 12 Q. B. D. 194; 15 Q. B. D. 60. A reversionary lease creates an *interesse termini* only, until entry thereunder at the time fixed therein, and does not enlarge the term of the original lease. *Lewis v. Baker*, 74 L. J. Ch. 39; [1905] 1 Ch. 46.

A married woman may, under the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 1 (2), sue alone, for the use and occupation of land to the rents of which she is, under sects. 1 (1), 2, 5 of that Act, separately entitled.

Where the estate of the lessor ceased before, or on the rent day, the tenant was not, at common law, liable to pay any rent for his occupation from the last rent day to the day of such cesser. This was remedied in certain cases by stats. 11 G. 2, c. 19, s. 15, and 4 & 5 W. 4, c. 22, s. 1. And now by the Apportionment Act, 1870 (33 & 34 V. c. 35, s. 2), all "rents" . . . "shall, like interest on money lent, be considered as accruing from day to day, and be apportionable in respect of time accordingly;" but (sect. 3) the apportioned part shall not be payable until the entire rent shall or would have become payable. By sect. 4, all persons, their heirs and executors, &c., are to have the same remedies for recovering the apportioned part, as for the entire portions if entitled thereto; but in the case of rents received and continuing, the entire rent shall be received by the person who would have been entitled if there had been no apportionment; and the apportioned part shall be recoverable from him. By sect. 5 "rents" includes rent service, rent charge, rent seck, and also tithes and payments in lieu thereof. See hereon, *Swansea Bank v. Thomas*, 48 L. J. Ex. 344; 4 Ex. D. 94; *Ex pte. Mandleberg*, 64 L. J. Q. B. 454; [1895] 1 Q. B. 844; *Rochester (Bishop) v. Le Fanu*, 75 L. J. Ch. 743; [1906] 2 Ch. 513; *Ellis v. Rowbotham*, 69 L. J. Q. B. 379; [1900] 1 Q. B. 740. The Act does not apply to forehand rent. *S. C.* It applies to the liability to pay as well as to the right to receive. *Glass v. Patterson*, [1902] 2 I. R. 660. Where premises are let at a rent and the lessee assigns part to another, the value of the respective parts with reference to which the apportionment of the reserved rent is to be calculated

is the value at the date of the severance, not that at the date of the lease granted. *Salts v. Battersby*, 79 L. J. K. B. 937; [1910] 2 K. B. 155.

By 14 & 15 V. c. 25, s. 1, where a tenancy of lands held by a tenant T. at rack rent determines by the cesser of the estate of the landlord L., entitled for his life, &c., instead of claims to emblements, T. shall hold the lands under the succeeding owner O., on the same terms as he would have held the same of L., till the end of the current year of tenancy, and shall then quit without notice; O. may recover a proportional part of the rent reserved for the time between the cesser of L.'s estate and T.'s quitting. The section applies to those tenancies only in which the right to emblements would arise. *Raines v. Welch*, 38 L. J. C. P. 118; L. R. 4 C. P. 91. It applies to the tenancy of a labourer's cottage with more than an acre of land, partly cultivated as a garden and partly sown with corn and planted with potatoes. S. C.

Defendant's occupation.] There must be an occupation or holding actual or constructive; therefore a tenant who has agreed to take premises, but has not entered, is not liable to an action for use and occupation. *Edge v. Stafford*, 1 C. & J. 391; 9 L. J. (O. S.) Ex. 101; *Lowe v. Ross*, 5 Ex. 553; 19 L. J. Ex. 318; *Towne v. D'Heinrich*, 13 C. B. 892; 22 L. J. C. P. 219. But it is *prima facie* sufficient for the plaintiff to prove that the defendant did occupy the premises; and the continuance of the occupation will be presumed till the contrary appears. *Harland v. Bromley*, 1 Stark. 455; *Ward v. Mason*, 9 Price, 291. Where there has been an actual demise, a constructive occupation of the premises by the defendant during the time granted is sufficient; an occupation which he might have had, if he had not voluntarily abstained from it. *Per Gibbs, C.J., Whitehead v. Clifford*, 5 Taunt. 519; *Pinero v. Judson*, 6 Bing. 206; 8 L. J. (O. S.) C. P. 19; *Atkins v. Humphrey*, 2 C. B. 654, 659; 15 L. J. C. P. 120. See *Smallwood v. Sheppards*, 64 L. J. Q. B. 727; [1895] 2 Q. B. 627. But there does not appear to be any authority for the proposition that use and occupation can, in the absence of an actual demise, be maintained on a constructive occupation after the tenant has in fact ceased to occupy, and has offered to surrender the premises to the landlord. As to what creates an actual demise, see *Replevin—Tenancy of Plaintiff, post*. Where there has been an actual demise to the defendant, to which he has assented, he is liable in debt for rent, even before entry. See Co. Litt. 270 a; Bac. Abr. Leases (M.).

Where the defendant entered a house under an agreement to take it and pay a half-year's rent in advance, Lush, J., held that that sum was recoverable only on a special count on the agreement. *Angell v. Randall*, 16 L. T. 498. The assignee of the reversion cannot, as it seems, maintain this action for rent in part incurred before the assignment; for there was then no occupation of the plaintiff's property by his permission, but debt for rent would lie. *Mortimer v. Preedy*, 3 M. & W. 602; 7 L. J. Ex. 174. An adverse occupation by the defendant will not entitle the owner to sue in this form of action. *Tew v. Jones*, 13 M. & W. 12; 14 L. J. Ex. 94. Indeed, 11 G. 2, c. 19, contemplates the relation of landlord and tenant. Hence, where a trespasser entered on land after a mortgage of it to the plaintiff, who had never taken possession nor got a judgment in ejectment, it was held that the latter could not recover rent in this form of action. *Turner v. Cameron's Coal Co.*, 5 Ex. 932; 20 L. J. Ex. 71. But a tenancy at sufferance is enough to support this action; as where a lessee under a lease from the plaintiff continues to hold adversely to him, after the expiration of it, as tenant to a stranger whose title is not shown. *Bayley v. Bradley*, 5 C. B. 396; 16 L. J. C. P. 206; *Hellier v. Sillcox*, 19 L. J. Q. B. 295. If A. agrees to let lands to B., who permits C. to occupy them, B. may be sued by A. for use and occupation. *Bull v. Sibbs*, 8 T. R. 327; *Conolly v. Baeter*, 2 Stark. 525. So, if B. assigns all his interest in the premises to D., A. may maintain an action for use and occupation against

B., provided A. has never recognized D. as his tenant. *Shine v. Dillon*, 1 R. 1 C. L. 277. After an agreement between the plaintiff and defendant for a lease, the receipt by the defendant of the rents and profits, or an attornment from an under-tenant, is proof of use and occupation by the defendant. *Neal v. Swind*, 2 C. & J. 377; 1 L. J. Ex. 118. If the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable during such time as the under-tenant retains possession, for the lessor is entitled to receive the absolute possession at the end of the term. *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 Ad. & E. 849; 8 L. J. Q. B. 126; see *Levy v. Lewis*, 6 C. B. (N. S.) 766; 28 L. J. C. P. 304; 9 C. B. (N. S.) 872; 30 L. J. C. P. 141; *Henderson v. Squire*, 38 L. J. Q. B. 73; L. R. 4 Q. B. 170. But it may be proved that the lessor had accepted the under-tenant as his tenant, as by his having accepted the key from the original lessee, while the under-tenant was in possession: by his acceptance of rent from him, or by some act tantamount to it. *Harding v. Crethorn*, *supra*, per Ld. Kenyon.

A tenant who has quitted in pursuance of an oral surrender to his landlord, without having given or received a notice to quit, remains liable; *Mollett v. Brayne*, 2 Camp. 104; *Matthews v. Sawell*, 8 Taunt. 270; or, after an insufficient notice to quit, although first acquiesced in by the landlord; *Johnstone v. Hudlestone*, 4 B. & C. 922; *Bessell v. Landsberg*, 7 Q. B. 638; 14 L. J. Q. B. 355; even though the landlord, on the tenant's quitting, puts up a bill in the window for the purpose of getting another tenant for the premises. *Redpath v. Roberts*, 3 Esp. 225; *Johnstone v. Hudlestone*, *supra*. But, not so, if the landlord have, with the assent of the tenant, accepted another person as tenant, and he have entered, for this operates as a surrender in law of the first tenant's term. *Thomas v. Cook*, 2 B. & A. 119; *Nickells v. Atherstone*, 10 Q. B. 944; 16 L. J. Q. B. 371. And the operation of such acceptance as a surrender applies even where there was a lease under seal; *Davison v. Gent*, 1 H. & N. 744; 26 L. J. Ex. 122; and possession of the premises by the new tenant, and the fact of a new lease having been granted and the old one delivered up and cancelled, is evidence of the assent of the first tenant. S. C.; *Walker v. Richardson*, 2 M. & W. 882; 6 L. J. Ex. 229. The old tenant must give up possession to the new tenant at or about the time of the grant of the new lease to which he assents. *Wallis v. Hands*, 62 L. J. Ch. 586, 588; [1893] 2 Ch. 75, 82. If the landlord have accepted the key of the premises, this in itself is a surrender, and the acceptance of another tenant is immaterial; *Dodd v. Acklom*, 6 M. & Gr. 672; 13 L. J. C. P. 11; so, if after refusal of the key which the tenant leaves behind, the landlord make use of it and enter the premises and puts up a board "to let." *Phené v. Popplewell*, 12 C. B. (N. S.) 334; 31 L. J. C. P. 235; see *Lyon v. Reed*, 13 M. & W. 285; 13 L. J. Ex. 277. Anything which amounts to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume, possession of the premises, if followed by such resumption of possession, amounts to a surrender by operation of law. *Phené v. Popplewell*, per Erle, C.J., 12 C. B. (N. S.) 340; 31 L. J. C. P. 236. But, unless the landlord intend to resume possession, the fact that the key has been left with him, and he has tried to let the premises, does not constitute a surrender, and after he has let them there is no relation back beyond the time of letting. *Oastler v. Henderson*, 46 L. J. Q. B. 607; 2 Q. B. D. 575. Where a surrender by operation of law is induced innocently by the tenant, the latter may be liable in damages. *Gray v. Owen*, 79 L. J. K. B. 389; [1910] 1 K. B. 622. A., the tenant of a house, three cottages, and a stable and yard at an entire rent for a term of seven years, before the expiration of the term assigned all the premises to B. for the remainder of the term, the house and cottages being in the possession of under-tenants. The landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a quarter. B. took possession of the stable and yard only. The occupiers of the cottages having left them after

the assignment, and before the expiration of the term, the landlord relet them. A. paid no rent after the assignment, but the landlord received rent from the under-tenants. Before the expiration of the term the landlord advertised the whole of the premises to be let or sold. It was held that this was a surrender by operation of law of all the premises. *Reeve v. Bird*, 1 C. M. & R. 31; 4 Tyrw. 612; 3 L. J. Ex. 282. Where a tenant from year to year, at a rent payable half-yearly, quitted without giving notice to quit, and the landlord, before the expiration of the next half year, let the premises to another tenant, it was held that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year when he quitted the premises to the time when the landlord relet the same to the second tenant. *Hall v. Burgess*, 5 B. & C. 332; 4 L. J. (O. S.) K. B. 172; and see *Walls v. Atcheson*, 3 Bing. 462; 4 L. J. (O. S.) C. P. 154. So, where rent was payable quarterly, if the tenant quitted by consent in the middle of a quarter, the landlord could not recover the rent, *pro rata*, either for the subsequent portion of the quarter or for that part of it during which the tenant occupied. *Whitehead v. Clifford*, 5 Taunt. 518; *Grimman v. Legge*, 8 B. & C. 324; 6 L. J. (O. S.) K. B. 321. But now see the Apportionment Act, 1870. Where a tenant, whose lease expired on Lady Day, paid a quarter's rent, after deducting a sum for repairs, on Midsummer Day, and was not afterwards seen on the premises, and a third person afterwards came into possession, and paid rent at irregular periods, a jury may presume that the landlord has accepted the latter as his tenant. *Woodcock v. Nuth*, 8 Bing. 170.

Where a tenant from year to year of a Lady Day holding, agreed with the landlord in December to surrender at Midsummer, a new tenancy is created, which operates as a surrender of the former one. *Fenner v. Blake*, 69 L. J. Q. B. 257; [1900] 1 Q. B. 426. Although the premises are burnt down and remain unoccupied, the tenant still continues liable in this action for the rent subsequently accruing; for the premises continue to be "held" by the defendant; *Baker v. Holtzapffel*, 4 Taunt. 45; *Izon v. Gorton*, 5 Bing. N. C. 501; 8 L. J. C. P. 272; unless it be agreed that the liability shall cease after the fire; in which case the lessee will be liable in use and occupation, for a portion of the rent during the time of actual occupation. *Parker v. Gibbins*, 1 Q. B. 421. The fact of the premises having been insured, and the landlord having received the insurance money and not applied it to reinstating the premises, affords no equitable defence to the action. *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J. Q. B. 168.

Where a tenant from year to year assigned all his personal property to the defendant for the benefit of his creditors, and the defendant executed the deed and acted under it, it was held that he was liable for the rent unless he repudiated the tenancy. *White v. Hunt*, 40 L. J. Ex. 23; L. R. 6 Ex. 32.

Use and occupation did not, at common law, lie against a husband for a half-year's rent due in respect of premises occupied for part of that time by his wife before marriage, and which continued to be occupied by her for a short time after her marriage; debt for rent was the proper remedy. *Richardson v. Hall*, 1 B. & B. 50. Where one of two executors of a deceased tenant for years enters into the premises, such entry does not enure as the entry of both so as to make them both liable in an action for use and occupation. *Nation v. Tozer*, 1 C. M. & R. 172; 3 L. J. Ex. 234. And, when one only of two joint lessees holds over the other cannot be charged for rent. *Draper v. Crofts*, 15 M. & W. 166; 15 L. J. Ex. 166. But, where two persons sign an agreement to become tenants, and one enters under it, it may be presumed that he entered for both; and use and occupation against both will lie. *Glen v. Dungey*, 4 Ex. 61; 18 L. J. Ex. 359. Where premises were held by parol under two trustees, one of whom died, and the lessee continues to hold, the surviving trustee may sue in his own right, and not as survivor. *Wheatley v. Boyd*, 7 Ex. 20; 21 L. J. Ex. 39.

If, after the determination of a lease, the tenant holds over and pays rent, such payment is conclusive evidence of a tenancy; and he will be liable in an action for use and occupation for the time he occupies the premises. *Bishop v. Howard*, 2 B. & C. 100; and see *Bayley v. Bradley*, 5 C. B. 326; 16 L. J. C. P. 206. So, an executor of a tenant from year to year, holding on and paying rent, will hold on the terms of the former demise, and be personally liable. *Buckworth v. Simpson*, 1 C. M. & R. 834; 4 L. J. Ex. 104. And where there has been a lease for a year, and by consent of both parties the tenant continues in possession afterwards, then, in the absence of anything showing a contrary intention, a tenancy from year to year on the terms of the lease, so far as they are applicable to such a tenancy, is to be implied; *Dougal v. McCarthy*, 62 L. J. Q. B. 462; [1893] 1 Q. B. 736, following *Right d. Flower v. Darby*, 1 T. R. 159, 162, 163. But where a tenant from year to year, after the expiration of his landlord's title, continued in possession for one quarter, and paid rent for that quarter to the party entitled in reversion, but quitted at the end of it, the payment is not evidence of a tenancy for more than the quarter, and the reversioner cannot sue the tenant for use and occupation beyond the quarter. *Freeman v. Jury*, M. & M. 19; *Jenner v. Clegg*, 1 M. & Rob. 213.

It is not necessary that there should be an *express* contract creating the relation of landlord and tenant between the parties: the relation may be implied. Where the defendant has entered under a contract for sale which ultimately goes off, and his occupation has been a beneficial one, it seems that he may be liable in this action; *Hearn v. Tomlin*, Peake, 191; but, only for the period since the putting an end to the contract; *Howard v. Shaw*, 8 M. & W. 118; see *Crouch v. Tregonning*, 41 L. J. Ex. 97; L. R. 7 Ex. 88; and he is not liable for rent at all, if the sale goes off for want of title, and there is no agreement about paying for such occupation. *Winterbottom v. Ingham*, 7 Q. B. 611; 14 L. J. Q. B. 298. It has been held that the defendant may rebut an implied agreement to pay for use and occupation by showing that he entered as vendee under a parol agreement, and that a payment he then made was for purchase-money and not rent. *Corringan v. Woods*, 15 W. R. 318. But, in a case where the defendant, vendor, was under contract to sell the premises, but subsequently gained possession of them from a sub-vendee by falsely representing that the original contract was at an end, he was held liable to the sub-vendee during such possession for use and occupation, though at that time the defendant had the legal estate. *Hull v. Vaughan*, 6 Price, 157. Where defendant took possession under an agreement that plaintiff, the landlord, should put the premises in repair, and that rent should not be payable till the completion of the repairs, and he quitted after six months in consequence of non-repair; yet this was held evidence from which a jury might infer an agreement to pay *ad interim*, on the footing of a *quantum valebant*. *Smith v. Eldridge*, 15 C. B. 236. *Secus*, where the person goes into possession under an agreement of tenancy and not under an implied agreement to pay what the premises are reasonably worth. *Fox v. Slaughter*, 35 T. L. R. 668. Where, under an agreement of purchase, the plaintiffs were to receive the rents and profits of the premises from a given day, and to pay the defendants interest on the purchase-money from that day, the plaintiffs were entitled to recover the occupation value of the premises although there was no tenancy between the parties. *Metropolitan Ry. Co. v. Defries*, 2 Q. B. D. 189, 387.

This action does not lie where the defendant enters under an agreement for a lease which the plaintiff cannot grant for want of title. *Rumball v. Wright*, 1 C. & P. 589. B. entered into a building agreement with A., which settled the rent to be reserved by the leases of future houses to be built under A., and provided that certain annual rents or sums should be payable to A., in the interim. B. assigned the agreement to C., and C. to D.; held, that C. could not be sued for the reserved annual sums after his assignment to D.; for that neither B. nor C. became yearly tenants by the

payments of the above sums, no estate having passed under the agreement; and the annual sums being only collateral sums, independent of any tenancy, for which B. alone was liable on the contract. *Camden (Marquis) v. Battenbury*, 5 C. B. (N. S.) 808; 28 L. J. C. P. 187; 7 C. B. (N. S.) 864; 28 L. J. C. P. 335. But B. is liable to pay such sums though the leases to be granted exceed three years, and the agreement is not under seal. *Adams v. Hagger*, 4 Q. B. D. 480. If the plaintiff be a co-director with the defendant of a company which occupies the plaintiff's premises, he cannot sue defendant on an implied contract. *Chadwick v. Clarke*, 1 C. B. 700. One co-tenant, who occupies a house alone, but without excluding his co-tenants, is not therefore liable to pay rent to them; *McMahon v. Burchell*, 2 Phill. 127; and one tenant of a farm, who takes all the profits, is not impliedly liable to his co-tenants for use and occupation. *Henderson v. Easin*, 2 Phill. 308; 12 Q. B. 986.

Where A. agreed by letter with B. to take a lease of B.'s iron ore for forty years at a certain rent, engaging to work the veins in a certain manner, it was held that this was not a mere licence, but a right constituting a hereditament within 11 G. 2, c. 19, s. 14, in respect of which use and occupation would lie against A., who had worked under it. *Jones v. Reynolds*, 4 Ad. & E. 805. This action lies against one who, under a written agreement or licence, had used a fishery; *Holford v. Pritchard*, 3 Ex. 793; 18 L. J. Ex. 315; or who has exercised a right of sporting. See *Thomas v. Fredericks*, 10 Q. B. 775; 16 L. J. Q. B. 393; and *Adams v. Clutterbuck*, 52 L. J. Q. B. 607; 10 Q. B. D. 403.

Where premises were hired with regard to a special event, which was the foundation of the contract and had become impossible by reason of an unforeseen accident, both parties are discharged from the further performance of the contract, and rent not due till a subsequent time is not recoverable. *Krell v. Henry*, 72 L. J. K. B. 794; [1903] 2 K. B. 740; *secus* as to rent due previously; *Chandler v. Webster*, 73 L. J. K. B. 401; [1904] 1 K. B. 493; and rent paid in advance cannot be recovered back. See *Civil Service Co-operative Soc. v. Gen. Steam Nav. Co.*, 72 L. J. K. B. 933; [1903] 2 K. B. 756; and *Elliott v. Crutchley*, 75 L. J. K. B. 147; [1906] A. C. 7, where the contract contained a special provision against the occurrence of the accident. But where premises are taken in the ordinary way for the purposes of residence the fact that the tenant subsequently becomes an alien enemy and is by an act of State prohibited from residing in those premises does not determine the tenancy. *London & Northern Estates Co. v. Kish-Schlesinger*, 85 L. J. K. B. 369; [1916] 1 K. B. 20. See also *Halsey v. Lowenfeld*, 85 L. J. K. B. 1498; [1916] 2 K. B. 707, as to the continued obligation of the lessee who becomes an alien enemy to pay rent.

Damages.] Where a rent is mentioned in the lease or agreement, such rent will be the measure of damages, though the lease be void by the Statute of Frauds. *De Medina v. Polson*, Holt, N. P. 47. But where there is no express agreement as to rent, or where the terms of the agreement have been so far departed from that the stipulated rent is no just criterion of value, the value of the premises must be proved; *Tomlinson v. Day*, 2 B. & B. 680; and though a tenant, who holds over after the end of his term, is presumed to hold at the old rent, yet where a new tenant is substituted by consent under an agreement afterwards abandoned, no such inference arises, and the jury must find the real annual value. *Thetford (Mayor) v. Tyler*, 8 Q. B. 95; 15 L. J. Q. B. 33.

Plaintiff's title expired.] Although the defendant cannot impeach the title of the plaintiff under whom he holds, yet he may show that it has expired. *Holmes v. Pontin*, Peake, 99; *Gravenor v. Woodhouse*, 1 Bing. 43. So he may show ouster of the plaintiff's title by sequestration. *Powell v. Hibbert*, 15 Q. B. 129; 19 L. J. Q. B. 347. Where the defendant

had come in under the plaintiff, it was held not competent for him to show that the plaintiff's interest had been forfeited to the lord of the manor, to whom the defendant had since paid rent upon notice and demand made, unless he has expressly renounced the plaintiff's title, and commenced a fresh holding under the new landlord. *Balls v. Westwood*, 2 Camp. 11. But it is not necessary for the tenant to surrender or suffer eviction before he refuses to pay rent. It will be enough if he have paid it to a *bonâ fide* claimant really entitled to the premises, under whom he has made a new arrangement, and commenced a fresh tenancy. *Mountnoy v. Collier*, 1 E. & B. 630; 22 L. J. Q. B. 124. See *post*, *Replevin—Evidence on denial of tenancy*. But a mere *claim* of rent is no defence at all, unless the defendant has actually given up possession, or has paid the rent to the owner of the legal estate under compulsion, so as to be able to show an eviction. *Emery v. Barnett*, 4 C. B. (N. S.) 473; 27 L. J. C. P. 216; *Hickman v. Machin*, 4 H. & N. 716; 28 L. J. Ex. 310; *Wilton v. Dunn*, 17 Q. B. 294; 21 L. J. Q. B. 60. As to what amounts to an eviction, *vide infra*.

Defendant's occupation determined.] As to notice to quit possession of land, see *post*, *Action for recovery of possession of land by landlord*. As to the notice necessary in the case of a right to shoot, see *Lowe v. Adams*, 70 L. J. Ch. 783; [1901] 2 Ch. 598. An agreement that on the tenant's quitting the rent shall cease, and an acceptance of the key by the landlord, or a letting of the premises by him to a third person, is a sufficient defence. *Whitehead v. Clifford*, 5 Taunt. 518; *Hall v. Burgess*, 5 B. & C. 332; 4 L. J. (O. S.) K. B. 172; *Grimman v. Legge*, 8 B. & C. 324; 6 L. J. (O. S.) K. B. 321; *Walls v. Atcheson*, 3 Bing. 462; 4 L. J. (O. S.) C. P. 154. But delivery of the keys by an agent of the defendant to a servant at the plaintiff's house, is not alone sufficient to prove an acceptance by the plaintiff. *Harland v. Bromley*, 1 Stark. 455. *Cannan v. Hartley*, 9 C. B. 634; 19 L. J. C. P. 323.

A tenancy from year to year is assignable by deed, and the privity of estate between the landlord and tenant is thereby severed. *Allcock v. Moorhouse*, 9 Q. B. D. 366.

Eviction.] "To constitute an eviction at law the lessee must, to use the pleader's language, establish that the lessor, without his consent and against his will, wrongfully entered upon the demised premises and evicted him, and kept him so evicted," *per* A. L. Smith, J., in *Baynton v. Morgan*, 57 L. J. Q. B. 465, 466; 21 Q. B. D. 101, 102. An eviction is a defence to rent not then due, for it determines the occupation. *Prentice v. Elliott*, 5 M. & W. 606; 9 L. J. Ex. 42. Where the premises are let at an entire rent, an eviction from part, if the tenant quits the residue, is a complete defence. *Smith v. Raleigh*, 3 Camp. 513. It has been said that, if the tenant continue in possession of the residue, he is liable *pro tanto* on a *quantum meruit*. *Stokes v. Cooper*, *Id.* 514, n. But it is now settled that eviction from any part by the lessor, is a suspension of the whole rent while the eviction lasts. Co. Litt. 148 b; 2 Wms. Saund. 204 (2); *Walker's Case*, 3 Rep. 22 b; *Reeve v. Bird*, 1 C. M. & R. 31, 36; 3 L. J. Ex. 282; *Neale v. Mackenzie*, 1 M. & W. 747; 6 L. J. Ex. 263; *Morrison v. Chadwick*, 7 C. B. 266; 18 L. J. C. P. 189; *Upton v. Tounend*, 17 C. B. 30; 25 L. J. C. P. 44. Eviction from part of the demised premises by a stranger, by title paramount, does not suspend the whole rent, but is merely a ground for its being apportioned. *Walker's Case*, *supra*; 1 Wms. Saund. 204 a (f). See also *Stevenson v. Lambard*, 2 East, 575. The apportionment is to be made according to the values at the date of the eviction. *Hartley v. Maddocks*, 68 L. J. Ch. 496; [1899] 2 Ch. 199; see also *Salts v. Battersby*, 79 L. J. K. B. 937; [1910] 2 K. B. 155.

A mere trespass is not an eviction; *Hodgskin v. Queenborough*, Willes, 130, n. (b); B. N. P. 177; *Newby v. Sharpe*, 47 L. J. Ch. 617; 8 Ch. D. 39;

nor is a demand of rent by an elegit creditor who had no right to eject the defendant. *Poole (Mayor) v. Whitt*, 15 M. & W. 571; 16 L. J. Ex. 229. But a threat of expulsion by a person entitled to possession, and a consequent attornment to him, are equivalent to expulsion. *Semb.*, S. C. So a demand by a person lawfully entitled, and a giving up possession to him, may amount to eviction. *Semb.*, *Carpenter v. Parker*, 3 C. B. (N. S.) 206; 27 L. J. C. P. 78. An eviction of the under-tenant is an eviction of the tenant. *Burn v. Phelps*, 1 Stark. 94. But a forcible expulsion of a man put into the plaintiff's house to keep possession for the defendant (tenant), and who was an unfit person, was held no eviction; the jury finding that the plaintiff did not intend to dispossess the defendant. *Henderson v. Mears*, 28 L. J. Q. B. 305. Where a lease of mines provided that the lessee should, jointly with the lessor, have the use of a railroad upon the demised premises, it was held that an expulsion from this railroad did not amount to an eviction, as the rent issued out of the land demised, and not out of the easement to use the railway. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J. Q. B. 374. See further, as to what amounts to an eviction, *Dunn v. Di Nuovo*, 3 M. & Gr. 105; 10 L. J. C. P. 318; *Upton v. Townend*, *supra*; *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J. Ex. 46; *Pellatt v. Boosey*, 31 L. J. C. P. 281.

Defendant treated by plaintiff as a trespasser.] If the landlord have treated the tenant as a trespasser, he cannot afterwards recover against him in this action. Thus, if he had *recovered* against him in ejectionment, he could not sue in this action for the rent accruing *after* the date of the writ; for, by suing for the tort, he precluded himself from suing *ex contractu*. *Birch v. Wright*, 1 T. R. 378; *Bridges v. Smyth*, 5 Bing. 410; 7 L. J. (O. S.) C. P. 143. The mere *bringing* of an ejectionment for a forfeiture will prevent the plaintiff from suing for rent subsequently due; for this determines the lease. *Jones v. Carter*, 15 M. & W. 718; *Grimwood v. Moss*, 41 L. J. C. P. 239; L. R. 7 C. P. 360; and see *Toleman v. Portbury*, 41 L. J. C. P. 98; L. R. 7 Q. B. 344; and *Dendy v. Nicholl*, 4 C. B. (N. S.) 376; 27 L. J. C. P. 220. So the issue and service by a superior landlord of a writ to recover possession for a forfeiture which has been incurred, bars a claim for rent by the mesne landlord. *Serjeant v. Nash*, 72 L. J. K. B. 630; [1903] 2 K. B. 304.

No beneficial occupation.] In the case of a ready-furnished house there is an implied condition that it shall be reasonably fit for occupation when the tenancy is to begin; and if the house be then uninhabitable by reason of its being infested with vermin; *Smith v. Marrable*, 11 M. & W. 5; 12 L. J. Ex. 223; *Campbell v. Wenlock (Lord)*, 4 F. & F. 716; or of defective drainage; *Wilson v. Finch Hatton*, 46 L. J. Ex. 489; 2 Ex. D. 336; the tenant may give up occupation, and then ceases to be liable to pay rent. There is, however, no condition that it shall remain fit for occupation during the term. *Sarson v. Roberts*, 65 L. J. Q. B. 37; [1895] 2 Q. B. 395. On the other hand, there is no implied warranty on the taking of furnished lodgings that the intending tenant is a fit and proper person in the sense that he is not suffering from an infectious disease. *Humphreys v. Miller*, 86 L. J. K. B. 1111; [1917] 2 K. B. 122. In the case of an unfurnished house, there is in general no condition that it shall be fit for occupation, either at the commencement of the term; *Hart v. Windsor*, 12 M. & W. 68, 86; 13 L. J. Ex. 129; or during its currency. *Arden v. Pullen*, 11 L. J. Ex. 359; 10 M. & W. 321; *Manchester Bonded Warehouse Co. v. Carr*, 89 L. J. C. P. 809; 5 C. P. D. 507. But now by the Housing, Town Planning, &c., Act, 1909 (9 Ed. 7, c. 44), s. 14, in any contract made after the passing of that Act, namely, December 3, 1909, "for letting for habitation a house, or part of a house," at a rent not exceeding that stated below, "there shall be implied a condition that the house is, at the commencement of the holding, in all respects reasonably fit for human habitation"; but

the condition shall not be implied when a house or part of a house is let for a term of not less than three years upon the terms that it be put by the lessee into a condition reasonably fit for occupation, and the lease is not determinable at the option of either party before the expiration of that term. By sect. 15 the condition implied by sect. 14 includes an undertaking that the house shall, during the holding, be kept by the landlord in all respects reasonably fit for habitation. *Seemle*, the obligation cast upon a landlord by these sections cannot be contracted out of. See *Housing of the Working Classes Act, 1903* (3 Ed. 7, c. 39), s. 12; and sect. 47 (1) of the *Housing, Town Planning, &c., Act, 1909*. An incursion of sewer rats in considerable numbers does not constitute a breach of the implied conditions under sects. 14, 15. *Stanton v. Southwick*, 89 L. J. K. B. 1066; [1920] 2 K. B. 642. The limit of annual rent is in the metropolis £40; in a borough or urban district with a population according to the last census for the time being of 50,000 or upwards, £26; and elsewhere £16. A tenant may sue his landlord for damages sustained by a breach of this condition. *Walker v. Hobbs*, 59 L. J. Q. B. 93; 23 Q. B. D. 458 (decided under 48 & 49 V. c. 72, s. 12). But the wife of the tenant cannot sue for a breach of the condition. *Cavalier v. Pope*, 75 L. J. K. B. 609; [1906] A. C. 428; *Cameron v. Young*, 77 L. J. P. C. 68; [1908] A. C. 176; *Middleton v. Hall*, 108 L. T. 804. Nor can the tenant's child. *Ryall v. Kidwell*, 83 L. J. K. B. 1140; [1914] 3 K. B. 135. A tenant is, notwithstanding the destruction of the house demised, liable to pay the rent reserved. *Manchester Bonded Warehouse Co. v. Carr*, *supra*; *Baker v. Holtzapfelf*, 4 Taunt. 45. Non-compliance by the landlord with a covenant to do repairs, whereby the premises have become unfit for profitable occupation, and that the defendant has quitted them on that account, is no defence. *Surplice v. Farnsworth*, 7 M. & Gr. 576; 13 L. J. C. P. 215; *Sutton v. Temple*, 12 M. & W. 52; 13 L. J. Ex. 17.

Payment.] By 4 A. c. 16, s. 10, payment of rent by the defendant to his lessor, before he had notice of an assignment of the premises by him to the plaintiff, is a good defence. *Cook v. Moylan*, 16 L. J. Ex. 253; 1 Ex. 67. But payment in advance to the lessor before the rent day affords no defence at law, as against the assignee, if the defendant had notice of the assignment before the rent day. *De Nicholls v. Saunders*, 39 L. J. C. P. 297; L. R. 5 C. P. 589. See *Clun's Case*, 10 Rep. 127; *Cromwell (Lord) v. Andrews*, Cro. Eliz. 15. If he had not notice before the rent day, the advance then becomes payment. *Cook v. Guerra*, 41 L. J. C. P. 89; L. R. 7 C. P. 132. As to what amounts to notice, *vide* S. C. Payment of property tax by the tenant, which the landlord is bound to allow him, notwithstanding that the tenant refuses to show him the collector's receipt for payment of the tax; *North London and Genl. Property Co. v. Moy*, 87 L. J. K. B. 986; [1918] 2 K. B. 439; is, in effect, payment by the tenant of so much of the next rent due by him. See *Denby v. Moore*, 1 B. & A. 123, 129, 130; *Cumming v. Bedborough*, 15 M. & W. 438, 444. It would, however, now seem necessary to plead the defence specially, as it would otherwise be likely to take the plaintiff by surprise. Rules, 1883, O. xix. r. 15. The tax must be deducted from the next payment of rent thereafter to be made by the tenant, and if the tenant do not so deduct the tax he cannot afterwards sue the landlord for it as money paid. *Denby v. Moore*, *supra*; *Cumming v. Bedborough*, *supra*. Nor can he deduct it from rent subsequently payable. S. C.C.; *Hill v. Kirshenstein*, 89 L. J. K. B. 1128; [1920] 3 K. B. 556. Nor can he in the case of land tax. *Andrew v. Hancock*, 1 B. & B. 47. But the tenant can enforce an agreement by the landlord to repay him the property tax, if he pay the rent in full. *Lamb v. Brewster*, 4 Q. B. D. 220, 607. These statutes do not allow the tenant to deduct the tax payable on the full improved value of the premises, but only that on the rent reserved. *Watson v. Horne*, 7 B. & C. 286; 6 L. J. (O. S.) K. B. 73; *Smith v. Humble*, 15 C. B. (N. S.) 321; *Mansfield v. Relf*, 77 L. J. K. B. 145; [1908]

1 K. B. 71. This amount may be deducted from that rent, although a deduction from the rent has been made by the tenant under the Licensing Acts in respect of the contribution to the compensation fund. *Hancock v. Gillard*, 76 L. J. K. B. 20; [1907] 1 K. B. 47. The tax cannot be deducted unless it has been paid by the tenant. See *Pocock v. Eustace*, 2 Camp. 181; explained in *Baker v. Davis*, 3 Camp. 474; *Ryan v. Thompson*, L. R. 3 C. P. 144; *Barnes v. Kyffin*, [1916] W. N. 166. The tenant may also, by way of payment, show payment of rates, which he may deduct from his rent under a statute allowing such deduction to be made, e.g., under the Poor Rate Assessment, &c., Act, 1869 (32 & 33 V. c. 41), s. 1, see *Hammond v. Farrow*, 73 L. J. K. B. 726; [1904] 2 K. B. 332; or the Rating Act, 1874 (37 & 38 V. c. 54), ss. 5, 6, 8, 9, see *Chaloner v. Bolckow*, 47 L. J. Q. B. 562; 3 App. Cas. 933; or under the Licensing Act in respect of the compensation charge, *Wooler v. North-Eastern Breweries*, 79 L. J. K. B. 138; [1910] 1 K. B. 247. Where, however, the statute does not so enact, as in cases of the Public Health Act, 1875 (38 & 39 V. c. 55), ss. 214, 226, and the Metropolis Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 96, the defence is one of set-off. *Skinner v. Hunt*, 73 L. J. K. B. 680; [1904] 2 K. B. 452, 457, per Vaughan Williams, L.J. With regard to payment of an amount equivalent to the rent to the superior landlord, under compulsion or threat of distress, or payment of any other charge on the land, see *Replevin—Denial of rent being in arrear, post*.

Statute of Limitations.] The Statute of Limitations is a good defence in an action against a person who has been tenant from year to year, but who has not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy can be inferred; though no notice to quit has been given. *Leigh v. Thornton*, 1 B. & A. 625.

Illegality.] It is a good defence that the premises have been knowingly let by the plaintiff to the defendant for an immoral purpose, as for prostitution; *Crisp v. Churchill*, cited 1 B. & P. 340; or for the use of a kept mistress; *Upfill v. Wright*, 80 L. J. K. B. 254; [1911] 1 K. B. 506. Where a lessee assigned the lease, knowing the house was to be continued to be used as a brothel, it was held he could not enforce the covenant of indemnity against the assignee. *Smith v. White*, 35 L. J. Ch. 454; L. R. 1 Eq. 626. But it is no defence that plaintiff knowingly let the land to defendant for the use of a company not licensed to hold land of which defendant was a promoter; *Job v. Lamb*, 11 Ex. 539; 25 L. J. Ex. 87; or to a company whose object is to promote secularist principles; *Bowman v. Secular Society*, 86 L. J. Ch. 568; [1917] A. C. 406.

Distress.] It seems to be no defence that the landlord has distrained goods to the full value of the rent, if he have sold them for a less sum. If he have sold them at too low a rate, the tenant's remedy is by action on the case. *Efford v. Burgess*, 1 M. & Rob. 23. But so long as the landlord retains the distress, though insufficient in amount, he cannot maintain the action. *Lehain v. Philpott*, 44 L. J. Ex. 225; L. R. 10 Ex. 242. It is no defence that the tenant quitted, without giving notice, in fear of a distress by the superior landlord. *Rickett v. Tullick*, 6 C. & P. 66.

ACTION FOR WASTE, BAD HUSBANDRY, ETC.

This action lies on a contract not under seal, express or implied, and is in some cases founded on wrong independent of contract, arising out of the relation of landlord and tenant. It may in some cases be maintained by a married woman alone.

Claims under the Agricultural Holdings Act, 1908 (8 Ed. 7, c. 28), are in case of difference settled by a reference. So in the case of claims under

stat. 50 & 51 V. c. 26 (allotments and cottage gardens) and 53 & 54 V. c. 57 (land under mortgage); 8 Ed. 7, c. 36 (small holdings and allotments).

The Demise—Statute of Frauds.] By the Stat. of Frauds (29 C. 2, c. 3), s. 1, all leases and terms, whether freehold or for years, not in writing and signed by the party making them, or their agents authorized by writing, shall have the effect of leases at will only, except (sect. 2) leases not exceeding three years from the making thereof, whereon the reserved rent is equal to two-thirds of the improved value. These sections apply only to leases whereby a rent is reserved. *Crosby v. Wadsworth*, 6 East, 602.

Sect. 4 of the same statute, which provides that no action shall be brought upon any contract or sale of lands, &c., or any interest in or concerning them, unless the agreement or some memorandum or note thereof is in writing signed by the party to be charged, or by some person authorized by him, applies to contracts for creating a tenancy as well as to sales; but although sect. 2 excepts leases for three years at rack rent out of sect. 4, as well as out of sect. 1; *Bolton (Lord) v. Tomlin*, 5 Ad. & E. 856; 6 L. J. K. B. 45; yet agreements for such leases are not so excepted; *Edge v. Strafford*, 1 Cr. & J. 391; 9 L. J. (O. S.) Ex. 101; and though the leases are valid, and any remedy on them in their character of leases may be resorted to, yet they do not confer the right to sue the lessee for damages for not taking possession. S. C. It seems, however, that the lessee might have been sued in debt for the rent reserved, for, where there has been an actual demise, debt lies before entry. An oral lease valid under sects. 1, 2, may be as special in its terms as a written one. *Bolton (Lord) v. Tomlin*, *supra*.

The three years must be from the *making*, and not from the *commencement* only. *Baker v. Reynolds*, Hill MSS., 2 Selw. N. P., 13th ed. 759. The written memorandum must, either expressly or by reasonable inference, state the time at which the term is to commence. *Humphery v. Conybeare*, 80 L. T. 40. An oral lease for two years, with an option to the lessee to continue the holding beyond three years from the making of the lease, is severable, and is good as to the two years. *Hand v. Hall*, 46 L. J. Ex. 603; 2 Ex. D. 355. Special terms, not necessarily implied in a tenancy, may yet be incorporated with an oral demise by implication. Thus, where an oral lease is had for want of proper formalities required by sect. 1, yet if the lessee enter and pay rent he becomes tenant from year to year on such of the terms of the invalid lease as are not inconsistent with such a tenancy; *Doe d. Rigge v. Bell*, 5 T. R. 471; *Richardson v. Gifford*, 1 Ad. & E. 52; 3 L. J. K. B. 122; and see *Martin v. Smith*, L. R. 9 Ex. 50; but, upon entry under an oral lease for more than three years, the lessee becomes tenant at will, and only becomes a yearly tenant on payment of any rent. *Berrey v. Lindley*, 3 M. & Gr. 498, 512; 11 L. J. C. P. 27, 32. The Act 8 & 9 V. c. 106, s. 3, now requires a *deed* wherever the Statute of Frauds required a writing, otherwise the lease is void at law. It is, however, good as an agreement. In order to show an implied promise to hold on the terms of a former lease, the old lease must be produced (unless admitted) duly stamped. *Walliss v. Broadbent*, 4 Ad. & E. 877; 6 L. J. K. B. 269. By Rules, 1883, O. xix. r. 20, any objection on the ground of insufficiency in law of the contract must be specially pleaded.

Where lands are held of a corporation under a parol demise, a yearly tenancy is created upon payment of rent. *Wood v. Tate*, 2 B. & P. N. R. 247; *Ecclesiastical Commissioners v. Merral*, 38 L. J. Ex. 93; L. R. 4 Ex. 162.

Where the defendant has enjoyed an incorporeal hereditament under an agreement, void as a grant because not under seal, for the whole period named therein, he is bound by the terms of the agreement; *Thomas v. Fredricks*, 10 Q. B. 775; 16 L. J. Q. B. 393; *Adams v. Clutterbuck*, 52 L. J. Q. B. 607; 10 Q. B. 403; but not if he have entered only. *Bird v. Higginson*, 6 Ad. & E. 824.

Waste.] By the common law, an action for waste lay only against the tenant by the curtesy, tenant in dower, or guardian, for these estates were created by law. The tenants for life or years, having obtained their estates by grant, were not punishable for waste until the Stat. of Marlbridge (52 H. 3, c. 23 or 24), which gave an action for damages against the lessee for life or years or *pur autre vie*, 2 Inst. 144 *et seq.* Subsequently the Stat. of Gloucester (6 E. 1, c. 5) gave the additional remedy against them of the writ of waste, to recover the land wasted, as well as damages for the waste. 2 Inst. 300, 301. The ordinary remedy for waste has for a long while been by an action on the case in the nature of waste; and now, by 3 & 4 W. 4, c. 27, s. 36, the writ of waste is itself abolished, and consequently that action is now the only remedy. 2 Wms. Saund. 252 *et seq.* (7). By the J. Act, 1873, s. 25 (3), a tenant for life without impeachment of waste may not commit equitable waste unless an intention to allow him to do so shall expressly appear by the instrument creating the estate.

The general rule as to waste at common law is that, in order to constitute it, there must be a diminution of value of the estate by it; or an increased burden upon it; or an impairing of the evidence of title. *Per Patteson, J.*, in *Huntley v. Russell*, 13 Q. B. 572; 18 L. J. Q. B. 239. It is not waste for a tenant to dig gravel from pits, or work mines already open on the land when leased, if they are not excepted; Co. Lit. 54 b; Bac. Abr. Waste (C. 3); nor to work quarries which have been worked by the owners of the inheritance for the purpose of making a profit. *Elias v. Snowdon Slate Quarries Co.*, 48 L. J. Ch. 811; 4 App. Cas. 454. Working for use is sufficient. *Id.* p. 465, *per* Ld. Selborne. But where gravel pits are opened by surveyors of highways under the Highway Acts, the tenant cannot continue to work and sell gravel for his own profit. *Huntley v. Russell, supra* (case of rector for dilapidations by predecessor). If anything be done to destroy the evidence of title, an action is maintainable by the landlord against his tenant. If the tenant open a new door, the landlord may recover against him in this action pending the lease, though the house itself may not be the worse for it, provided the jury find that his reversionary interest is injured; for the mere alteration of the property may tend to the injury of the owner. *Young v. Spencer*, 10 B. & C. 145, 152; 8 L. J. (O. S.) K. B. 106. It is observable that an act of the nature here referred to seems to be actionable without regard to its effect on the evidence of title; for the alteration cannot be made without destroying at least some part of the freehold, which no tenant has a right to do, even although compensating improvement may in other respects result from it. In this latter case, however, the waste was known in equity as "meliorating waste," and an injunction will not be granted to restrain it. *Doherty v. Allman*, 3 App. Cas. 709. The erection of buildings on the land demised is not waste unless the building is an injury to the inheritance. *Jones v. Chappell*, 44 L. J. Ch. 658; L. R. 20 Eq. 539. The accumulation of large quantities of rubbish on the land may be waste. *W. Ham, &c., Central Charity Board v. E. L. Waterworks Co.*, 69 L. J. Ch. 257; [1900] 1 Ch. 624, where it was said by Buckley, J., that in determining whether waste has been committed the test is whether the act complained of is one which alters the nature of the thing demised. The tenant is bound during the term to keep distinctly marked the boundaries between the demised land and his own land adjoining. *Spike v. Harding*, 47 L. J. Ch. 323; 7 Ch. D. 871. See *Searle v. Cooke*, 59 L. J. Ch. 259; 43 Ch. D. 519.

A tenant at will is not liable for permissive waste; *Harnett v. Maitland*, 16 M. & W. 257; 16 L. J. Ex. 134; in the absence of an express or implied contract to repair. *Blackmore v. White*, 68 L. J. Q. B. 180, 183; [1899] 1 Q. B. 293, 300. But tenants for years are liable for permissive, as well as for voluntary waste. See *Harnett v. Maitland, supra*, and *Yellowly v. Gower*, 11 Ex. 274, 293, 294; 24 L. J. Ex. 289, 298; *Davies v. Davies*, 57 L. J. Ch. 1093; 38 Ch. D. 499. See also Litt. s. 67; Co. Litt. 53 a; 2 Inst. 229; and 1 Wms. Saund. 323 c (7), 2 *Id.* 252 (7), and *Woodhouse v.*

Walker, 49 L. J. Q. B. 609; 5 Q. B. D. 404. In *In re Cartwright*, 58 L. J. Ch. 590; 41 Ch. D. 532, and *In re Parry & Hopkin*, 69 L. J. Ch. 190; [1900] 1 Ch. 160, tenants for life were held not liable for permissive waste; these decisions seem, however, to be inconsistent with the opinions expressed by the courts (not mere *dicta* of Parke, B., and Lush, J.) in *Yellowly v. Gower*, and *Woodhouse v. Walker*, *supra*, that tenants for life and for years are under the same liability. The lord may recover damages against a tenant for life of copyholds for not repairing according to the special custom of the manor. *Blackmore v. White*, *supra*. *Secus* for non-repair in the absence of such special custom. *Galbraith v. Poynton*, 74 L. J. K. B. 649; [1905] 2 K. B. 258.

An action for waste will lie by the lessor, although the waste amounts also to a breach of covenant in the lease for which he might sue; *Kinlyside v. Thornton*, 2 Wm. Bl. 1112; *Marker v. Kenrick*, 13 C. B. 188; 22 L. J. C. P. 129; but the acts for which the action is brought must be waste *per se*, and not mere breach of covenant. *Jones v. Hill*, 7 Taunt. 392. And the covenants may restrict the liability for acts that would otherwise be waste. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; *Yellowly v. Gower*, 11 Ex. 274; 24 L. J. Ex. 289. Where the destruction of a building demised is caused by its user in an apparently reasonable and proper manner, having regard to its character and the purposes for which it was intended to be used, this is not waste. *Manchester Bonded Warehouse Co. v. Carr*, 49 L. J. C. P. 809; 5 C. P. D. 507.

The right of a remainderman to sue tenant for life for waste arises when the waste is committed, and the Statute of Limitations then begins to run. *Higginbotham v. Hawkins*, 41 L. J. Ch. 828; L. R. 7 Ch. 676. As to right to trees as between tenant for life and remainderman, see *Honywood v. Honeywood*, 43 L. J. Ch. 652; L. R. 18 Eq. 306; *Dashwood v. Magniac*, 60 L. J. Ch. 809; [1891] 3 Ch. 306.

In an action of waste the defendant is entitled to the verdict unless the damages are substantial. *Doherty v. Allman*, 3 App. Cas. 709, 733, *per* Ld. Blackburn, citing *Harrow School Governors v. Alderton*, 2 B. & P. 86, *per* Ld. Eldon; *Meux v. Copley*, 61 L. J. Ch. 449; [1892] 2 Ch. 253. The measure of damages is the diminution of the value of the reversion, less a discount for immediate payment. *Whitham v. Kershaw*, 16 Q. B. D. 613. The right to recover such damages is not assignable. *Defries v. Milne*, 82 L. J. Ch. 1; [1913] 1 Ch. 98.

By 14 & 15 V. c. 25, s. 3, the tenant of a farm who shall erect any buildings on the farm for agricultural or trade purposes by written consent of his landlord will be at liberty to remove them if the lessor shall not buy them within a month after notice of removal, at a valuation fixed by referees. See, further, the Agricultural Holdings Act, 1908.

Where a lease provides that at the expiration of the tenancy all damages done by the tenant should "be made good or paid for by the tenant, the amount of such payment, if in dispute, to be referred to and settled by two valuers," the settlement of the amount of the payment is a condition precedent to an action in respect of dilapidations. *Babbage v. Coulburn*, 52 L. J. Q. B. 50; 9 Q. B. D. 235. It is otherwise where there is also an independent contract to pay fair compensation. *Dawson v. Fitzgerald*, 45 L. J. Ex. 493; 1 Ex. D. 257.

Non-repairs.] The obligation to repair implied in a tenancy for years, in the absence of express stipulation, is not well defined. A tenant from year to year is only bound to keep the premises wind and water-tight, and to use them in a "tenantlike" or "husbandlike" manner, and not to commit waste. *Ferguson v. —*, 2 Esp. 590; *Horsefall v. Mather*, Holt, N. P. 7; *Auworth v. Johnson*, 5 C. & P. 239; *Leach v. Thomas*, 7 C. & P. 327. He is not liable for the mere wear and tear of the premises. *Torriano v. Young*, 6 C. & P. 8.

If the tenant hold over after a lease with a repairing covenant, he

presumably continues liable for the same repairs, so far as they are consistent with a yearly tenancy; *Digby v. Atkinson*, 4 Camp. 275; *Beale v. Sanders*, 6 L. J. C. P. 283; 3 Bing. N. C. 850; *Arden v. Sullivan*, 14 Q. B. 832; 19 L. J. Q. B. 268; *Ecclesiastical Commrs. v. Merral*, 38 L. J. Ex. 93; L. R. 4 Ex. 162; *Harris v. Hickman*, 73 L. J. K. B. 31; [1904] 1 K. B. 13; see also *Dougal v. McCarthy*, 62 L. J. Q. B. 462; [1893] 1 Q. B. 736; unless altered circumstances rebut the presumption. *Johnson v. St. Peter, Hereford*, 4 Ad. & E. 520; 5 L. J. K. B. 116. Where a tenant enters under a lease for seven years, not under seal, and thereby agrees to do certain repairs in the seventh year of the term, and he occupies and pays rent during the whole term, he is bound to do the repairs. *Martin v. Smith*, 43 L. J. Ex. 42; L. R. 9 Ex. 50.

An express contract to repair supersedes implied obligations of the like nature. *Standen v. Christmas*, 10 Q. B. 135; 16 L. J. Q. B. 265. The law with regard to the obligation to repair under such a covenant is stated under tit. *Action on covenant to repair, post*.

There is no implied obligation of the landlord to do substantial repairs, though the premises be in a dangerous state. *Gott v. Gandy*, 2 E. & B. 845; 23 L. J. Q. B. 1. Nor to inform a proposed tenant of their state. *Keates v. Cadogan (Earl)*, 10 C. B. 591; 20 L. J. C. P. 76. As to how far it might be an answer to an action on the lessee's covenant to repair, see *Colebeck v. Girdlers' Co.*, 45 L. J. Q. B. 225; 1 Q. B. D. 234. The tenant in common of a house is under no liability to contribute to expense of repairs done by his co-tenant. See *Leigh v. Dickeson*, 54 L. J. Q. B. 18; 15 Q. B. D. 60.

Good husbandry—Custom.] The obligation to good husbandry arises either by contract, or the mere relation of tenant, or from local custom; or other circumstances. The custom is not necessarily excluded by proof of express agreement, if the two be consistent. *Hutton v. Warren*, 1 M. & W. 466; 5 L. J. Ex. 234. An occupier of land as a yearly tenant under a parol agreement impliedly agrees to cultivate the land in a husbandlike manner, according to the custom of the country, whether the land is or is not in good condition at the commencement of the tenancy, and the measure of damage for breach of this implied agreement is the injury to the reversion occasioned thereby. *Williams v. Lewis*, 85 L. J. K. B. 40; [1915] 3 K. B. 493. A custom that an outgoing tenant should leave the manure, being paid for it, is excluded by an express stipulation that he should leave it without any mention of payment. *Roberts v. Barker*, 1 Cr. & M. 808; 2 L. J. Ex. 268. A tenant who holds over after a lease has expired, or enters under an agreement for a lease, holds subject to the terms of the lease, as to the course of husbandry. S. C.; *Doe d. Thomson v. Amey*, 12 Ad. & E. 476. See also cases cited *supra*. But if, after holding over and paying rent, he by deed assigns his interest to a third person, the assignee does not, until his tenancy has been recognized by the lessor, hold on the terms of the original lease. *Elliott v. Johnson*, 36 L. J. Q. B. 41; L. R. 2 Q. B. 120.

Though it is generally treated as a custom for the incoming tenant to pay the value of fallows, &c., to the outgoing tenant, yet when there is no incoming tenant the contract implied by the custom is that the landlord shall pay the value. *Faviell v. Gaskoin*, 7 Ex. 273; 21 L. J. Ex. 85. In such case the person in receipt of the rents is liable, although only tenant for life. *Mansel v. Norton*, 52 L. J. Ch. 357; 22 Ch. D. 769. *Prima facie*, the outgoing tenant's remedy for tillages or tenant right is against the landlord, for there is, under ordinary circumstances, no privity between the outgoing and incoming tenants. The mere fact of the incoming tenant entering upon the land does not render him liable for such tillages, but it is a question of fact whether the contract between the outgoing tenant and the landlord subsists, or a new contract has been entered into with the incoming tenant, the landlord being discharged. *Codd v. Brown*, 15 L. T.

536; *Sucksmith v. Wilson*, 4 F. & F. 1083; and see *Faviell v. Gaskoin*, *supra*, and *Bradburn v. Foley*, 47 L. J. C. P. 331; 3 C. P. D. 129. A usage that the outgoing tenant should look to the incoming tenant for payment for such tillages, to the exclusion of the landlord's liability, is unreasonable and bad. S. C. Whatever the arrangement between the outgoing and incoming tenant, the landlord is entitled to a payment of arrears of rent due from the former out of the valuation. *Stafford v. Gardner*, L. R. 7 C. P. 242. The amount is recoverable by the tenant from the landlord on a *quantum meruit*, and the ascertainment of the amount by valuation is not a condition precedent to his right to sue when it is not made such by the terms of the lease. *Sucksmith v. Wilson*, *supra*. Where a tenant holds on the general terms of cultivating according to good husbandry, drainage may be part of it, and a custom for the outgoing tenant to charge his landlord with part of the expense of such drainage, though done without his knowledge, is reasonable and consistent with the terms. *Mousley v. Ludlam*, 21 L. J. Q. B. 64. As to the allowance of interest on the valuation, see *Marsh v. Jones*, 40 Ch. D. 563. A stipulation that the tenant shall not sell any straw or manure produced on the farm without licence disables him from selling it even after the tenancy has expired. *Massey v. Goodall*, 17 Q. B. 310; 20 L. J. Q. B. 526. The tenant is exonerated from his agreement to use as fodder on the farm all the hay, &c., produced thereon, if the hay, &c., has been destroyed by fire before being so used. *In re Hull & Lady Meux's Arbitration*, 74 L. J. K. B. 252; [1905] 1 K. B. 588, C. A. The Agricultural Holdings Act, 1908, which gives an outgoing agricultural tenant a right to compensation for certain improvements effected by him, provides also (sect. 1 (3)) that "nothing in this section shall prejudice the right of a tenant to claim any compensation to which he may be entitled under custom agreement or otherwise in lieu of any compensation provided by this section." Certain freedom of cropping and disposal of the produce is allowed the tenant, notwithstanding any custom or contract (sect. 26). By sects. 10, 11, the tenant is entitled to compensation for damage done to his crops by game and for unreasonable disturbance.

A valuation made in the usual way cannot be re-opened, although the valuers have included therein things which by the custom of the country should not have been valued or which did not exist. *Freeman v. Jefferies*, 38 L. J. Ex. 116; L. R. 4 Ex. 189.

[Action by and against assignee of lessor.] 32 H. 8, c. 34, giving the right of action by the assignee of the lessor against the lessee (sect. 1), and by the lessee against the assignee of the lessor (sect. 2), does not extend to parol contracts; *Standen v. Christmas*, 16 L. J. Q. B. 265; 10 Q. B. 135; but where the assignee can determine the tenancy, the continued holding of the tenant under him is evidence of an agreement with the assignee to hold on the old terms. *Buckworth v. Simpson*, 1 C. M. & R. 834, 844; 4 L. J. Ex. 104; *Arden v. Sullivan*, 14 Q. B. 832; 19 L. J. Q. B. 268; *Cornish v. Stubbs*, 39 L. J. C. P. 202; L. R. 5 C. P. 334; *Smith v. Eggington*, 43 L. J. C. P. 140; L. R. 9 C. P. 145. In other cases the action must have been in the name of the original lessor. *Bickford v. Parson*, 5 C. B. 923; 17 L. J. C. P. 192. See *Elliott v. Johnson*, 36 L. J. Q. B. 41; L. R. 2 Q. B. 120; *Allcock v. Moorhouse*, 9 Q. B. D. 366. Now, however, under the Conveyancing Act, 1881, s. 10 (1), the person entitled to the income of the land may enforce any provision contained in a lease made after December 31, 1881, having reference to the subject-matter thereof, and this section seems to apply to a parol lease, where a deed is not required by statute. But not to an agreement for a lease, unless it could be enforced by specific performance. See *Manchester Brewery Co. v. Coombs*, 70 L. J. Ch. 814; [1901] 2 Ch. 608, 619.

Where a demise is determined by the expiration of the landlord's estate, and the tenant continues to hold under the remainderman, paying the same

rent, the question whether a term contained in the former tenancy is adopted into the new contract of demise is a question of fact. If such a tenant continue to hold under the remainderman, and nothing pass between them except the payment and receipt of rent, the new landlord is not bound by a stipulation, contained in a former tenancy, which is not known to him in fact, nor is according to the custom of the country. *Oakley v. Monck*, 35 L. J. Ex. 87; L. R. 1 Ex. 159.

Breach.] As to proof of breach of contract to repair or to use good husbandry, see *Action on covenants, post*. Where the customary course of husbandry, as alleged, is negatived by the jury, the plaintiff cannot recover for not cultivating according to the real custom. *Angerstein v. Handson*, 1 C. M. & R. 789; 4 L. J. Ex. 118. But the judge may amend when the breach is non-repair.

ACTION ON BILLS OF EXCHANGE, CHEQUES, AND PROMISSORY NOTES.

The Bills of Exchange Act, 1882* (45 & 46 V. c. 61), codifies the law on this subject, and its sections now replace a large number of the decisions on these instruments. "The proper course is in the first instance to examine the language of the statute and to ask what is its natural meaning, uninfluenced by any considerations derived from the previous state of the law," but if "a provision be of doubtful import resort to the previous state of the law" would be perfectly legitimate. *Bank of England v. Vagliano*, [1891] A. C. 107, 144, 145, *per* Ld. Herschell. The Act, in Part II., enacts in detail the law, so far as relates to bills of exchange, and in Parts III. and IV. respectively enacts that relating to cheques and promissory notes: this is done, to a great extent, by reference to Part II., and this scheme is accordingly adopted in the following pages.

ACTION ON BILLS OF EXCHANGE.

Sect. 3. "(1.) A bill of exchange is an unconditional order in writing, addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand, or at a fixed or determinable future time, a sum certain in money to or to the order of a specified person, or to bearer.

"(2.) An instrument which does not comply with these conditions, or which orders any act to be done in addition to the payment of money, is not a bill of exchange.

"(3.) An order to pay out of a particular fund is not unconditional within the meaning of this section; but an unqualified order to pay, coupled with (a) an indication of a particular fund out of which the drawee is to reimburse himself or a particular account to be debited with the amount, or (b) a statement of the transaction which gives rise to the bill, is unconditional." See *In re Boyse*, 56 L. J. Ch. 135; 33 Ch. D. 612. In *Roberts v. Marsh*, 84 L. J. K. B. 388; [1915] 1 K. B. 42, the addition of the words on the face of a cheque, "To be retained," were held merely to import a condition as between drawer and drawee, and did not prevent the instrument being "an unconditional order in writing" within sect. 3.

"(4.) A bill is not invalid by reason—

"(a.) That it is not dated;

* Cited for brevity as B. of Ex. Act, 1882.

"(b.) That it does not specify the value given, or that any value has been given therefor;

"(c.) That it does not specify the place where it is drawn, or the place where it is payable."

See sect. 12 as to the insertion of the date in an undated bill.

Sect. 4. "(1.) An inland bill is a bill which is or on the face of it purports to be (a) both drawn and payable within the British Islands, or (b) drawn within the British Islands upon some person resident therein. Any other bill is a foreign bill.

"For the purposes of this act 'British Islands' mean any part of the United Kingdom of Great Britain and Ireland, the islands of Man, Guernsey, Jersey, Alderney, and Sark, and the islands adjacent to any of them being part of the dominions of her Majesty.

"(2.) Unless the contrary appear on the face of the bill the holder may treat it as an inland bill."

Sect. 5. "(1.) A bill may be drawn payable to, or to the order of, the drawer; or it may be drawn payable to, or to the order of the drawee." See *Chamberlain v. Young*, 63 L. J. Q. B. 28; [1893] 2 Q. B. 206.

Sect. 6. "(1.) The drawee must be named or otherwise indicated in a bill with reasonable certainty.

"(2.) A bill may be addressed to two or more drawees whether they are partners or not, but an order addressed to two drawees in the alternative or to two or more drawees in succession is not a bill of exchange."

Sect. 7. "(1.) Where a bill is not payable to bearer, the payee must be named or otherwise indicated therein with reasonable certainty." See *Chamberlain v. Young, supra*.

"(2.) A bill may be made payable to two or more payees jointly, or it may be made payable in the alternative to one of two, or one or some of several payees. A bill may also be made payable to the holder of an office for the time being."

Sect. 9. "(1.) The sum payable by a bill is a sum certain within the meaning of this act, although it is required to be paid—

"(a.) With interest."

In the Scottish case of *Lamberton v. Aiken*, 2 F. 189, it was held that an obligation to pay a capital sum on demand, "together with any interest that may accrue thereon," was not a promissory note, as, the rate of interest not being specified, the obligation was not for a sum certain.

"(b.) By stated instalments.

"(c.) By stated instalments, with a provision that upon default in payment of any instalment the whole shall become due.

"(d.) According to an indicated rate of exchange or according to a rate of exchange to be ascertained as directed by the bill."

A cheque "for 7,680 francs (Paris)" is for a sum certain within this section. *Cohn v. Boulken*, 36 T. L. R. 767.

"(2.) Where the sum payable is expressed in words and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable.

"(3.) Where a bill is expressed to be payable with interest, unless the instrument otherwise provides, interest runs from the date of the bill, and if the bill is undated from the issue thereof."

Sect. 10. "(1.) A bill is payable on demand—

"(a.) Which is expressed to be payable on demand, or at sight, or on presentation; or

"(b.) In which no time for payment is expressed.

"(2.) Where a bill is accepted or indorsed when it is overdue, it shall as regards the acceptor who so accepts, or any indorser who so indorses it, be deemed a bill payable on demand."

Sect. 11. "A bill is payable at a determinable future time within the meaning of this act which is expressed to be payable—

"(1.) At a fixed period after date or sight.

"(2.) On or at a fixed period after the occurrence of a specified event which is certain to happen, though the time of happening may be uncertain. "An instrument expressed to be payable on a contingency is not a bill, and the happening of the event does not cure the defect."

Sect. 12. "Where a bill expressed to be payable at a fixed period after date is issued undated, or where the acceptance of a bill payable at a fixed period after sight is undated, any holder may insert therein the true date of issue or acceptance, and the bill shall be payable accordingly.

"Provided that (1) where the holder in good faith and by mistake inserts a wrong date, and (2) in every case where a wrong date is inserted, if the bill subsequently comes into the hands of a holder in due course the bill shall not be avoided thereby, but shall operate and be payable as if the date so inserted had been the true date."

Sect. 13. "(1.) Where a bill or an acceptance or any indorsement on a bill is dated, the date shall, unless the contrary be proved, be deemed to be the true date of the drawing, acceptance, or indorsement, as the case may be.

"(2.) A bill is not invalid by reason only that it is ante-dated or post-dated, or that it bears date on a Sunday."

Sect. 20. "(1.) Where a simple signature on a blank stamped paper is delivered by the signer in order that it may be converted into a bill, it operates as a *prima facie* authority to fill it up as a complete bill for any amount the stamp will cover, using the signature for that of the drawer, or the acceptor, or an indorser; and, in like manner, when a bill is wanting in any material particular, the person in possession of it has a *prima facie* authority to fill up the omission in any way he thinks fit.

"(2.) In order that any such instrument when completed may be enforceable against any person who became a party thereto prior to its completion, it must be filled up within a reasonable time, and strictly in accordance with the authority given. Reasonable time for this purpose is a question of fact.

"Provided that if any such instrument after completion is negotiated to a holder in due course it shall be valid and effectual for all purposes in his hands, and he may enforce it as if it had been filled up within a reasonable time and strictly in accordance with the authority given."

Sect. 21. "(1.) Every contract on a bill, whether it be the drawer's, the acceptor's or an indorser's, is incomplete and revocable, until delivery of the instrument in order to give effect thereto.

"Provided that where an acceptance is written on a bill, and the drawee gives notice to or according to the directions of the person entitled to the bill that he has accepted it, the acceptance then becomes complete and irrevocable.

"(2.) As between immediate parties, and as regards a remote party other than a holder in due course, the delivery—

"(a.) in order to be effectual must be made either by or under the authority of the party drawing, accepting, or indorsing, as the case may be :

"(b.) may be shown to have been conditional or for a special purpose only, and not for the purpose of transferring the property in the bill,

"But if the bill be in the hands of a holder in due course, a valid delivery of the bill by all parties prior to him so as to make them liable to him is conclusively presumed.

"(3.) Where a bill is no longer in the possession of a party who has signed it as drawer, acceptor, or indorser, a valid and unconditional delivery by him is presumed until the contrary is proved."

Sect. 22. "(1.) Capacity to incur liability as a party to a bill is co-extensive with capacity to contract.

"Provided that nothing in this section shall enable a corporation to make itself liable as drawer, acceptor, or indorser of a bill unless it is competent to it so to do under the law for the time being in force relating to corporations."

"(2.) Where a bill is drawn or indorsed by an infant, minor, or corpora-

tion having no capacity or power to incur liability on a bill, the drawing or indorsement entitles the holder to receive payment of the bill, and to enforce it against any other party thereto."

Sect. 27. "(1.) Valuable consideration for a bill may be constituted by—

"(a.) Any consideration sufficient to support a simple contract :

"(b.) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

"(2.) Where value has at any time been given for a bill, the holder is deemed to be a holder for value as regards the acceptor and all parties to the bill who became parties prior to such time.

"(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien."

Sect. 29. "(1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions; namely :

"(a.) That he became the holder of it before it was overdue and without notice that it had been previously dishonoured, if such was the fact :

"(b.) That he took the bill in good faith, and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it.

"(2.) In particular the title of a person who negotiates a bill is defective within the meaning of this act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

"(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder."

This section substitutes the term "holder in due course," for "*bonâ fide* holder for value without notice." The rights of a holder in due course are defined by sect. 38. "Defect in the title" is used in this Act as equivalent to "equity attaching to the bill." "Force and fear" is the equivalent, in Scottish law, for "duress." The effect of taking a bill overdue or dishonoured is defined by sect. 36 (2, 5). A bill of exchange may be "complete and regular on the face of it," notwithstanding that it has not been accepted. *National Park Bank of New York v. Berggren*, 19 Com. Cas. 234.

Sect. 30. "(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

"(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

Sect. 37. "Where a bill is negotiated back to the drawer, or to a prior indorser or to the acceptor, such party may, subject to the provisions of this act" (*vide* sect. 59 (3) and sect. 61), "re-issue and further negotiate the bill, but he is not entitled to enforce payment of the bill against any intervening party to whom he was previously liable."

Sect. 38. "The rights and powers of the holder of a bill are as follows :—

"(1.) He may sue on the bill in his own name;

"(2.) Where he is a holder in due course, he holds the bill free from any defect of title of prior parties, as well as from mere personal defences available to prior parties among themselves, and may enforce payment against all parties liable on the bill :

“(3.) Where his title is defective—

“(a.) If he negotiates the bill to a holder in due course, that holder obtains a good and complete title to the bill; and

“(b.) if he obtains payment of the bill the person who pays him in due course gets a valid discharge for the bill.”

Sect. 53. “(1.) A bill, of itself, does not operate as an assignment of funds in the hands of the drawee available for the payment thereof, and the drawee of a bill who does not accept as required by this act is not liable on the instrument.”

Sect. 58. “(1.) Where the holder of a bill payable to bearer negotiates it by delivery without indorsing it, he is called a ‘transferor by delivery.’

“(2.) A transferor by delivery is not liable on the instrument.

“(3.) A transferor by delivery who negotiates a bill thereby warrants to his immediate transferee being a holder for value that the bill is what it purports to be, that he has a right to transfer it, and that at the time of transfer he is not aware of any fact which renders it valueless.”

Sect. 71. “(1.) Where a bill is drawn in a set, each part of the set being numbered, and containing a reference to the other parts, the whole of the parts constitute one bill.”

“(3.) Where two or more parts of a set are negotiated to different holders in due course, the holder whose title first accrues is as between such holders deemed the true owner of the bill; but nothing in this sub-section shall affect the rights of a person who in due course accepts or pays the part first presented to him.”

Sect. 72. “Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties thereto are determined as follows:

“(1.) The validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or indorsement, or acceptance *supra* protest, is determined by the law of the place where such contract was made.

“Provided that—

“(a.) Where a bill is issued out of the United Kingdom it is not invalid by reason only that it is not stamped in accordance with the law of the place of issue:

“(b.) Where a bill, issued out of the United Kingdom, conforms, as regards requisites in form, to the law of the United Kingdom, it may, for the purpose of enforcing payment thereof, be treated as valid as between all persons who negotiate, hold, or become parties to it in the United Kingdom.

“(2.) Subject to the provisions of this act the interpretation of the drawing, indorsement, acceptance, or acceptance *supra* protest of a bill, is determined by the law of the place where such contract is made.

“Provided that where an inland bill is indorsed in a foreign country the indorsement shall, as regards the payer, be interpreted according to the law of the United Kingdom.

“(3.) The duties of the holder with respect to presentment for acceptance or payment, and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured.

“(4.) Where a bill is drawn out of but payable in the United Kingdom and the sum payable is not expressed in the currency of the United Kingdom, the amount shall, in the absence of some express stipulation, be calculated according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable.

“(5.) Where a bill is drawn in one country and is payable in another, the due date thereof is determined according to the law of the place where it is payable.”

Amount of bill.] There is now no restriction as to the amount of a bill, for 48 G. 3, c. 88, s. 2, is repealed by the B. of Ex. Act, 1882, s. 96.

Production of the bill.] It is generally necessary for the plaintiff to produce the bill or note on which he claims, whenever the form of pleading puts it in issue; and even when not in issue, interest is not recoverable without production. *Hutton v. Ward*, 15 Q. B. 26; 19 L. J. Q. B. 293. But, where it appears that it has been destroyed, as where the defendant tore his own note of hand, a copy is admissible; *Anon.*, 1 Ld. Raym. 731; or, other secondary evidence may be given where the defence is not raised that the instrument is lost or destroyed. *Blackie v. Pidding*, *Charnley v. Grundy*, *infra*. Thus, under a defence denying acceptance, it is not competent for defendant to avail himself of the defence that plaintiff, an indorsee, has lost the bill and cannot produce it. *Blackie v. Pidding*, 6 C. B. 196. So, in an action on a note against maker, the defence of the loss of it must be pleaded specially. *Charnley v. Grundy*, 14 C. B. 608; 23 L. J. C. P. 121. The principle of this defence is that the holder of a negotiable security is only entitled to payment on production of it for re-delivery to the person liable to pay. If the defendant refuse to pay on that ground only, as where it is destroyed or is lost, there must be a defence to that effect. In *Poole v. Smith*, Holt, N. P. 144, Gibbs, C.J., seems to have held that where the bill is lost after plea pleaded, the defence might be raised without a special plea; *sed quære*.

By sect. 69, "Where a bill has been lost before it is overdue, the person who was the holder of it may apply to the drawer to give him another bill of the same tenor, giving security to the drawer if required to indemnify him against all persons whatever in case the bill alleged to have been lost shall be found again.

"If the drawer on request as aforesaid refuses to give such duplicate bill, he may be compelled to do so."

Sect. 70. "In any action or proceeding upon a bill, the court or a judge may order that the loss of the instrument shall not be set up, provided an indemnity be given to the satisfaction of the court or judge against the claims of any other person upon the instrument in question."

Unless the plaintiff avail himself of relief afforded by these sections he cannot, where the defence is properly pleaded, recover on a lost bill indorsed by the payee without proving that it had been destroyed; though he had offered an indemnity to the defendant; *Pierson v. Hutchinson*, 2 Camp. 211; *Hansard v. Robinson*, 7 B. & C. 90; 5 L. J. (O. S.) K. B. 242; and, though the bill was lost after it became due; S. C.; or, was payable to the plaintiff's order and not indorsed when lost; *Ramuz v. Crowe*, 1 Ex. 167; 16 L. J. Ex. 280. See further *Conflans Stone Quarry Co. v. Parker*, 37 L. J. C. P. 51; L. R. 3 C. P. 1. And, the loss of a bill in a negotiable state is fatal to a recovery, on the debt for which the bill was given, as well as on the bill. *Crowe v. Clay*, 9 Ex. 604; 23 L. J. Ex. 150. Even an express promise by the defendant to pay the bill will not entitle the plaintiff to recover on it. *Davis v. Dodd*, 4 Taunt. 602. The plaintiff could maintain his action if he proved that the bill had been destroyed. *Pierson v. Hutchinson*, 2 Camp. 211, 212; see also *Wright v. Maidstone (Lord)*, 24 L. J. Ch. 623. The payee of a note, not negotiable, may require payment without producing it. *Wain v. Bailey*, 10 Ad. & E. 616; and see *per Jervis, C.J.*, in *Charnley v. Grundy*, 14 C. B. 614; 23 L. J. C. P. 122. If the acceptor improperly detain the bill in his hands, the drawer or other party may sue him upon it, without giving him notice to produce it; *Smith v. McClure*, 5 East, 477; and, where the defendant had admitted that he owed the money due upon a bill which was in his own possession, *Abbott, C.J.*, held that such admission might be given in evidence under the common counts without a notice to produce the bill. *Fryer v. Brown*, Ry. & M. 145. An admission of the handwriting of the defendant to the acceptance is *prima facie* evidence of the regularity of such acceptance,

and it dispenses with production, unless there be a "saving of just exceptions;" *Chaplin v. Levy*, 9 Exch. 531; 23 L. J. Ex. 117; and see *Sharples v. Richard*, 2 H. & N. 57; 26 L. J. Ex. 302, where, in an action by indorsee against drawer, the court doubted whether on traverses only of presentment for acceptance and notices of dishonour, it was necessary to produce the bill.

The bill or note produced must appear to be the same upon which the plaintiff claims, and if any material variance exist, it will be fatal, unless amended by leave of the judge at N. P. Where a bill appears to be altered it lies upon the party producing it to show that the alteration was made under such circumstances as not to vitiate the instrument; *Henman v. Dickinson*, 5 Bing. 183; 7 L. J. (O. S.) C. P. 68; and it cannot be left to the jury on the mere inspection of the bill, without other proof, to decide whether it was altered at the time of making or at a subsequent period. *Knight v. Clements*, 8 Ad. & E. 218; 7 L. J. Q. B. 144. Where a note payable in two months was dated by mistake January, 1854, instead of 1855, but crossed by the maker before delivery, "due 4th March, 1855," it was held that this operated as a correction, and that the note was rightly described as of 1855. *Fitch v. Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293.

Variance in parties—Liability on the bill—Statute.] A nominal partner who is named in the bill must join in suing. *Guidon v. Robson*, 2 Camp. 302.

Sect. 23, "No person is liable as drawer, indorser, or acceptor of a bill who has not signed it as such: Provided that—

"(1.) Where a person signs a bill in a trade or assumed name, he is liable thereon as if he had signed it in his own name:

"(2.) The signature of the name of a firm is equivalent to the signature by the person so signing of the names of all persons liable as partners in that firm."

Sect. 53, "(1.) . . . the drawee of a bill who does not accept as required by this act is not liable on the instrument."

Sect. 24. "Subject to the provisions of this act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is wholly inoperative, and no right to retain the bill or to give a discharge therefor, or to enforce payment thereof, against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or enforce payment of the bill is precluded from setting up the forgery or want of authority.

"Provided that nothing in this section shall affect the ratification of an unauthorized signature not amounting to a forgery."

Sect. 25. "A signature by procuration operates as notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent in so signing was acting within the actual limits of his authority." The effect of this section is that if the agent has exceeded his authority in signing, the principal may refuse payment of the bill, and persons taking it do so subject to this risk. Where, however, the bill has once been paid, the transaction is complete and the section does not confer a right to recover the proceeds. *Morison v. London County and Westminster Bank*, 83 L. J. K. B. 1202; [1914] 3 K. B. 356.

Sect. 26. "(1.) Where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature, indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability.

"(2.) In determining whether a signature on a bill is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted."

Sect. 58. "(2.) A transferor by delivery is not liable on the instrument."

A person is not liable as acceptor who accepts by procuration for the drawee, but without his authority. *Polhill v. Walter*, 3 B. & Ad. 122; *Eastwood v. Bain*, 3 H. & N. 738; 28 L. J. Ex. 44. He is, however, liable for breach of warranty of authority; *vide Action on warranty of authority, post*. And, if one of several partners accept a bill in his own name on behalf of the partnership, having no authority to bind the firm, he will be personally liable as acceptor. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J. C. P. 61; *Nicholls v. Diamond*, 9 Ex. 154; 23 L. J. Ex. 1. But where a bill drawn on a firm of B. & Co. was accepted by W. A. M. B., a partner having authority to accept bills, thus, "B. & Co., W. A. M. B.," it was held that W. A. M. B. was liable thereon jointly with his co-partners only. *In re Barnard*, 55 L. J. Ch. 935; 32 Ch. D. 447. The master of a ship who drew a bill of exchange on the owners in favour of the suppliers of coal to the ship, concluding with the words "value received . . . on . . . coal . . . supplied to my vessel to enable her to complete her voyage . . . for which I hold my vessel owners and freight responsible," is personally liable thereon. *Ceylon Coaling Co. v. Goodrich, or The Elmville*, 73 L. J. P. 104; [1904] P. 319.

Sect. 24 does not apply to indorsements made abroad. *Embricos v. Anglo-Austrian Bank*, 74 L. J. K. B. 326; [1905] 1 K. B. 677.

Variance in names, &c.] Although variances are now in most cases amendable, it has been thought as well to retain the cases as bearing upon other important points. Where initials or some contraction for a Christian name are used in the bill itself, the same initials or contraction may be used in the writ or statement of claim by 3 & 4 W. 4, c. 42, s. 12; but it may become necessary to identify the parties so designated, and if the name is spelt wrongly, oral evidence is admissible to show who was intended. *Willis v. Barrett*, 2 Stark. 29. Where a bill is drawn with the payee's name in blank, and in the statement of claim it is stated that A. B. (a *bonâ fide* holder who has inserted his own name) was payee, it is no variance. *Attwood v. Griffin, Ry. & M.* 425. In an action against several joint makers of a note, it is no objection on the ground of variance, that one of them, who has let judgment go by default, has been sued by a wrong Christian name; the identity of the party and service of the writ on him being shown. *Dickinson v. Bowes*, 16 East, 110. The name of a party to the bill may be stated as on the bill, though it be not the real name. *Forman v. Jacob*, 1 Stark. 47.

Variance in the place of payment.] If a bill be drawn payable at a particular place, this, as against the drawer, is part of the contract, and it is a variance to state it without that qualification: Bayley on Bills, 6th ed., 393; but as against the acceptor, this is now, by reason of sect. 19, no variance, unless the bill be accepted payable at a particular place, and not "otherwise or elsewhere." So, where a bill was directed to "A. B., payable in London," payment in London was held part of the contract. *Hodge v. Fillis*, 3 Camp. 463. As to promissory notes see sect. 87. Where a note contains in the body of it a promise to pay at a particular place, it is a variance to omit the place. *Spindler v. Grellett*, 1 Ex. 384; 17 L. J. Ex. 6; *Vanderdoncket v. Thellusson*, 8 C. B. 812; 19 L. J. C. P. 12; *Sanderson v. Bowes*, 14 East, 500. But when the place of payment is only mentioned in the memorandum at the foot of a note, it is no variance to omit it; *Price v. Mitchell*, 4 Camp. 200; *Williams v. Waring*, 10 B. & C. 2; 8 L. J. (O. S.) K. B. 7; *Masters v. Baretto*, 8 C. B. 433; 19 L. J. C. P. 50. And, the reason is not because a writing in the corner may not be part of a contract, but because by the usage of merchants it is a mere memorandum there written for the convenience of parties. *Warrington v. Early*, 2 E. & B. 766; 23 L. J. Q. B. 47. But where a note was alleged to be payable at a certain place, and it was only made so payable by a memorandum at the bottom, *Abbott, C.J.*, held it no variance; *Hardy v. Woodroffe*, 2 Stark. 319; *Sproule*

v. *Legg*, 3 Stark. 157; and, the reason seems to be that, if payable generally, it is payable at the place named. *Blake v. Beaumont*, 4 M. & Gr. 7; 11 L. J. C. P. 222.

Variance in consideration.] The words "value received," in a bill payable to the drawer's order, mean value received by the drawee; and if stated to be value received by the drawer, it is a variance. *Highmore v. Primrose*, 5 M. & S. 65; *Priddy v. Henbrey*, 1 B. & C. 674. But where the bill is drawn payable to the order of a third person, "for value received," it is no variance to state that it was for value received "of the drawer." *Grant v. Da Costa*, 3 M. & S. 351. "Value received," in a note, imports value received from the payee. *Clayton v. Gosling*, 5 B. & C. 360.

Variance in the sum.] The money mentioned in the statement of claim on a bill means English money; if the bill is really for foreign money it is a variance. *Kearney v. King*, 2 B. & A. 301; *Sproule v. Legg*, 1 B. & C. 16.

By sect. 9, "(2) Where the sum payable," by a bill, "is expressed in words, and also in figures, and there is a discrepancy between the two, the sum denoted by the words is the amount payable."

Ambiguous and irregular instruments.] Sect. 3 (1), defines a bill of exchange, and (2) enacts that an instrument not complying with the conditions therein stated is not a bill. See also sects. 6 (2), 7 (2).

Sect. 5, "(2) Where in a bill drawer and drawee are the same person or where the drawee is a fictitious person or a person not having capacity to contract, the holder may treat the instrument, at his option, either as a bill of exchange or as a promissory note."

Sect. 7, "(3) Where the payee is a fictitious or non-existing person the bill may be treated as payable to bearer."

An instrument drawn thus, "pay to — order," the blank not having been filled up, is payable to the order of the drawer. *Chamberlain v. Young*, 63 L. J. Q. B. 28; [1893] 2 Q. B. 206. The following instrument, "I promise to pay to J. B. or order," &c., signed "J. B." with J. G.'s name and address in the corner, and J. G.'s name written across it as an acceptance, and indorsed by J. B., may be treated by the holder as against J. B., as a note by him; *Edis v. Bury*, 6 B. & C. 433; 5 L. J. (O. S.) K. B. 179; and *semble*, at the holder's election as a bill of exchange. *Id.* "Pay without acceptance to the order of J. C. F." signed by the manager on behalf of a joint-stock banking company at one place and addressed to the company at another, is as against a partner in the company, a promissory note. *Miller v. Thomson*, 3 M. & Gr. 576; 11 L. J. C. P. 21.

The manager of an incorporated company wrote to the cashier thus: "53 days after date credit P., or order, with the sum of £500, claimed *per* 'Cleopatra,' in cash on account of this corporation," signed by the manager. This was held to be a bill of exchange. *Ellison v. Collingridge*, 9 C. B. 570; 19 L. J. C. P. 268.

"I promise to pay T. L. or order," signed H. O. : the name of the defendant was on the left corner, and his acceptance across it. Held, that T. L. might sue defendant on it as a bill of exchange. *Lloyd v. Oliver*, 18 Q. B. 471; 21 L. J. Q. B. 307; and *semb.*, it might have been treated as either a bill or a note as against H. O. *Id.* An instrument payable to order, with a direction "at Messrs. A. B.," instead of *to* Messrs. A. B., may also be treated as a bill or note, in an action against the drawer. *Shuttleworth v. Stephens*, 1 Camp. 407; *Allan v. Mawson*, 4 Camp. 115.

Without the drawer's signature, a bill though accepted is of no force, and cannot be treated as a promissory note; *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J. Q. B. 293; *Goldsmid v. Hampton*, 5 C. B. (N. S.) 94; 27 L. J. C. P. 286; *M'Call v. Taylor*, 19 C. B. (N. S.) 301; 34 L. J. C. P. 365; see also *South Wales and Cannock Chase Coal Co. v. Underwood*, 15 T. L. R. 157. So, a bill not directed to any drawee is void as a bill,

and an acceptance by some one, to whom it is not directed, is no acceptance; *Peto v. Reynolds*, 9 Ex. 410; *Davis v. Clarke*, 6 Q. B. 16; 13 L. J. Q. B. 304; unless he be an acceptor for honour; *Polhill v. Walter*, 3 B. & Ad. 114; 1 L. J. K. B. 92.

A bill may be complete and regular on the face of it notwithstanding that it has not been accepted. *National Park Bank of New York v. Berggren*, 19 Com. Cas. 234.

An acceptance where there is no drawee named may make the person accepting liable as on a promissory note by himself. *Peto v. Reynolds*, *supra*. In *Fielder v. Marshall*, 9 C. B. (N. S.) 506; 30 L. J. C. P. 158, S. M. was sued on the following instrument:—"Pay to Mrs. E. F., or order," (Signed) "A. L.," directed "To Mrs. E. F., Nelson Lodge, Chelsea," and across was written, "Accepted, S. M.;"—the whole document, except "A. L.," was written by the defendant, and was given by him to E. F. to secure a debt from A. L. to her; and it was held that the address, "To Mrs. E. F.," might be treated as a repetition of the payee's name, and not as a drawee, and the document as a promissory note made by S. M.

A payee, P., is fictitious within sect. 7 (3), where although P. is a real person he was never intended by the drawer to have any right on the bill, and even although the document which was concocted by G. is not really a bill, the signatures of the named drawer and that of P. having been forged by G., who fraudulently obtained the signature of the plaintiff V., as acceptor, V. and P. being both ignorant of the circumstances; such a document may therefore be treated as payable to bearer. *Bank of England v. Vagliano*, 60 L. J. Q. B. 145; [1891] A. C. 107. Sect. 7 (3) applies although the acceptor believed that P. was a real person. S. C.; *Clutton v. Attenborough*, 66 L. J. Q. B. 221; [1897] A. C. 90. *Secus*, where the drawer is induced by fraud to draw a cheque to the order of a real person intending him to receive the proceeds. *North and South Wales Bank v. Macbeth*, 77 L. J. K. B. 464; [1908] A. C. 137; *Vinden v. Hughes*, 74 L. J. K. B. 410; [1905] 1 K. B. 795; *Town and County Advance Co. v. Provincial Bank of Ireland*, [1917] 2 I. R. 421.

Payee against Acceptor.

The proofs in this action entirely depend upon the pleadings. If the acceptance be intended to be put in issue, it must be traversed by the statement of defence.

Bill when payable—Statute.] Sects. 10, 11, respectively define what bills are payable on demand, and what bills are payable at a determinable future time.

Sect. 14, "Where a bill is not payable on demand the day on which it falls due is determined as follows:

- "(1.) Three days, called days of grace, are, in every case where the bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace: Provided that—
- "(a.) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by Royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day.
- "(b.) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day.
- "(2.) Where a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is

determined by excluding the day from which the time is to begin to run and by including the day of payment.

“(3.) Where a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery.

“(4.) The term ‘month’ in a bill means calendar month.”

Sect. 65, “(5) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour.” The Bank Holidays Act, 1871 (34 & 35 V. c. 17), s. 1, appoints as bank holidays, Easter Monday, Whitsun Monday, the first Monday in August, and December 26th, if a week day. If it be a Sunday, then the holiday is December 27th; 38 & 39 V. c. 13, s. 2. By 34 & 35 V. c. 17, s. 5, these days may in any year be altered by Order in Council; and her Majesty may by proclamation appoint other days to be kept as bank holidays (s. 4).

Bill when payable.] Where a bill is drawn at so many months after date, calendar months are intended, sect. 14 (4); and the day on which it falls due is always regulated by the day of the date, irrespective of the length of the months, and in ordinary cases will be the day with the same number in the last month of the currency; thus a bill drawn at two months on the 10th of January, would (exclusively of the days of grace) be due on the 10th of March. But, if the date be one of the last days of a month having more days than the month in which the bill becomes due, then the bill will be due on the last day of that month: thus, bills drawn, at one month, on the 28th, 29th, 30th, or 31st of January, will, it would seem, in ordinary years, be all due (exclusively of the days of grace) on the 28th of February, and with the days of grace payable on the 3rd of March; Byles on Bills, 11th ed. p. 204; Story on Bills, 2nd ed. s. 300, pp. 74, 75; Marius, 4th ed. p. 18; and dicta in *Freeman v. Read*, 4 B. & S. 174; 32 L. J. M. C. 239, and in *Webb v. Fairmaner*, 3 M. & W. 473; 7 L. J. Ex. 140.

It follows from sect. 14 (1), that where a fast or thanksgiving day alone is proclaimed, the bills due that day are payable the day before, but if the proclamation further appoint the day to be kept as a bank holiday, they are payable the day after the fast or thanksgiving day.

A provision that the whole of the instalments payable under a promissory note shall become immediately payable on failure to pay any instalment “punctually” does not deprive the maker of the note of the days of grace. *Schaverien v. Morris*, 37 T. L. R. 366.

An action on the bill commenced before the expiration of the last day of grace is premature. *Kennedy v. Thomas*, 63 L. J. Q. B. 761; [1894] 2 Q. B. 759.

Acceptance—statute.] Sect. 2. “Acceptance means an acceptance completed by delivery or notification.”

Sect. 17. “(1) The acceptance of a bill is the signification by the drawee of his assent to the order of the drawer.

“(2) An acceptance is invalid unless it complies with the following conditions, namely:

“(a.) It must be written on the bill and be signed by the drawee. The mere signature of the drawee without additional words is sufficient.

“(b.) It must not express that the drawee will perform his promise by any other means than the payment of money.”

As to acceptance of a bill drawn in a set, *vide* sect. 71 (4). As to signature by agent, *vide* sect. 91 (1).

Sect. 18. “A bill may be accepted,

“(1.) Before it has been signed by the drawer, or while otherwise incomplete:

“(2.) When it is overdue, or after it has been dishonoured by a previous refusal to accept, or by non-payment:

"(3.) When a bill payable after sight is dishonoured by non-acceptance, and the drawee subsequently accepts it, the holder, in the absence of any different agreement, is entitled to have the bill accepted as of the date of first presentment to the drawee for acceptance."

Sect. 19. "(1) An acceptance is either (a) general or (b) qualified.

"(2) A general acceptance assents without qualification to the order of the drawer. A qualified acceptance in express terms varies the effect of the bill as drawn.

"In particular an acceptance is qualified which is—

"(a.) conditional, that is to say, which makes payment by the acceptor dependent on the fulfilment of a condition therein stated :

"(b.) partial, that is to say, an acceptance to pay part only of the amount for which the bill is drawn :

"(c.) local, that is to say, an acceptance to pay only at a particular specified place :

An acceptance to pay at a particular place is a general acceptance, unless it expressly states that the bill is to be paid there only and not elsewhere :

"(d.) qualified as to time :

"(e.) the acceptance of some one or more of the drawees, but not of all."

By sect. 21 (1) the acceptor's contract is incomplete and revocable until delivery of the bill has been made, or notification of acceptance given as described in that section.

Sect. 44 (1), "The holder of a bill may refuse to take a qualified acceptance." As to the effect of taking such an acceptance, *vide* sect. 44 (2).

Sect. 52. "(1.) When a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable.

"(2.) When by the terms of a qualified acceptance presentment for payment is required, the acceptor, in the absence of an express stipulation to that effect, is not discharged by the omission to present the bill for payment on the day that it matures.

"(3.) In order to render the acceptor of a bill liable it is not necessary to protest it, or that notice of dishonour should be given to him."

Sect. 54. "The acceptor of a bill by accepting it—

"(1.) Engages that he will pay it according to the tenor of his acceptance :

"(2.) Is precluded from denying to a holder in due course :

"(a.) The existence of the drawer, the genuineness of his signature, and his capacity and authority to draw the bill ;

"(b.) In the case of a bill payable to drawer's order, the then capacity of the drawer to indorse, but not the genuineness or validity of his indorsement ;

"(c.) In the case of a bill payable to the order of a third person, the existence of the payee and his then capacity to indorse, but not the genuineness or validity of his indorsement."

By sect. 71 (4), where a bill is drawn in a set, "the acceptance may be written on any part, and it must be written on one part only.

"If the drawee accepts more than one part, and such accepted parts get into the hands of different holders in due course he is liable on every such part as if it were a separate bill."

Acceptance, general or qualified.] A conditional acceptance will not support the allegation of a general one, though the condition has been performed. *Langston v. Corney*, 4 Camp. 177; *Ralli v. Sarell*, D. & Ry. N. P. C. 33; *Swan v. Cox*, 1 Marsh. 176. But where the drawee has accepted on condition of an extension of time for payment, the indorsee may sue as on a bill accepted payable at the postponed date. *Russell v. Phillips*, 14 Q. B. 891; 19 L. J. Q. B. 297. Drawee of a bill, dated 8th September, at four months, accepted generally, adding the words "due 11th December." Held, a memorandum for his own convenience perhaps accidentally mis-

dated, and not a qualified acceptance. *Fanshawe v. Peet*, 2 H. & N. 1; 26 L. J. Ex. 314. "Accepted, payable on giving up a bill of lading for goods, &c., per Amazon," is a conditional acceptance, binding the holder to give up the bill of lading on presentment for payment, but, not imposing on him a further condition to the acceptor's liability, that the bill of lading should be given up on the very day the bill falls due. *Smith v. Vertue*, 9 C. B. (N. S.) 214; 30 L. J. C. P. 56. A bill of exchange was drawn by F. payable "to order F.," the drawees accepted the bill, as follows—across its face they stamped the words "Accepted payable at the A. Bank"; above "accepted" they wrote the words "In favour of F. only—No. 28," the word "order" had been struck out, but it did not appear by whom; it was held, in an action by indorsees for value, that there was a general acceptance of a negotiable bill. *Meyer v. Decroix*, 61 L. J. Q. B. 205; [1891] A. C. 520. Whether an acceptance be general or qualified is a question of law for the judge. *Sproat v. Matthews*, 1 T. R. 182.

An acceptance, expressed to be payable at a banker's or other place, was formerly held to be a special or qualified, and not a general acceptance. *Rowe v. Young*, 2 B. & B. 165. But by sect. 19 (2) replacing Onslow's Act (1 & 2 G. 4, c. 78), s. 1, such acceptance is general unless it expressly states that the bill is to be paid there *only, and not elsewhere*. A bill which is drawn payable at a particular place is within this section; there being no distinction between the case where the bill is so rendered payable by the language of the drawer, or of the acceptor; and unless the acceptance be special within the statute, it is unnecessary, *as against the acceptor*, to aver or prove any presentment. *Selby v. Eden*, 3 Bing. 611; 4 L. J. (O. S.) C. P. 198; *Fayle v. Bird*, 6 B. & C. 531; 5 L. J. (O. S.) K. B. 217. The use of the word "only" is not essential to qualify the acceptance, if the words "and not elsewhere" are inserted. *Higgins v. Nichols*, 7 Dowl. 551. By sect. 52 (1), when a bill is accepted generally, presentment for payment is not necessary in order to render the acceptor liable; and if the holder neglect to present, and the bankers, at whose house it is made payable generally, fail, with money of the acceptor in their hands, the acceptor is not thereby discharged. *Turner v. Hayden*, 4 B. & C. 1. But, by sect. 54 (1), if the acceptance is local, the plaintiff must prove presentment at the place named, in order to charge the acceptor; and this was the rule at common law. *Rowe v. Young*, *supra*. An acceptance payable at the acceptor's bankers is equivalent to an order on the banker to pay the bill to any holder who can by law give a valid discharge for it, and to debit his customer with the amount. *Robarts v. Tucker*, 16 Q. B. 560; 20 L. J. Q. B. 270.

A bill of exchange drawn generally may now be accepted in three ways; either generally, or payable at a particular banker's, or at a particular banker's and not elsewhere. If the drawee accept generally, he undertakes to pay the bill at maturity when presented to him. If he accept payable at a banker's, he undertakes to pay the bill at maturity, when presented, either to himself, or at the banker's. If he accept payable at a banker's and not elsewhere, he contracts to pay the bill at maturity, provided it is presented at the banker's, but not otherwise. *Halstead v. Skelton*, 5 Q. B. 86; 13 L. J. Ex. 177.

Acceptance, how proved.] The acceptance, when traversed, is proved by evidence of the acceptor's handwriting, and the production of the bill, with such proof, is *primâ facie* evidence of acceptance before action brought, as the presumption is that it was accepted within a reasonable time after date, according to the regular course of business, and before maturity. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J. C. P. 69. What is such reasonable time depends on the places of residence of the parties, &c. S. C. If several, not partners, are acceptors, the handwriting of all must be proved. *Gray v. Palmers*, 1 Esp. 135.

Acceptance by partners.] By sect. 23 (2), "the signature of the name of a firm is equivalent to the signature by the person so signing of

the names of all persons liable as partners in that firm." If one of several partners accept a bill drawn on the firm, it is sufficient to prove the partnership, and his handwriting, in an action against all; *Mason v. Rumsey*, 1 Camp. 384; and, where a bill was directed to "E. M. and others, trustees of," &c., and was "accepted, E. M.," it was held that, on proving that E. M. accepted by authority of the other trustees, plaintiff could recover on the bill against the others, as well as against E. M., though E. M. alone signed, and did not expressly sign on behalf of the rest. *Jenkins v. Morris*, 16 M. & W. 877. But the name of the firm must appear on the face of the instrument, and an action cannot be maintained thereon against the firm, when one partner signed his own name only, although the proceeds were in reality applied to partnership purposes; *Siffkin v. Walker*, 2 Camp. 308; *Emly v. Lye*, 15 East, 7; *Nicholson v. Ricketts*, 2 E. & E. 497; 29 L. J. Q. B. 55; for no person whose name, or the name of whose firm, does not appear on the bill can be liable on it; *Emly v. Lye*, *supra*; *Beckham v. Drake*, 9 M. & W. 79, 92, 96; 11 L. J. Ex. 201; *Miles' Claim*, 43 L. J. Ch. 732; L. R. 9 Ch. 635; and see sect. 23. Where a bill is accepted by a partner in a firm in a name common to himself and the firm, and he carries on no business separate from the firm, there is a presumption that the bill is accepted for and binds the firm. *Yorkshire Banking Co. v. Beatson*, 49 L. J. C. P. 380, 387; 5 C. P. D. 109, 121. This presumption may, however, be rebutted by evidence that the bill was accepted as that of the partner for his own private purposes, and not as those of the firm. S. C. The Partnership Act, 1890, 53 & 54 V. c. 39, s. 6, does not affect any general rule of law relating to the execution of negotiable instruments.

It is a good defence that the plaintiff had notice that the firm would not be bound by such an acceptance; *Galway (Lord) v. Mathew*, 10 East, 264; *Jones v. Corbett*, 2 Q. B. 828; 11 L. J. Q. B. 181; *Grout v. Enthoven*, 1 Ex. 382; 17 L. J. Ex. 70; 53 & 54 V. c. 39, s. 8; or, that the bill was not accepted for partnership purposes, and that there was connivance between the partner who accepted and the plaintiff. *Shirreff v. Wilks*, 1 East, 48. Although it was formerly held that, in the absence of fraud or collusion, a party who had received a bill given by one or several partners in the name of the firm for his separate debt, might sue the partnership on such bill; *Swan v. Steele*, 7 East, 210; *Ridley v. Taylor*, 13 East, 175; *Lloyd v. Ashby*, 2 B. & Ad. 23; 2 L. J. (O. S.) K. B. 144; it is now established that the unexplained fact that a partnership security has been received from one of the partners in discharge of a separate claim against himself is a badge of fraud, or of such palpable negligence as amounts to fraud, which it is incumbent on the party who takes the security to remove, by showing either that the party from whom he received it acted with the authority of the rest of his partners, or that he himself had good reason to believe so. *Leverson v. Lane*, 13 C. B. (N. S.) 278; 32 L. J. C. P. 10; *Ex pte. Darlington Joint Stock Banking Co.*, 34 L. J. Bky. 10; *Arden v. Sharp*, 2 Esp. 524; *Green v. Deakin*, 2 Stark. 347; and now see 53 & 54 V. c. 39, s. 7; see also *Heilbut v. Nevill*, 38 L. J. C. P. 273; 39 L. J. C. P. 245; L. R. 4 C. P. 354; L. R. 5 C. P. 478. This defence was formerly raised by a traverse of the acceptance. *Hogg v. Skeen*, 18 C. B. (N. S.) 426; 34 L. J. C. P. 153, explaining *Musgrave v. Drake*, 5 Q. B. 185; 13 L. J. Q. B. 16. But under Rules, 1883, O. xix. r. 15, it would seem it ought to be specially pleaded.

Where one partner has subscribed in a style slightly differing from the real name of the firm, it is a question for the jury whether he had authority from the firm to do so; or whether he must be taken to have issued the bill on his own account. *Faith v. Richmond*, 11 Ad. & E. 339; 9 L. J. Q. B. 97. And, it seems, that no partner has any implied authority to bind in any but the true style of the firm. *Kirk v. Blurton*, 9 M. & W. 284; 12 L. J. Ex. 117. Where a bill was accepted by one of two partners, "J. B. & Co.," the true style being "J. B.," the firm was held, as a matter of law, not bound. S. C. The correctness of the application of the law in this

case has, however, been doubted, on the ground that it was a question for the jury whether "J. B." and "J. B. & Co." did not mean the same thing. *Stephens v. Reynolds*, 5 H. & N. 513; 29 L. J. Ex. 278. See also *Maclae v. Sutherland*, 3 E. & B. 36; 23 L. J. Q. B. 242. One of two partners may perhaps, under the general authority conferred by the partnership, bind the other by signing the true names of both, instead of the fictitious name of the firm. *Norton v. Seymour*, 3 C. B. 792, 794; 16 L. J. C. P. 100. As to the liability of partner on an acceptance in blank by his co-partner, see *Hogarth v. Latham*, 47 L. J. Q. B. 339; 3 Q. B. D. 643, and cases there cited.

The implied power of one partner to bind the others by his acceptance, &c., of bills does not extend to partnerships other than for trading purposes, such as solicitors; *Hedley v. Bainbridge*, 3 Q. B. 316; 11 L. J. Q. B. 293; see *Forster v. Mackreth*, 36 L. J. Ex. 94; L. R. 2 Ex. 163; or, brokers; *Yates v. Dalton*, 28 L. J. Ex. 69; or auctioneers; *Wheatley v. Smithers*, 75 L. J. K. B. 627; [1906] 2 K. B. 321; reversed but not upon this point: 76 L. J. K. B. 900; [1907] 2 K. B. 684. So, there is no implied authority in a director of a joint stock company, not being a trading partnership, to accept bills on the part of the directors of the company. *Bramah v. Roberts*, 3 Bing. N. C. 963; 6 L. J. C. P. 346. Nor is there any implied authority to the directors of a mining company to bind the shareholders by making notes or accepting bills. *Dickinson v. Valpy*, 10 B. & C. 128; 8 L. J. (O. S.) K. B. 51. But if it be shown to be necessary from the very nature of the company, or usual in similar companies, to draw and accept bills, it would be reasonable that the directors should have such powers, and the law would imply it. *Per Bosanquet, J., Id.*

After a partnership is proved, the admission of one partner that he accepted the bill in the name of the firm will be proof of the acceptance as against all. *Hodenpyl v. Vingerhoed, per Abbott, C.J., MSS.*; Chitty on Bills, 11th ed. 415; see 53 & 54 V. c. 39, s. 15.

A railway company incorporated in the usual manner, cannot draw, accept or indorse bills. *Bateman v. Mid Wales Ry.*, 35 L. J. C. P. 205; L. R. 1 C. P. 499. Nor, has a company incorporated under the Companies Act, 1908, this power, unless it is, at any rate impliedly, given by the memorandum and articles of association. *Peruvian Ry. v. Thames and Mersey Marine Insurance Co.*, 36 L. J. Ch. 864; L. R. 2 Ch. 617. But where a company have the power, and represent that they have exercised it, they cannot afterwards set up an informality in the execution of the power. *Ex pte. Overend, Gurney & Co.*, 39 L. J. Ch. 27; L. R. 4 Ch. 460.

The power of registered companies to make or accept notes and bills is regulated by statute.

Acceptance by agent.] By sect. 26, an agent will be personally liable to third persons by drawing, indorsing, or accepting in his own name, unless he unequivocally show on the face of the writing that he signs only in a ministerial capacity. Thus, a bill was drawn, "Pay to J. S. or order £200, value received, and place same to account of Y. B. Co., as per advice from C. M. to H. B." (the defendant), "cashier of the Y. B. Co.," and the defendant wrote, "Accepted per H. B.;" it was held that defendant was personally liable, although he accepted by direction of the company. *Thomas v. Bishop*, 2 Str. 855. So, where an agent to a country branch of a London bank, to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name a bill for the amount upon the firm in London, he was held liable, although the plaintiff knew he was agent only. *Leadbitter v. Farrow*, 5 M. & S. 345. Where a bill was directed "to the A. C. Mining Co.," and was accepted in his own name "for the A. C. Mining Co.," by one of the managing partners who had no authority to sign for the rest, it was held that on proof of his being partner in the adventure he was liable on the acceptance. *Owen v. Van Uster*, 10 C. B. 318; 20 L. J. C. P. 61. So, where a bill was directed

to "J. D., purser of W. D. Mining Co.," being an unincorporated company, and the acceptance was "J. D., *per pro.* W. D. Mining Co.," held that J. D. was personally liable; being himself a shareholder, and not authorized to bind the rest; and this, although at the time of acceptance he notified to the plaintiffs, the drawers, his intention not to be personally bound. *Nicholls v. Diamond*, 9 Ex. 154; 23 L. J. Ex. 1. And where a bill directed to a person who was only purser and not an adventurer, purported to be in payment for goods supplied to the company, and the drawee accepted it "for the company, W. C., purser," he was held liable; for the bill was not directed to the company, and therefore could not be accepted by, or by procuration for them, and the acceptance "for the company" was not inconsistent with an intention on the part of the defendant to bind himself; and, being at utmost only ambiguous, must be taken to be operative against him. *Mare v. Charles*, 5 E. & B. 978; 25 L. J. Q. B. 119. *Semble*, if the acceptance had been "*per procuration*," it would have been inoperative. S. C.

If the acceptance be by an agent, his authority and handwriting must be proved. If it be within his authority, his abuse of the power will not affect a *bonâ fide* holder for value. *Bryant, &c. (Lord) v. Quebec Bank*, 62 L. J. P. C. 68; [1893] A. C. 170; see also *Hambro v. Burnand*, 73 L. J. K. B. 669; [1904] 2 K. B. 10. An admission by defendant of his liability on another bill, accepted by the same agent, is confirmatory evidence, after other proof, of a general authority. *Llewellyn v. Winckworth*, 13 M. & W. 598; 14 L. J. Ex. 329. But *semb.*, it would not be evidence *per se*. S. C. As to signature by procuration, see sect. 25, and *Reid v. Rigby*, 63 L. J. Q. B. 451; [1894] 2 Q. B. 40, and *Morison v. London County and Westminster Bank*, 83 L. J. K. B. 1202; [1914] 3 K. B. 356. If an agent, as apparent principal, carry on a business for another, to which business the drawing or accepting bills is incidental, the principal cannot, by secret instructions to his agent, divest the latter of the power of drawing and accepting bills. *Edmunds v. Bushell*, 35 L. J. Q. B. 20; L. R. 1 Q. B. 97. Proof that the defendant's wife conducted his business and had applied the proceeds of the bill in payment of debts incurred in the business, and absence of any proof by whom the defendant's name was written as acceptor, is no evidence that the defendant had sanctioned the acceptance. *Goldstone v. Tovey*, 6 Bing. N. C. 98. Proof of an acceptance by the wife, in her own name, of a bill drawn on her husband, and that he, after looking at it, promised to pay, saying he knew all about it, is evidence that he authorized this mode of acceptance, and he is bound by it. *Lindus v. Bradwell*, 5 C. B. 583; 17 L. J. C. P. 121. The manager of a co-partnership has not, as such manager, authority to sign the name of the firm. *Beveridge v. Beveridge*, L. R. 2 H. L. Sc. 183.

Proof of acceptance by admission.] By sect. 21 (1), where an acceptance is written on a bill, notice by the drawee to the person entitled thereto, that he has accepted it, makes the acceptance complete and irrevocable. By sect. 24, subject to the provisions of the Act, a forged or unauthorized signature is wholly inoperative unless the party against whom it is sought to enforce payment of the bill is precluded (see sect. 54 (2)), from setting up the forgery or want of authority. But this it not to "affect the ratification of an unauthorized signature not amounting to a forgery." It seems, therefore, that a forged acceptance cannot be ratified, except, perhaps, in a case falling within sect. 21 (1). See *Brook v. Hook*, 40 L. J. Ex. 50; L. R. 6 Ex. 89. The defendant paid a bill of exchange (of which the plaintiff was holder) on which his acceptance had been forged. In an action against him on another bill similarly accepted, the jury found that the signature was not made by the defendant's authority, nor had he adopted it; that the defendant did not know that the plaintiff was the holder of the former bill, nor did he lead the plaintiff to believe that the acceptance was his. It was held that the payment by him of the former

bill did not estop the defendant from denying the authority to accept. *Morris v. Bethell*, L. R. 5 C. P. 47. See also *M'Kenzie v. British Linen Co.*, 6 App. Cas. 82.

Where in an action against the acceptor of a bill, his attorney gave a notice to produce all papers relating to the bill, describing it, and adding, "and which said bill was accepted by the said defendant," the notice was held to be *prima facie* evidence of the acceptance. *Holt v. Squire*, Ry. & M. 282.

Acceptance before drawing.] As to acceptance of a bill before it is filled in, see sect. 20. The Statute of Limitations is no defence to an action by a holder in due course; *vide* sect. 29; though the drawer issued the bill improperly after a lapse of twelve years. *Montague v. Perkins*, 22 L. J. C. P. 187. And even although a smaller sum is expressed in figures on the margin of the bill, yet if these be altered and the blank filled in to the full amount covered by the stamp, the acceptor is liable to that amount to a holder in due course. *Garrard v. Lewis*, 10 Q. B. D. 30.

Where an acceptance has been given for valuable consideration with the drawer's name alone in blank, the latter can be added after the death of the acceptor. *Carter v. White*, 54 L. J. Ch. 138; 25 Ch. D. 666.

And it is immaterial that the names of the drawer and indorsee are forgeries or fictitious. *L. & S. W. Bank v. Wentworth*, 49 L. J. Ex. 657; 5 Ex. D. 96.

But where A. merely writes a blank acceptance, he will not be liable thereon even at the suit of a *bona fide* holder for value, unless A. issued the acceptance, intending it to be filled up so as to become a complete bill. *Baxendale v. Bennett*, 47 L. J. Q. B. 624; 3 Q. B. D. 525. In *Lawson's Executors v. Watson*, [1907] S. C. 1353, a document in the form of a bill of exchange with no drawer's signature but merely the signature of the acceptor was held not to be a completed bill of exchange but to be evidence of the acceptor's indebtedness to the executors of the person to whom he had delivered it.

It is a material alteration, which avoids the bill, at any rate as between the immediate parties, to insert words before the acceptance making the bill payable at a particular place. *Hanbury v. Lovett*, 28 L. T. 366. And it seems that where the holder of a bill, accepted in blank, has taken it from the drawer with knowledge of it having been so accepted, he will have no better title than the drawer had. *Hatch v. Searles*, 2 Sm. & Giff. 147; aff. 24 L. J. Ch. 22. See further as to acceptance in blank, *Hogarth v. Latham*, 47 L. J. Q. B. 339; 3 Q. B. D. 643.

Semble the proviso in sect. 20 (2), applies to an instrument negotiated to a holder in due course, but not to one issued only, *vide* sect. 2, to such holder. *Herdman v. Wheeler*, 71 L. J. K. B. 270; [1902] 1 K. B. 361. *Lewis v. Clay*, 67 L. J. Q. B. 224; but see the contrary view expressed by Moulton, L.J. in *Lloyd's Bank v. Cooke*, *infra*. Apart from that section the apparent acceptor may be estopped from denying the acceptance. *Lloyd's Bank v. Cooke*, 76 L. J. K. B. 666; [1907] 1 K. B. 794. There B. was entrusted by A. with a blank stamped piece of paper signed by A. and was authorised to fill it up as a promissory note for a certain amount. B. fraudulently filled up the paper as a promissory note for a larger amount and obtained by means of it an advance of that amount from the plaintiffs, who had no notice of the fraud. A. was held estopped from denying the validity of the note as between himself and the plaintiffs and was liable for the full amount. With that case compare *Smith v. Prosser*, 77 L. J. K. B. 71; [1907] 2 K. B. 735. There, the defendant gave two persons a power of attorney to act for him in his absence, and, in anticipation of funds being required while he was away, he signed his name to two blank unstamped pieces of paper, which were lithographed forms of promissory notes, and handed them to one of the two persons to be retained till he should give instructions for their issue as promissory

notes. The person to whom the pieces of paper were entrusted, without waiting for instructions and in fraud of the defendant filled up the notes for considerable sums and sold them to the plaintiff, who took them in good faith and without notice of the fraud. It was held that as the defendant handed the notes to his agent as custodian only, and not with the intention that they should be issued as negotiable instruments, he was not estopped from denying the validity of the notes as between himself and the plaintiff.

Presentment for payment.] Proof of presentment is necessary against the acceptor on a qualified acceptance, but not on a general acceptance, even where the bill is payable on demand. *Rumball v. Ball*, 10 Mod. 38; *Norton v. Ellam*, 2 M. & W. 461; 6 L. J. Ex. 121. If the bill or note be payable after sight, it must be presented in order to charge the acceptor or maker. *Dixon v. Nuttall*, 1 C. M. & R. 307; 3 L. J. Ex. 290; and see sect. 54 (1). But by sect. 52 (2), the acceptor is not in general discharged by non-presentation of the bill to him on the day it matures. By sect. 10 (1) (a), a bill payable at sight is payable on demand.

Evidence under money claims.] In an action by payee against acceptor if the plaintiff be also the drawer, the bill will be evidence of money had and received; *Thompson v. Morgan*, 3 Camp. 101; or on an account stated; *Rhodes v. Gent*, 5 B. & A. 245; but not where the payees or holders are third persons. *Semb., Early v. Bowman*, 1 B. & Ad. 889; 9 L. J. (O. S.) K. B. 156. An acknowledgment of his acceptance by the defendant to the holder is evidence of an account stated between them. *Per Bayley, J., Leaper v. Tatton*, 16 East, 423; *Higmore v. Primrose*, 5 M. & S. 65.

Acceptance, effect of, in accrediting the drawing.] Sect. 54 (2) defines the effect of an acceptance in admitting the drawing. For this purpose it matters not that the bill is accepted in blank; *L. & S. W. Bank v. Wentworth*, 49 L. J. Ex. 657; 5 Ex. D. 96. So an acceptor for the honour of the drawer is estopped from disputing the drawer's signature. *Phillips v. Im Thurn*, 18 C. B. (N. S.) 694; 35 L. J. C. P. 220; L. R. 1 C. P. 463.

Indorsee against Acceptor.

In this action the plaintiff may be put to prove the indorsements alleged, besides the facts required to be proved in an action by the payee.

Indorsement—Statute.] Sect. 2. "Indorsement means an indorsement completed by delivery."

Sect. 8. "(1.) When a bill contains words prohibiting transfer, or indicating an intention that it should not be transferable, it is valid as between the parties thereto, but is not negotiable.

"(2.) A negotiable bill may be payable either to order or to bearer.

"(3.) A bill is payable to bearer which is expressed to be so payable, or on which the only or last indorsement is an indorsement in blank.

"(4.) A bill is payable to order which is expressed to be so payable, or which is expressed to be payable to a particular person, and does not contain words prohibiting transfer, or indicating an intention that it should not be transferable.

"(5.) Where a bill, either originally or by indorsement, is expressed to be payable to the order of a specified person, and not to him or his order, it is nevertheless payable to him or his order at his option."

As to restraining negotiability of bill, *vide* sects. 34 (4) and 36 (1).

Sect. 31. "(1.) A bill is negotiated when it is transferred from one person to another in such a manner as to constitute the transferee the holder of the bill.

“(2.) A bill payable to bearer is negotiated by delivery.

“(3.) A bill payable to order is negotiated by the indorsement of the holder completed by delivery.

“(4.) Where the holder of a bill payable to his order transfers it for value without indorsing it, the transfer gives the transferee such title as the transferor had in the bill, and the transferee in addition acquires the right to have the indorsement of the transferor.

“(5.) Where any person is under obligation to indorse a bill in a representative capacity, he may indorse the bill in such terms as to negative personal liability.”

Sect. 32. “An indorsement, in order to operate as a negotiation, must comply with the following conditions, namely:—

“(1.) It must be written on the bill itself and be signed by the indorser.

The simple signature of the indorser on the bill, without additional words, is sufficient.

“An indorsement written on an allonge, or on a ‘copy’ of a bill issued or negotiated in a country where ‘copies’ are recognized, is deemed to be written on the bill itself.

“(2.) It must be an indorsement of the entire bill. A partial indorsement, that is to say, an indorsement which purports to transfer to the indorsee a part only of the amount payable, or which purports to transfer the bill to two or more indorsees severally, does not operate as a negotiation of the bill.

“(3.) Where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others.” In the case of dividend warrants the rule is otherwise, *vide* sect. 97 (3) (d).

“(4.) Where, in a bill payable to order, the payee or indorsee is wrongly designated, or his name is mis-spelt, he may indorse the bill as therein described, adding, if he think fit, his proper signature.

“(5.) Where there are two or more indorsements on a bill, each indorsement is deemed to have been made in the order in which it appears on the bill, until the contrary is proved.

“(6.) An indorsement may be made in blank or special. It may also contain terms making it restrictive.”

Sect. 33. “Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not.”

Sect. 34. “(1.) An indorsement in blank specifies no indorsee, and a bill so indorsed becomes payable to bearer.

“(2.) A special indorsement specifies the person to whom, or to whose order the bill is to be payable.

“(3.) The provisions of this act relating to a payee apply with the necessary modifications to an indorsee under a special indorsement.”

“(4.) When a bill has been indorsed in blank, any holder may convert the blank indorsement into a special indorsement by writing above the indorser's signature a direction to pay the bill to or to the order of himself or some other person.”

Sect. 35. “(1.) An indorsement is restrictive which prohibits the further negotiation of the bill or which expresses that it is a mere authority to deal with the bill as thereby directed and not a transfer of the ownership thereof, as, for example, if a bill be indorsed ‘Pay D. only,’ or ‘Pay D. for the account of X.,’ or ‘Pay D. or order for collection.’

“(2.) A restrictive indorsement gives the indorsee the right to receive payment of the bill and to sue any party thereto that his indorser could have sued, but gives him no power to transfer his rights as indorsee unless it expressly authorize him to do so.

“(3.) Where a restrictive indorsement authorizes further transfer, all subsequent indorsees take the bill with the same rights and subject to the same liabilities as the first indorsee under the restrictive indorsement.”

Sect. 36. "(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise."

Sect. 37 relates to the negotiation of a bill to a party liable thereon.

Sect. 38 defines the rights and powers of the holder of a bill.

Indorsement, how proved.] It appears from sects. 21 and 32 (1) that "indorsement" in general implies the writing of the holder's name on the bill and the delivery thereof to the alleged indorsee as indorsee; "delivery" is defined by sect 2; as to the requisites of valid delivery, see sect. 21 (2, 3). As against the acceptor it is not necessary that the indorser should intend to guarantee the indorsee, if the acceptor make default. See *Denton v. Peters*, L. R. 5 Q. B. 475, 477, and *Smith v. Johnson*, 27 L. J. Ex. 363; 3 H. & N. 222. The delivery need not be personal. Thus, if a general agent for the indorsee, being indebted to him, indorse and deposit a bill among other securities of the indorsee in his custody, it is sufficient. *Lysaght v. Bryant*, 9 C. B. 46; 19 L. J. C. P. 160. So, where A. indorsed a bill in blank and delivered it to the plaintiff, the manager of a bank, for value received from the bank, and the plaintiff, by direction of the directors of the bank, sued the acceptor upon it; it was held that those facts proved an indorsement to the plaintiff, inasmuch as an indorsement in blank enables the indorsee to hand it over and give title to any one to sue. *Law v. Parnell*, 7 C. B. (N. S.) 282; 29 L. J. C. P. 17; *Ancona v. Marks*, 7 H. & N. 686; 31 L. J. Ex. 163. But, there must be a delivery with intent to transfer the property, and, if the indorsed bill be delivered to an agent for a special purpose only, and he part with it improperly, this will not be an indorsement except in the hands of a *bonâ fide* holder for value; *Marston v. Allen*, 8 M. & W. 494; 11 L. J. Ex. 122; *Barber v. Richards*, 6 Ex. 63; 20 L. J. Ex. 135; and therefore, where the bill was delivered by such agent to plaintiff when overdue without consideration, it was held no indorsement. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J. Q. B. 1.

An indorsement made in France of a bill drawn, accepted and made payable in England, is good, if made according to English law. *Lebel v. Tucker*, L. R. 3 Q. B. 77; 37 L. J. Q. B. 46. And see sect. 72 (2). So, where the bill was also drawn in France, and there indorsed to an Englishman in England. *Smallpage and Brandon's Cases*, 30 Ch. D. 598; 55 L. J. Ch. 116. But the indorsement of a French promissory note must be made according to French law to enable the indorsee to sue in England; *Trimbey v. Vignier*, 1 Bing. N. C. 151; 3 L. J. C. P. 246; so in the case of a French bill, even though accepted in England. *Bradlaugh v. De Rin*, L. R. 3 C. P. 538; 37 L. J. C. P. 318. This seems to have been assumed by the Ex. Ch. on appeal in this case, though they reversed the judgment on the ground that the C. P. had proceeded on an erroneous view of the law of France; and the court intimated that the judgment in *Trimbey v. Vignier*, *supra*, was wrong, on the same ground. L. R. 5 C. P. 473; 39 L. J. C. P. 254.

By sect. 54 (2) the acceptor is precluded from denying to a holder in due course the capacity of the payee to indorse, but not the genuineness or validity of his indorsement. Thus, where a bill is drawn by a partner in the name of his firm, his authority to indorse is not admitted by acceptance. *Garland v. Jacomb*, L. R. 8 Ex. 216. So, where a bill payable to the drawer's own order was drawn and indorsed by procuration by the same person, it was held that the acceptance only admitted the drawing by procuration and not the indorsing. *Robinson v. Yarrow*, 7 Taunt. 455. But, where the drawing and indorsement are both forgeries, and the acceptor, with knowledge of this, negotiates the bills, he cannot dispute the regularity of the indorsement. *Beeman v. Duck*, 11 M. & W. 251; 12 L. J. Ex. 198. It seems that under the Crim. P. Act, 1865, s. 8, an indorsement might be proved by comparing it with the drawer's signature, which the acceptor is estopped from denying; and that as an authority to draw bills is some evidence of an authority to indorse also, see *Prescott v. Flinn*, *infra*,

the indorsement might be so proved, even when both signatures are *per* procuracy.

By sect. 7 (3), where the payee is a fictitious or non-existing person, the bill may be treated as payable to bearer.

Where there was no proof of the handwriting of one of the indorsers, but it appeared that the indorsement was upon the bill when the defendant accepted it, and that he promised to pay it, Ryder, C.J., left the case to the jury, who found for the plaintiff, and the court refused a new trial. *Hankey v. Wilson*, Sayer, 223. So, an offer made by the acceptor to pay a bill with certain names on it, is a sufficient admission of the plaintiff's title, so as to supersede the necessity of proof of each person's handwriting. *Bosanquet v. Anderson*, 6 Esp. 43. But, where the bill was shown to the defendant with the name of the payee indorsed upon it, and the defendant merely objected to the want of consideration, it was ruled that that did not supersede the necessity of proving the indorser's handwriting. *Duncan v. Scott*, 1 Camp. 101. An admission of his handwriting by the indorser, though evidence against himself, is not evidence of indorsement in an action against the acceptor. *Hemings v. Robinson*, Barnes, 436.

Indorsement by agent.] When the indorsement is by an agent, it is necessary to show that the person by whom the indorsement was written had the authority of the person whose name is written. In such a case an authority to draw does not of itself import an authority to indorse bills; but it is a fact which ought to go to the jury as evidence. The clerk of the payees of a bill having been accustomed to draw cheques for them, and in one instance authorized to indorse a bill, and two other bills indorsed by him having been discounted at the payee's bankers, and the proceeds received by them—these facts were held evidence that the clerk had a general authority to indorse. *Prescott v. Flinn*, 9 Bing. 19; 1 L. J. C. P. 145. A power to A. to indorse and negotiate bills remitted to G. will not authorize the indorsement of a bill remitted to G. for a special purpose, and which G. could not have applied to his own use without fraud; and though the indorsement by G. himself would have transferred a good title to a *bonâ fide* holder, the indorsement by A. in G.'s name does not. *Fearn v. Filica*, 7 M. & Gr. 513; 14 L. J. C. P. 15. Where a bill payable to the drawer's order is handed by him to another, for a good consideration, with the intention of transferring the property to him, but the drawer omits to indorse it, the transferee has no authority to indorse by procuracy in the drawer's name. *Harrop v. Fisher*, 10 C. B. (N. S.) 196; 30 L. J. C. P. 283. A farm bailiff, accustomed to pay and receive all moneys for his employer, has no implied authority to draw or indorse bills in the name of his principal. *Davidson v. Stanley*, 2 M. & Gr. 721. Though a wife, who carries on business for her husband, may be presumed to have authority to indorse in his name, yet an indorsement in her own name by a *feme covert* of a bill payable to her order, formerly conveyed no interest if without her husband's consent; *Barlow v. Bishop*, 1 East, 432; *aliter*, if the indorsement be made with the husband's consent; *Prestwick v. Marshall*, 7 Bing. 565. But under the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 1, a married woman can indorse a bill of exchange payable to her. If the maker promise to pay a note, with the indorsement of a married woman upon it, it may be presumed as against him that she had authority from her husband to indorse it in her own name; *Cotes v. Davis*, 1 Camp. 485; recognised in *Prestwick v. Marshall*, *supra*; *Prince v. Brunatte*, 1 Bing. N. C. 435; 4 L. J. C. P. 90; and *Lindus v. Bradwell*, 5 C. B. 583; 17 L. J. C. P. 121; but, it is to be observed that, as she was the payee, the defendant, as maker, was estopped, without any promise, from disputing her capacity to indorse; see sect. 54 (2) (c). Where the wife, who managed all the money part of the business, had power to indorse in the husband's name, it may be left to the jury to say whether the power authorized an indorsement by her daughter, in her presence, and by her direction. *Lord*

v. *Hall*, 8 C. B. 627; 19 L. J. C. P. 47. A power to A. to draw or indorse in B.'s name may be exercised by a clerk of A. by his direction. *Ex parte Sutton*, 2 Cox, 84, cited *per cur.* in the last case. By sect. 32 (3), "where a bill is payable to the order of two or more payees or indorsees who are not partners, all must indorse, unless the one indorsing has authority to indorse for the others."

A partner may indorse for the whole firm by procuracy. *Williamson v. Johnson*, 1 B. & C. 146; 1 L. J. (O. S.) K. B. 65. Where a bill of exchange indorsed to H. & F. was indorsed by H. & F. by procuracy of J. D., a partner in the firm of H. & Co., who managed the business of the firm, and it was proved that J. D. was in the habit of indorsing bills in that manner, although there was no such person as F. in the firm of H. & Co., the indorsee was held to have a good title. S. C. A partner has no implied authority to indorse a bill in the name of the partnership as security for his private debt; and the acceptor is not estopped by his acceptance from showing this want of authority. *Garland v. Jaomb*, L. R. 8 Ex. 216. On the dissolution of a partnership a power, given to one of the partners to receive and pay debts, does not authorize him to indorse a bill in the name of the partnership; and, the partnership being dissolved, he has no general authority to do so. *Kilgour v. Finlyson*, 1 H. Bl. 155. But a retiring partner may orally give his late partners authority to indorse existing securities; and a statement by the ex-partner that he has left the assets and securities in the hands of the continuing partners, and that he has no objection to their using the partnership name, is evidence from which a jury may infer an authority to indorse. *Smith v. Winter*, 4 M. & W. 454; 8 L. J. Ex. 34. The Partnership Act, 1890 (53 & 54 V. c. 39), s. 6, does not affect any general rule of law relating to the power to indorse.

Date of indorsement.] By sect. 36, "(4) except where an indorsement bears date after the maturity of the bill, every negotiation is *prima facie* deemed to have been effected before the bill was overdue." A bill is presumed to be issued when dated. *Anderson v. Weston*, 6 Bing. N. C. 296; 9 L. J. C. P. 194. But the date of an indorsement cannot be inferred from the date of the drawing; and if it be material, plaintiff should be prepared to prove it, either directly or by inference from circumstances. *Rose v. Rowcroft*, 4 Camp. 245.

Proof of mesne indorsements.] All the indorsements that have been stated, though unnecessarily, must (if traversed) be proved as against acceptor. *Waynam v. Bend*, 1 Camp. 175. But an offer by the acceptor to the holder to give another bill was held by Ld. Ellenborough an admission to the holder's title, and of the defendant's liability, and so dispensed with proof of the mesne indorsements. *Bosanquet v. Anderson*, 6 Esp. 43. By sect. 8 (4), where a bill of exchange is not drawn payable to bearer, it now only becomes so when the *last* or *only* indorsement is in blank; hence it is not, as it formerly was, sufficient to prove an indorsement in blank, if there is a subsequent special indorsement. See *Smith v. Clarke*, Peake, 225; *Walker v. Macdonald*, 2 Ex. 527; 17 L. J. Ex. 377. In an action by the indorsee of a bill against the acceptor, the first count stated all the indorsements; the second count an indorsement by the payee to the plaintiff; Abbott, C.J., said that all the indorsements must be proved or struck out, though not stated in the declaration; and this need not be done before the trial. *Cocks v. Borrodale*, Chitty on Bills, 11th ed. 409. Indorsements may be struck out, even after the bill has been read in evidence and objected to on the ground of the omission to state them in the statement of claim. *Mayer v. Jadis*, 1 M. & Rob. 247. By striking out intermediate indorsements, the plaintiff loses the security of those indorsers.

Title of the plaintiff as indorsee.] Sects. 21, 29, and 30 define the conditions necessary to entitle the plaintiff to sue as indorsee. When a

bill is indorsed in blank, possession is sufficient *prima facie* title; and several plaintiffs, suing as indorsees, need not prove that they are in partnership, or that the bill was indorsed to them jointly. *Ord v. Portal*, 3 Camp. 239; *Rordasz v. Leach*, 1 Stark. 446; *Attwood v. Rattenbury*, 6 B. Moore, 579. But, where it is specially indorsed to a firm, the partnership must be proved to consist of the plaintiffs. 3 Camp. 240, n. Where the plaintiffs sue in a particular capacity, as trustees of a bankrupt, and allege an indorsement to them as such trustees, they must prove that the bills were indorsed to them in that capacity. *Bernasconi v. Argyle (Duke)*, 3 C. & P. 29. On a traverse of the indorsement to the plaintiff the defendant may show that the right to sue on it as indorsee is in other persons, and not in the plaintiff, though the indorsement is in blank. *Machell v. Kinnear*, 1 Stark. 499. In that case the plaintiffs were trustees of the estate of H., an insolvent; two of them were partners in the firm of L. & Co., but one was a stranger; the defendant sent the bill indorsed by him in blank to L. & Co., on account of H.'s estate; on objection being taken, *Ld. Ellenborough* held that, on these circumstances being shown, it was necessary for the plaintiffs to show that L. & Co. had transferred the bill to the plaintiffs, or had authorized them to sue. The defendant might also show that, though indorsed in blank, it was never delivered to the plaintiff as indorsee, but only as agent for another; *Adams v. Jones*, 12 Ad. & E. 455; 9 L. J. Q. B. 407; or had been delivered to the plaintiff on a condition which had not been complied with. *Bell v. Ingestre*, 12 Q. B. 317; 19 L. J. Ex. 71; *Dawson v. Isle*, 75 L. J. Ch. 338; [1906] 1 Ch. 633. So, on a traverse of a previous indorsement by A. to B., it might have been shown that A. had delivered it to B. as agent only, and B. had indorsed it in fraud of the true owner, with the plaintiff's privity. *Marston v. Allen*, 8 M. & W. 494; 11 L. J. Ex. 122. Again, where the payee indorsed specially to M., and handed it to him to get discounted, and he indorsed it to plaintiff without value when overdue, it was held on a traverse of the indorsement from the payee to M. that the defendant was entitled to the verdict. *Lloyd v. Howard*, 15 Q. B. 995; 20 L. J. Q. B. 1. But, in many of the above cases, the defence must now be pleaded specially. See Rules, 1883, O. xix. r. 15. And, where the plaintiff was a *bonâ fide* holder for value, on a traverse of the indorsement by A., the payee, to a previous indorser, B., the defendant could not show that A. delivered the bill for a particular purpose, and B. fraudulently negotiated it. *Hayes v. Caulfield*, 5 Q. B. 81. So, where E. indorsed a bill in blank, and delivered it to B. to get discounted, and he deposited it with T. for value received by himself, it was held that this proved an indorsement from E. to T.; *Barber v. Richards*, 6 Ex. 63; 20 L. J. Ex. 135; for, if the holder put his name on the back of a bill, and deliver it to his agent for a particular purpose, and he deliver it to a third person for value, that is an indorsement from the holder to such third person. *Per Parke, B., Ibid.* Nor is it any answer, on a denial of the indorsement, that it was indorsed to the plaintiff by the directors of a company (intermediate indorsees), who had no authority to indorse; for it is enough if the indorsement give a title to the bill, though the company may not be bound by such indorsement. *Smith v. Johnson*, 3 H. & N. 222; 27 L. J. Ex. 363. See also *Denton v. Peters*, L. R. 5 Q. B. 477, 479. An indorsement in blank by the maker of a note, and a delivery by his executor to the plaintiff, is no indorsement to the plaintiff so as to give him a title to sue. *Bromage v. Lloyd*, 1 Ex. 32; 16 L. J. Ex. 257. As to restricting the negotiability of a bill by the acceptance, see *Meyer v. Decroix*, 61 L. J. Q. B. 205; [1891] A. C. 520.

Evidence under money claims.] Although an acceptance has been said to be evidence of money had and received by the acceptor to the use of the holder (*Bayley on Bills*, 6th ed. 363), yet, on principle, it can be available upon the money claims only where there is privity; as, where the parties on the record are immediate parties on the bill, or there has been a promise to

pay, an account actually stated or acknowledgment of liability; and the later authorities are to that effect. *Waynam v. Bend*, 1 Camp. 175; *Eales v. Dicker*, M. & M. 324.

Drawer against Acceptor.

When a bill, though not payable on the drawer's own order, has been dishonoured by the acceptor, and taken up by the drawer, he may sue the acceptor; *Simmonds v. Parminter*, 1 Wils. 185; and in such action may be obliged by proper defences to prove: 1. The acceptance; 2. The presentment to the defendant, and his refusal to pay, which may be done by calling the person who presented the bill, or by proving a promise by the defendant to pay, which dispenses with proof of the presentment; and 3. The return of the bill to, and payment thereof by, the plaintiff. To prove the latter fact, it has been held not sufficient to produce the bill with a general receipt on the back of it from the then holder; for the receipt *prima facie* imports that the bill was paid by the acceptor. *Scholey v. Walsby*, Peake, 25. But the legitimacy of this last presumption is doubtful; *per cur.* in *Phillips v. Warren*, 14 M. & W. 379; 14 L. J. Ex. 280.

Payee or Indorsee against Drawer.

In an action by the payee or indorsee against the drawer, the plaintiff may have to prove: 1. The drawing of the bill; 2. Presentment to the drawee for acceptance or to acceptor for payment; 3. His default; 4. Due notice to the defendant of the default or dishonour; and 5. In the case of an indorsee, the indorsements.

Drawing—Statute.] Sect. 55. “(1.) The drawer of a bill by drawing it—(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken.”

Sect. 16. “The drawer of a bill, and any indorser, may insert therein an express stipulation—

“(1.) Negating or limiting his own liability to the holder:

“(2.) Waiving as regard himself some or all of the holder's duties.”

By sect. 72 (1), when a bill is payable abroad, the obligations of the acceptor, and therefore of the drawer and indorsers, are regulated by *lex loci* of performance of contract.

Proof of the drawing.] The drawing of the bill, when traversed, must be proved by evidence of the drawer's handwriting; or, if drawn by an agent, by proving the authority of the agent and his handwriting. A farm bailiff, intrusted to pay and receive money, has not any implied authority to bind his principal by drawing bills. *Davidson v. Stanley*, 2 M. & Gr. 721. If drawn in the name of a partnership, the partnership must be proved, and the handwriting of the partner who drew the bill.

Presentment to drawee for acceptance—Statute.] Sect. 39. “(1.) Where a bill is payable after sight, presentment for acceptance is necessary in order to fix the maturity of the instrument.

“(2.) Where a bill expressly stipulates that it shall be presented for acceptance, or where a bill is drawn payable elsewhere than at the residence or place of business of the drawee, it must be presented for acceptance before it can be presented for payment.

“(3.) In no other case is presentment for acceptance necessary in order to render liable any party to the bill.

“(4.) Where the holder of a bill, drawn payable elsewhere than at the place of business or residence of the drawee, has not time, with the exercise of reasonable diligence, to present the bill for acceptance before presenting it for payment on the day that it falls due, the delay caused by presenting the bill for acceptance before presenting it for payment is excused, and does not discharge the drawer and indorsers.”

Sect. 40. “(1.) Subject to the provisions of this act, when a bill payable after sight is negotiated, the holder must either present it for acceptance or negotiate it within a reasonable time.

“(2.) If he do not do so, the drawer and all indorsers prior to that holder are discharged.

“(3.) In determining what is a reasonable time within the meaning of this section, regard shall be had to the nature of the bill, the usage of trade with respect to similar bills, and the facts of the particular case.”

Sect. 41. “(1.) A bill is duly presented for acceptance which is presented in accordance with the following rules:—

“(a.) The presentment must be made by or on behalf of the holder to the drawee or to some person authorized to accept or refuse acceptance on his behalf at a reasonable hour on a business day and before the bill is overdue:

“(b.) Where a bill is addressed to two or more drawees, who are not partners, presentment must be made to them all, unless one has authority to accept for all, then presentment may be made to him only:

“(c.) Where the drawee is dead, presentment may be made to his personal representative:

“(d.) Where the drawee is bankrupt, presentment may be made to him or to his trustee:

“(e.) Where authorized by agreement or usage, presentment through the post office is sufficient.

“(2.) Presentment in accordance with these rules is excused, and a bill may be treated as dishonoured by non-acceptance—

“(a.) Where the drawee is dead or bankrupt, or is a fictitious person, or a person not having capacity to contract by bill:

“(b.) Where after the exercise of reasonable diligence, such presentment cannot be effected:

“(c.) Where, although the presentment has been irregular, acceptance has been refused on some other ground.

“(3.) The fact that the holder has reason to believe that the bill, on presentment, will be dishonoured, does not excuse presentment.”

Sect. 42. “(1.) When a bill is duly presented for acceptance, and is not accepted within the customary time, the person presenting it must treat it as dishonoured by non-acceptance. If he do not, the holder shall lose his right of recourse against the drawer and indorsers.”

Sect. 43. “(1.) A bill is dishonoured by non-acceptance—

“(a.) when it is duly presented for acceptance, and such an acceptance as is prescribed by this act is refused or cannot be obtained; or

“(b.) when presentment for acceptance is excused and the bill is not accepted.

“(2.) Subject to the provisions of this act, when a bill is dishonoured by non-acceptance, an immediate right of recourse against the drawer and indorsers accrues to the holder, and no presentment for payment is necessary.”

Sect. 44. “(1.) The holder of a bill may refuse to take a qualified acceptance, and if he does not obtain an unqualified acceptance may treat the bill as dishonoured by non-acceptance.

“(2.) Where a qualified acceptance is taken, and the drawer or an indorser has not expressly or impliedly authorized the holder to take a qualified acceptance, or does not subsequently assent thereto, such drawer or indorser is discharged from his liability on the bill.

"The provisions of this sub-section do not apply to a partial acceptance, whereof due notice has been given. Where a foreign bill has been accepted as to part, it must be protested as to the balance.

"(3.) When the drawer or indorser of a bill receives notice of a qualified acceptance, and does not within a reasonable time express his dissent to the holder, he shall be deemed to have assented thereto."

Presentment to drawee for acceptance.] Where a bill, presentment of which for acceptance is not required by sect. 39, has been presented and acceptance refused, due notice of such refusal must be given; *Blessard v. Hirst*, 5 Burr. 2670; *Goodall v. Dolley*, 1 T. R. 712; and all parties entitled to notice are discharged by want of it; S. C.; and are not liable on a subsequent refusal of the drawee to pay; *Roscow v. Hardy*, 12 East, 434; and see sect. 42, *supra*. But by sect. 48 (1) the drawer is not discharged by want of notice of non-acceptance, as against a subsequent holder in due course. It may be observed that what is said by the drawee on the bill being presented is evidence for the plaintiff of want of assets, but not what passed between the drawee and the holder afterwards. *Prideaux v. Collier*, 2 Stark. 57. The bill must be left with the drawee for 24 hours, unless during that time he either accept or refuse to do so; Bayley on Bills, 6th ed. 228; Marius, 3rd ed. 15; *Van Dieman's Land, Bank of, v. Bank of Victoria*, 40 L. J. P. C. 28, 32; L. R. 3 P. C. 526, 543. The drawee may revoke and cancel his acceptance before he parts with the bill. *Cox v. Troy*, 5 B. & A. 474.

It is not sufficient to show that the bill was presented to some person on the drawee's premises without connecting him with the drawee. *Cheek v. Roper*, 5 Esp. 175.

Where the payee delayed for eight months to present a bill drawn in Calcutta to the drawee at Hong Kong, payable sixty days after sight, the drawer was held discharged; *Mullick v. Radakissen*, 9 Moo. P. C. 46; although no actual loss or damage had been caused by the delay, and the parties to it continued solvent. S. C. The holder may, however, put the bill into circulation without presenting it. *Mulman v. D'Eguino*, 2 H. Bl. 565. And the question in such cases is whether, looking at the situation and interests of each holder and drawer, there has been any unreasonable delay on the part of the former in forwarding the bill for acceptance or putting it into circulation. *Mellish v. Rawdon*, 9 Bing. 416; 2 L. J. C. P. 29. In that case a delay of nearly five months on a foreign bill was allowed, the exchange having fallen against the plaintiff immediately after the purchase by him of the bill. See also *Chartered Mercantile Bank of India v. Dickson*, L. R. 3 P. C. 574. With regard to bills payable after eight, drawn by bankers in the country on their correspondents in London, "It does not seem unreasonable," says Ld. Tenterden, "to treat bills of this nature as not requiring immediate presentment, but as being retainable by the holders for the purpose of using them, within a moderate time (for indefinite delay, of course, cannot be allowed), as part of the circulating medium of the country." *Shute v. Robins*, M. & M. 136.

An indorsee presenting a bill for acceptance does not impliedly warrant the genuineness of the drawer's or indorser's signatures. *East India Co. v. Tritton*, 3 B. & C. 280, 291; *Guaranty Trust Co. of New York v. Hannay*, 87 L. J. K. B. 1223, 1228, 1239, 1246; [1918] 2 K. B. 623, 632, 652, 665.

Presentment for payment—Statute.] Sect. 45. "Subject to the provisions of this act a bill must be duly presented for payment. If it be not so presented, the drawer and indorsers shall be discharged.

"A bill is duly presented for payment which is presented in accordance with the following rules:—

"(1.) Where the bill is not payable on demand, presentment must be made on the day it falls due."

"(2.) Where the bill is payable on demand, then, subject to the provisions

of this act, presentment must be made within a reasonable time after its issue in order to render the drawer liable, and within a reasonable time after its indorsement, in order to render the indorser liable."

As to when a bill is payable on demand, see sect. 10.

"In determining what is a reasonable time, regard shall be had to the nature of the bill, the usage of trade with regard to similar bills, and the facts of the particular case.

"(3.) Presentment must be made by the holder or by some person authorized to receive payment on his behalf at a reasonable hour on a business day, at the proper place as hereinafter defined, either to the person designated by the bill as payer, or to some person authorized to pay or refuse payment on his behalf if with the exercise of reasonable diligence such person can there be found.

"(4.) A bill is presented at the proper place :—

"(a.) Where a place of payment is specified in the bill and the bill is there presented.

"(b.) Where no place of payment is specified, but the address of the drawee or acceptor is given in the bill, and the bill is there presented.

"(c.) Where no place of payment is specified and no address given, and the bill is presented at the drawee's or acceptor's place of business if known, and if not, at his ordinary residence if known.

"(d.) In any other case if presented to the drawee or acceptor wherever he can be found, or if presented at his last known place of business or residence.

"(5.) Where a bill is presented at the proper place, and after the exercise of reasonable diligence no person authorized to pay or refuse payment can be found there, no further presentment to the drawee or acceptor is required.

"(6.) Where a bill is drawn upon, or accepted by two or more persons who are not partners, and no place of payment is specified, presentment must be made to them all.

"(7.) Where the drawee or acceptor of a bill is dead, and no place of payment is specified, presentment must be made to a personal representative, if such there be, and with the exercise of reasonable diligence he can be found.

"(8.) Where authorized by agreement or usage a presentment through the post office is sufficient."

Sect. 52. "(4.) Where the holder of a bill presents it for payment, he shall exhibit the bill to the person from whom he demands payment, and when a bill is paid the holder shall forthwith deliver it up to the party paying it."

By sect. 72 (3) presentment of a bill payable abroad must be according to the law of the foreign country.

Presentment for payment.] Presentment must be proved, although the acceptor has become bankrupt or insolvent. *Russel v. Langstaffe*, 2 Dougl. 514; *Esdaille v. Soverby*, 11 East, 114. And, where he is dead, it must be made to a personal representative, sect. 45 (7), *supra*; or, if there be none, at the house of the deceased. *Molloy*, b. 2, c. 10, s. 34; *Chitty on Bills*, 11th ed. 256. See *Smith v. Bank of N. S. Wales*, 41 L. J. Adm. 49, 54; L. R. 4 P. C. 194, 206, 207. But if the bill be accepted payable at a particular place, a presentment at that place, though the acceptor is dead, is enough to charge the drawer. *Philpott v. Bryant*, 3 C. & P. 244, and see sect. 45 (4, 7). Where a bill is accepted by an agent, the drawee being abroad, presentment to the agent must be proved. *Philips v. Astling*, 2 Taunt. 206.

A bill, payable at a banker's, must be presented within banking hours; *Parker v. Gordon*, 7 East, 385; *Elford v. Teed*, 1 M. & S. 28; but, if

presented after, and a servant at the banking-house returns for answer "no orders," it is sufficient; *Garnett v. Woodcock*, 6 M. & S. 44; *Henry v. Lee*, 2 Chitty, 124. Presentment at 8 p.m. at the private residence of a merchant is good. *Barclay v. Bailey*, 2 Camp. 527. So, at the place where the bill is made payable (not being the banker's) between 7 and 8 p.m., though no one be there. *Wilkins v. Jadis*, 2 B. & Ad. 188; 9 L. J. (O. S.) K. B. 173. Presentment to a banker's clerk at the clearing-house is a presentment at the banker's. *Reynolds v. Chettle*, 2 Camp. 596; *Harris v. Packer*, 3 Tyr. 370, n.

Where the bill is directed to a drawee by a certain address and accepted generally, it is enough to present it to an inmate of the house at such address, though the drawee has in the meantime removed. *Buxton v. Jones*, 1 M. & Gr. 83.

An indorsee presenting a bill for payment does not impliedly warrant the genuineness of the drawer's or indorser's signatures. *East India Co. v. Tritton*, 3 B. & C. 280, 291; *Guaranty Trust Co. of New York v. Hannay*, 87 L. J. K. B. 1223, 1228; [1918] 2 K. B. 623, 632.

Presentment—proof of.] A part payment (*Vaughan v. Fuller*, Stra. 1246), or a promise to pay after the bill is due, is *prima facie* evidence as an admission that the bill was duly presented. *Lundie v. Robertson*, 7 East, 231; *Croxon v. Worthen*, 5 M. & W. 5; 8 L. J. Ex. 158.

Presentment delayed or excused—Statute.] By sect. 46, "(1.) Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence.

"(2.) Presentment for payment is dispensed with,—

"(a.) Where, after the exercise of reasonable diligence, presentment, as required by this act, cannot be effected.

"The fact that the holder has reason to believe that the bill will, on presentment, be dishonoured, does not dispense with the necessity for presentment.

"(b.) Where the drawee is a fictitious person.

"(c.) As regards the drawer where the drawee or acceptor is not bound, as between himself and the drawer, to accept or pay the bill, and the drawer has no reason to believe that the bill would be paid if presented.

"(d.) As regards an indorser, where the bill was accepted or made for the accommodation of that indorser, and he has no reason to expect that the bill would be paid if presented.

"(e.) By waiver of presentment, express or implied."

Dishonour by non-payment—Statute.] Sect. 47. "(1.) A bill is dishonoured by non-payment—

"(a.) When it is duly presented for payment and payment is refused or cannot be obtained; or

"(b.) When presentment is excused and the bill is overdue and unpaid.

"(2.) Subject to the provisions of this act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder."

Vide sects. 65 to 68 as to acceptance, and payment for honour.

Notice of dishonour and effect of non-notice—Statute.] Sect. 48. "Subject to the provisions of this act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser, and any drawer or indorser to whom such notice is not given is discharged; Provided that—

"(1.) Where a bill is dishonoured by non-acceptance, and notice of

dishonour is not given, the rights of a holder in due course subsequent to the omission, shall not be prejudiced by the omission.

- ‘ (2.) Where a bill is dishonoured by non-acceptance, and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.’

Notice of dishonour—when sufficient—Statute.] Sect. 49. “ Notice of dishonour, in order to be valid and effectual, must be given in accordance with the following rules :—

- “ (5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill, and intimate that the bill has been dishonoured by non-acceptance or non-payment.
- “ (6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.
- “ (7.) A written notice need not be signed, and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.”

Notice of dishonour—when sufficient.] Proof of *knowledge* of dishonour is not equivalent to proof of *notice*. See *Burgh v. Legge*, 5 M. & W. 418; 8 L. J. Ex. 258; and *Solarte v. Palmer*, 7 Bing. 530; 9 L. J. (O. S.) Ex. 121; 1 Bing. N. C. 194. Where H. is secretary to two companies, whether information he receives as secretary to one company is notice to him as secretary to the other depends on whether it “ comes to him under such circumstances that it is his duty to communicate it to the other company.” *Deep Sea Fishery Co.’s Claim*, 71 L. J. Ch. 321; [1902] 1 Ch. 507; *In re Hampshire Land Co.*, 65 L. J. Ch. 860; [1896] 2 Ch. 743.

Repeated calls at the drawee’s house without effect are not evidence of notice, but may excuse notice altogether, and should be pleaded in excuse. *Allen v. Edmundson*, 2 Ex. 719; 17 L. J. Ex. 291.

If the presentment and notice of dishonour, as proved, be sufficient, the allegations in the statement of claim will be amended by the judge at the trial to meet the facts proved; as where the presentment for payment was stated to have been to the acceptor, and notice of dishonour to the defendant, the judge may amend, by stating—the death of the acceptor, that the defendant was his executor, and a presentment to the defendant for payment; *Caunt v. Thompson*, 7 C. B. 400; 18 L. J. C. P. 125; or the claim may be amended by alleging a waiver of notice; *Killby v. Rochussen*, 18 C. B. (N. S.) 357; *Cordery v. Colville*, 14 C. B. (N. S.) 374; 32 L. J. C. P. 210.

By whom notice should be given.—Statute.] By sect. 49, “ (1.) The notice must be given by or on behalf of the holder or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

“ (2.) Notice of dishonour may be given by an agent either in his own name or in the name of any party entitled to give notice, whether that party be his principal or not.

“ (3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

“ (4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given.”

“ (13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal.”

By whom notice should be given.] A bill was drawn by A., indorsed by him to B., and by him to plaintiff, in whose hands it was dishonoured; plaintiff's attorney gave note of dishonour to A. in due time, either for plaintiff or B., but by mistake stated he applied for payment on behalf of B. (from whom he had no authority), and it was held that the notice was sufficient notwithstanding the misrepresentation. *Harrison v. Ruscoe*, 15 M. & W. 231; 15 L. J. Ex. 110. And, after a bill has in fact been dishonoured, an unequivocal notice that it has been dishonoured is good, if given by a party to the bill, though he had at the time no certain knowledge of the fact. *Jennings v. Roberts*, 4 E. & B. 615; 24 L. J. Q. B. 102. A notice by the holder's solicitor, not stating on whose behalf the notice is given, is sufficient. *Woodthorpe v. Lawes*, 2 M. & W. 109; 6 L. J. Ex. 69.

To whom notice should be given—Statute.] By sect. 49, “(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

“(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

“(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

“(11.) Where there are two or more drawers or indorsers who are not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.”

“(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he give notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.”

By sub-sects. (3, 4) notice given by the holder or indorser enures for the benefit of other persons having remedies on the bill.

To whom notice should be given.] Where the drawers are in partnership, a notice to one is notice to all; and therefore where a bill is drawn by a firm upon one of that firm, and dishonoured, notice of the dishonour need not be given to the firm. *Porthouse v. Parker*, 1 Camp. 82. See also 53 & 54 V. c. 39, s. 16. But it seems that notice to a member of a public company or quasi-corporation is not notice to the company. *Steward v. Dunn*, 12 M. & W. 655, 664; 13 L. J. Ex. 324, 327—8; *Powles v. Page*, 3 C. B. 16; 15 L. J. C. P. 217. The indorser of a dishonoured bill was abroad, but had a house in England, and the bill was shown to his wife there, and payment demanded, and she was also informed of the non-payment; held sufficient. *Cromwell v. Hynson*, 2 Esp. 511; *Housego v. Cowne*, 2 M. & W. 348; 6 L. J. Ex. 110. Where a substituted bill has been given and dishonoured, and the plaintiff sues on the first bill, he need not give notice of the dishonour of the substituted bill, the defendant being no party to it. *Bishop v. Rowe*, 3 M. & S. 362. Presentation at the banking-house where a bill is made payable “in need” by the indorsee is not notice of dishonour to the indorsers. *Ex pte. Prange*, 35 L. J. Ch. 311; L. R. 1 Eq. 1.

Time within which notice must be given.—Statute.] By sect. 49, “(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

“In the absence of special circumstances notice is not deemed to have been given within a reasonable time unless—

“(a.) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

“(b.) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day, then by the next post thereafter.”

(13.) *supra*, regulates the time within which notice must be given by an agent in whose hands a bill of exchange is dishonoured.

“(14.) Where a party to a bill receives due notice of dishonour, he has, after the receipt of such notice, the same period of time for giving notice to antecedent parties that the holder has after the dishonour.”

Sect. 50. “(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.”

By sect. 49 (15), delay caused by miscarriage in the post office is excused.

Sect. 92, “Where, by this act, the time limited for *doing any act or thing* is less than three days, in reckoning time, non-business days are excluded.

“Non-business days for the purposes of this act mean—(a.) Sunday, Good Friday, Christmas Day : (b.) a bank holiday under the Bank Holidays Act, 1871, or acts amending it : (c.) a day appointed by Royal proclamation as a public fast or thanksgiving day.”

“Any other day is a business day.”

By sect. 72 (3), the necessity for and sufficiency of a notice of dishonour are determined by the law of the place where the bill is dishonoured.

Time within which notice must be given.] The principle when there are several indorsements is that each indorser has his own day to give notice, but the holder has not as many days to give notice to the drawer, or prior indorser, as there are intermediate indorsers. He can sue the drawer upon a notice given by the last indorser only *if each* and every prior indorser has in due time given notice of dishonour to the next preceding indorser. A single default breaks the chain of notices and disqualifies the holder from suing any indorser prior to the defective link, unless a direct and immediate notice has been given by the plaintiff to the person sued. *Rowe v. Tipper*, 13 C. B. 249; 22 L. J. C. P. 135; *Turner v. Leech*, 4 B. & A. 451; *Marsh v. Maxwell*, 2 Camp. 210, n. Where the holder employs a solicitor to ascertain the residence of a prior indorser, the latter has, after he has received it, a day before giving notice of dishonour. *Firth v. Thrush*, 8 B. & C. 387. When a bill has passed through several branch banks of the same establishment, each is to be considered as a separate party, so as to be entitled to the usual time for giving notice of dishonour, though the bill may have passed by delivery without indorsement. *Clode v. Bayley*, 12 M. & W. 51; 13 L. J. Ex. 17. So, where, in the ordinary course of business, it has passed through several independent banks. *Prideaux v. Criddle*, 38 L. J. Q. B. 232; L. R. 4 Q. B. 455. In *Fielding v. Corry*, 67 L. J. Q. B. 7; [1898] 1 Q. B. 268, it was held (*diss.* Collins, L.J.) that where the day after dishonour notice thereof had been posted, but directed to the wrong branch bank, and the following day notice of dishonour, not in itself sufficient, was telegraphed to the right bank, the notice was sufficient. *Sed quære.*

If the notice of dishonour, sent to the drawer of a bill, arrives too late through misdirection, it is for the jury to say whether the holder used “due diligence” to find the drawer’s address; *Siggers v. Brown*, 1 M. & Rob. 520; and, if the delay arose from the bill having been sent to a wrong person through a mistake caused by the indistinctness of the drawer’s writing on the bill, he is not discharged. *Hewitt v. Thomson*, *Id.* 548.

Notice, proof of, by admission.] Admission of liability is evidence of notice; as, by a promise to pay; for this admits everything done to entitle the plaintiff to sue; *Lundie v. Robertson*, 7 East, 231; *Croxon v. Worthen*,

5 M. & W. 5; 8 L. J. Ex. 158; even though it is proved or admitted that notice was not in fact given. *Killby v. Rochussen*, 18 C. B. (N. S.) 357. So, a declaration by the defendant made to a party to, but not the holder of the bill, of his intention to pay the bill, "and not to avail himself of the informality of notice," is evidence of due notice. *Brownell v. Bonney*, 1 Q. B. 39; 10 L. J. Q. B. 71. So, where defendant knew that the bill was unpaid, and only objected to pay it on the ground of fraud in the holder, Lord Tenterden, C.J., held this evidence of due notice. *Wilkins v. Jadis*, 1 M. & Rob. 41. A promise to pay, though conditional as to the mode of payment, is sufficient. *Campbell v. Webster*, 2 C. B. 258; 15 L. J. C. P. 4. So, where the drawer of a foreign bill, on being told it was dishonoured, said that his affairs were deranged, but that he would be glad to pay it as soon as his accounts with his agents were cleared, this is sufficient proof of a protest having been duly made. *Gibbon v. Coggen*, 2 Camp. 188; *Greenway v. Hindley*, 4 Camp. 52. Where the plaintiff gave in evidence an agreement made between the prior indorser and the defendant (the drawer), after the bill became due, reciting, that the defendant had drawn the bill in question, that it was overdue and ought to be in the hands of the prior indorser, and it was agreed that the latter should take the money due to him upon the bill by instalments; this agreement was held to dispense with other proof of notice of dishonour. *Gunson v. Metz*, 1 B. & C. 193; 1 L. J. (O. S.) K. B. 75. But, a mere offer, upon being arrested, to give another bill, was no evidence of notice. *Cuming v. French*, 2 Camp. 106, n. The drawer of a bill, being applied to for payment, said, "If the acceptor does not pay, I must; but exhaust all your influence with the acceptor first"; the drawer afterwards directed the applicant to raise the money on the lives of himself and the acceptor; it was held that this admission, though evidence, was not to be taken as *conclusive* of the defendant's having received, or waived, notice of dishonour of the bill. *Hicks v. Beaufort (Duke)*, 4 Bing. N. C. 229; 7 L. J. C. P. 131.

Notice, proof of delivery of.] By sect. 49, "(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office."

When the notice must be given on a certain day, it is enough if the letter be put into the post at such an hour that it would, in the usual course, be delivered on that day; *Stocken v. Collin*, 7 M. & W. 515; 10 L. J. Ex. 227. The post-mark is not conclusive of the time of posting. S. C. If a notice be sent by post, the direction of the letter will be too general to an indorser, "Mr. H., Bristol." *Walter v. Haynes*, Ry. & M. 149. But, where the bill was dated "Manchester" only, it was held sufficient to direct to the drawer at "Manchester," generally. *Mann v. Moors*, *Id.* 249. So, where a person drew a bill, dating it generally "London," on an acceptor resident in London whose address was stated on the bill, it was held that proof of a letter containing notice of dishonour of the bill having been put into the post office, addressed generally to the drawer, "London," was evidence of due notice of dishonour. *Clarke v. Sharpe*, 3 M. & W. 166. And, in such a case, this is enough, as against the drawer, though the letter never reach him, and though his residence might have been found by inquiry at the drawee's address given on the bill. *Burmester v. Barron*, 17 Q. B. 828; 21 L. J. Q. B. 135. For the plaintiff had done all that the drawer himself required, who had supplied no better address; and there was sufficient evidence of due diligence. S. C. Where the plaintiff supplied goods to a company, and took in payment a bill of exchange accepted by the company, and indorsed by the defendant, a director, at the company's office, at which the defendant was in the habit of attending; it was held that notice of dishonour sent to the company's office was sufficient, although the company was then wound up, and the defendant ceased to attend at the office, and did not receive the notice till long after.

Berridge v. Fitzgerald, 38 L. J. Q. B. 335; L. R. 4 Q. B. 639. If there be no post, the notice may be sent by any ordinary mode of conveyance; as in the case of a foreign bill, by the first regular ship bound for the place where notice is to be given. *Muilman v. D'Eguino*, 2 H. Bl. 565. In proving a notice sent by post, Lord Ellenborough ruled that it was not sufficient to show that it was contained in a letter, which letter was put upon the table for the purpose of being carried to the post, and that, in the course of the business, all letters deposited upon that table were carried to the post; but, he said it might have been sufficient had the person, who was in the habit of carrying the letters to the post, been called, and stated that he invariably carried all such letters to the post. *Hetherington v. Kemp*, 4 Camp. 193. And, it was held in *Skilbeck v. Garbett*, 7 Q. B. 846; 14 L. J. Q. B. 338, that if it be shown that the letter was put on the proper day with others in a box in the plaintiff's office, out of which the postman invariably called every day to take the letters, this is evidence of a sending by the post without calling the postman. To prove the sending of a notice by post, the plaintiff's clerk was called, who stated that a letter containing the notice was sent by post on a Tuesday morning, but he had no recollection whether it was put in by himself or another clerk; it was held that this was not sufficient evidence of putting into the post. *Hawkes v. Salter*, 4 Bing. 715; 6 L. J. (O. S.) C. P. 180. Proof that duplicate notices of dishonour were written; that a letter, of which the witness could not state the contents, was sent on the same day by the plaintiff to the defendant; and that the defendant having received notice to produce the letter written to him on that day, refused to do so;—was held slight *prima facie* evidence of the receipt of a notice. *Roberts v. Bradshaw*, 1 Stark. 28; see also *Curlewis v. Corfield*, 1 Q. B. 814.

Contents of notice, how proved.] Where a written notice has been given by a letter, a duplicate or copy is good evidence without notice to produce the letter. *Kine v. Beaumont*, 3 B. & B. 288. And, in the case of *Swain v. Lewis*, 2 C. M. & R. 261; 4 L. J. Ex. 249, it was held that it is not necessary to give a notice to produce a notice of dishonour of a bill of exchange, whether by letter or otherwise. Secondary evidence of such notice is, therefore, admissible without notice to produce. But, where, in an action against the indorser of a bill, it became necessary to prove that notice of the dishonour of *other bills* had been given to the defendant, for which purpose examined copies of letters containing such notices were offered, *Abbott, C.J.*, ruled that a notice to produce such letters was necessary, and that the case did not fall within the exception as to notices respecting bills which are the subject-matter of the action. *Lanauze v. Palmer*, M. & M. 31.

Protest of bill.—Statute.] By sect. 51, “(1.) Where an inland bill has been dishonoured it may, if the holder think fit, be noted for non-acceptance or non-payment, as the case may be; but it shall not be necessary to note or protest any such bill in order to preserve the recourse against the drawer or indorser.

“(2.) Where a foreign bill, appearing on the face of it to be such, has been dishonoured by non-acceptance it must be duly protested for non-acceptance, and where such a bill, which has not been previously dishonoured by non-acceptance, is dishonoured by non-payment it must be duly protested for non-payment. If it be not so protested the drawer and indorsers are discharged. Where a bill does not appear on the face of it to be a foreign bill, protest thereof in case of dishonour is unnecessary.

“(3.) A bill which has been protested for non-acceptance may be subsequently protested for non-payment.

“(4.) (As amended by the Bills of Exchange (Time of Noting) Act, 1917), subject to the provisions of this act when a bill is noted or protested, it may be noted on the day of its dishonour and must be noted not later

than the next succeeding business day. When a bill has been duly noted, the protest may be subsequently extended as of the date of the noting.

"(5.) Where the acceptor of a bill becomes bankrupt or insolvent or suspends payment before it matures, the holder may cause the bill to be protested for better security against the drawer and indorsers.

"(6.) A bill must be protested at the place where it is dishonoured: Provided that—

"(a.) When a bill is presented through the post office, and returned by post dishonoured, it may be protested at the place to which it is returned and on the day of its return if received during business hours, and if not received during business hours, then not later than the next business day:

"(b.) When a bill drawn payable at the place of business or residence of some person other than the drawee, has been dishonoured by non-acceptance, it must be protested for non-payment at the place where it is expressed to be payable, and no further presentment for payment to, or demand on, the drawee is necessary.

"(7.) A protest must contain a copy of the bill, and must be signed by the notary making it, and must specify—

"(a.) The person at whose request the bill is protested:

"(b.) The place and date of protest, the cause or reason for protesting the bill, the demand made, and the answer given, if any, or the fact that the drawee or acceptor could not be found.

"(8.) Where a bill is lost or destroyed, or is wrongly detained from the person entitled to hold it, protest may be made on a copy or written particulars thereof.

"(9.) Protest is dispensed with by any circumstance which would dispense with notice of dishonour. Delay in noting or protesting is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate the bill must be noted or protested with reasonable diligence."

Sect. 93. "For the purposes of this act, where a bill or note is required to be protested, within a specified time or before some further proceeding is taken, it is sufficient that the bill has been noted for protest before the expiration of the specified time or the taking of the proceeding; and the formal protest may be extended at any time thereafter as of the date of the noting."

Sect. 94. "Where a dishonoured bill or note is authorized or required to be protested, and the services of a notary cannot be obtained at the place where the bill is dishonoured, any householder or substantial resident of the place may, in the presence of two witnesses, give a certificate, signed by them, attesting the dishonour of the bill, and the certificate shall in all respects operate as if it were a formal protest of the bill."

A form is given in Schedule 1 to the Act, which if used is sufficient.

Protest.] In case of an inland bill, a protest is unnecessary and of no effect. *Windle v. Andrews*, 2 B. & A. 696; *Bonar v. Mitchell*, 5 Ex. 415; 19 L. J. Ex. 302.

In case of a foreign bill, notice of dishonour without notice of protest is sufficient, if the party to whom notice is given reside in this country; *Robins v. Gibson*, 1 M. & S. 288; and it is sufficient, though he should happen at the time of the dishonour to be absent abroad; *Cromwell v. Hynson*, 2 Esp. 511. In giving notice of non-payment to the drawer of a foreign bill resident abroad, it is necessary to give him notice that the bill has been protested; *Robins v. Gibson*, 1 M. & S. 289; but it is not necessary to send him a copy of the protest. *Goodman v. Harvey*, 4 Ad. & E. 870; 6 L. J. K. B. 260. So, it was sufficient where the notice stated that the bill "had been duly presented and returned dishonoured." *Ex pte. Lowenthal*, L. R. 9 Ch. 591; 43 L. J. Bk. 83. The production of the

protest purporting to be attested by a notary public, when made abroad, is sufficient proof of the protest. *Anon.*, 12 Mod. 345; Bayley on Bills, 6th. ed. 490. But a notarial protest is no evidence that a foreign bill of exchange has been presented for payment in England; *Chesmer v. Noyes*, 4 Camp. 129; and, a protest made in England, must, it is said, be proved in the ordinary way. Chitty on Bills, 11th ed. 340. But, there is a dictum of Ld. Abinger to the contrary in *Brain v. Preece*, 11 M. & W. 775. In *Geratopulo v. Wieler*, 10 C. B. 690; 20 L. J. C. P. 105, it was held (explaining *Vandewall v. Tyrell*, M. & M. 87), that upon payment *supra* protest for the honour of a party it is enough if, before payment, the bill be in fact protested, and a declaration of payment for honour be made and noted in the notarial register, and that the formal protest may be drawn up afterwards, even after action brought; and, that a duplicate protest made from the notary's book was primary evidence, as much as the protest sent abroad. A promise to pay (though qualified) is an admission by the defendant of due protest for non-acceptance, and notice of it. *Campbell v. Webster*, 2 C. B. 258; 15 L. J. C. P. 4.

Waiver or dispensation of notice.—Statute.] Sect. 50, “(2.) Notice of dishonour is dispensed with—

“(a.) When, after the exercise of reasonable diligence, notice as required by this act cannot be given to or does not reach the drawer or indorser sought to be charged :

“(b.) By waiver express or implied. Notice of dishonour may be waived before the time of giving notice has arrived, or after the omission to give due notice :

“(c.) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person, (2) where the drawee is a fictitious person or person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill, (5) where the drawer has countermanded payment.”

Waiver or dispensation of notice.] See sect. 50 (2), *supra*. Whenever the want of notice is excused, the circumstances relied upon as the excuse must appear in the statement of claim. See Rules, 1883, App. C., s. 4, No. 6. Therefore, when the defendant told the indorsee beforehand not to send such notice, and that he would pay the amount, this is not evidence to support an averment of notice, but should have been pleaded as a dispensation of it. *Burgh v. Legge*, 5 M. & W. 418; 8 L. J. Ex. 258. A mere promise to pay made in anticipation that the bill will be dishonoured, does not dispense with notice of dishonour. *Pickin v. Graham*, 1 Cr. & M. 725; 2 L. J. Ex. 253. But, if the drawer, a few days before the bill becomes due, call on the holder, and tell him that he has no regular residence, but he will call and see if the bill be paid by the acceptor, this dispenses with notice of dishonour. *Phipson v. Kneller*, 4 Camp. 285. So, if the holder send a dishonoured bill to the place of business of the indorser, for the purpose of giving notice, and find it closed, he can recover against him without having left a notice, as these facts go to prove a dispensation of notice. *Allen v. Edmundson*, 2 Ex. 719; 17 L. J. Ex. 291; *Crosse v. Smith*, 1 M. & S. 545.

The effect of a promise to pay a dishonoured bill is thus summed up by Byles, J., in *Cordery v. Colville*, 14 C. B. (N. S.) 374; 32 L. J. C. P. 210, 211. “A promise to pay may operate either as evidence of notice of dishonour, or as a prior dispensation, or as a subsequent waiver of notice. Whether made after, or even before, the time for giving notice has expired,—inasmuch as notice may be given at any time within the limit prescribed by law,—a promise to pay is always evidence from which a jury may infer due notice. But even when the other evidence is conclusive to show that due notice was not given, or when a jury refuses to draw the inference that

it was given, yet a promise to pay made within the time for giving notice is a dispensing with notice, and made after that time is a waiver of notice. It is true that a prior dispensation, or subsequent waiver of notice, should be pleaded, but the C. L. P. Act, 1852, s. 222 " (and now also Rules, 1883, O. xxviii. r. 1), "enables and obliges the court to amend the record, whenever an amendment is necessary in order to decide the real question in controversy between the parties. The practical consequence is, that in almost every case proof of a promise to pay cures the want of notice of dishonour." See also *Woods v. Dean*, 3 B. & S. 101; 32 L. J. Q. B. 1.

Notice excused; no effects.] By sect. 50 (2) (c) (2), notice of dishonour is dispensed with where the drawee or acceptor is as between himself and the drawer under no obligation to accept or pay the bill. Notice of dishonour to the drawer is unnecessary if he had not, at the time of drawing or before the time of becoming due, any effects either in the hands of the drawee, or consigned on their way to him; *Bickerdike v. Bollman*, 1 T. R. 405; nor a reasonable expectation of having any; *Claridge v. Dalton*, 4 M. & S. 226. See *Carew v. Duckworth*, 38 L. J. Ex. 149; L. R. 4 Ex. 313, the case of a cheque. This excuse must be alleged in the statement of claim; *per Parke, B.*, in *Burgh v. Legge*, 5 M. & W. 421; 8 L. J. Ex. 258, 259. When issue is joined on the want of effects in the hands of the drawee, the terms of the allegation will sufficiently indicate the required proof. The averment is disproved if it be shown that the drawer had effects on the way to the drawee, though they never reached him. *Rucker v. Hiller*, 3 Camp. 217; 16 East, 43. So, if the drawer had some effects in the drawee's hands at the time when the bill was drawn, though at the time the bill was presented for acceptance and thence until presentment for payment he had not any. *Orr v. Maginnis*, 7 East, 359. So, though there were no effects at the time the bill was drawn or accepted, provided there were effects when it became due; for the whole period must be looked to from the drawing of the bill till it is due; and notice is requisite if the drawee had any effects at any time during that interval. *Hammond v. Dufrene*, 3 Camp. 145; *Thackray v. Blackett*, *Id.* 164. So, if the drawer has effects in the hands of the drawee, though he is indebted to the drawee greatly beyond that amount. *Blackham v. Doren*, 2 Camp. 503. So, where there is a running account between the drawer and the drawee, and a fluctuating balance between them, and the drawer has reasonable grounds to expect that he shall have effects in the drawee's hands when the bill becomes due; *per* Ld. Ellenborough, C.J., *Brown v. Maffey*, 15 East, 221; or, where the bill is drawn in the reasonable expectation that, in the ordinary course of mercantile transactions, it would be accepted or paid; *Claridge v. Dalton*, *supra*; *Lafitte v. Slatter*, 6 Bing. 623; 8 L. J. (O. S.) C. P. 273; and see *Carew v. Duckworth*, *supra*; or, where the acceptor has received from the drawer his acceptances upon which he has raised money, and some of which have been dishonoured, and some are outstanding; *Spooner v. Gardiner*, Ry. & M. 84. And, in general, where the drawer would have any remedy over against a third person (as in the case of a bill drawn for the accommodation of a person to whom he indorses it), notice ought to be alleged and proved. *Cory v. Scott*, 3 B. & A. 619; *Norton v. Pickering*, 8 B. & C. 610; 7 L. J. (O. S.) K. B. 85; *Lafitte v. Slatter*, 6 Bing. 623; 8 L. J. (O. S.) C. P. 273; *Turner v. Samson*, 46 L. J. Q. B. 167; 2 Q. B. D. 23; *Foster v. Parker*, 46 L. J. C. P. 77; 2 C. P. D. 18. It is no excuse of notice, that the plaintiff and the defendant are both shareholders in a joint-stock company, and that the defendant drew the bill on the company (the acceptors) in order to raise money for them, and as an additional security to the plaintiff who advanced the money. *Maltass v. Siddle*, 6 C. B. N. S. 494; 28 L. J. C. P. 257.

The fact that the drawer of a bill made it payable at his own house is evidence that the bill is an accommodation bill, and so excuses notice of dishonour. *Sharp v. Bailey*, 9 B. & C. 44; 7 L. J. (O. S.) K. B. 138.

Notice dispensed with by ignorance of drawer's residence.] Where either want of notice or delay is sought to be excused by the holder's ignorance of the place of residence of the defendant, it is a question for the jury whether he used due diligence to find it; *Bateman v. Joseph*, 12 East, 433; and time may be allowed for inquiries by post; *Baldwin v. Richardson* 1 B. & C. 245. It is not enough to show that inquiries as to an indorser's residence were made at the place at which the bill was payable. *Beveridge v. Burgis*, 3 Camp. 262. Inquiry should be promptly made of some of the other parties to the bill or note; and of persons of the same name, &c. Bayley on Bills, 6th ed. 281-2; *Chapcott v. Curlewis*, 2 M. & Rob. 484. Where the holder does not know the drawer's residence, notice of dishonour is to be given, not on the day after the bill becomes due, but on the day after that on which the holder after using reasonable diligence is in a position to give the notice. *Gladwell v. Turner*, 39 L. J. Ex. 31, 32; L. R. 5 Ex. 61, *per* Martin, B. Calling on the indorser the day after the bill becomes due, to know where the drawer lives, and, on his not being in the way, calling again the next day, and then giving the drawer notice, has been considered sufficient. *Browning v. Kinnear*, Gow. 81. In one case it was held sufficient, on the dishonour of a promissory note, to make inquiry at the maker's house for the residence of the defendant, the payee, and indorser. *Sturges v. Derrick*, Wightw. 76. See further as to special circumstances excusing delay, *Ceylon Coaling Co. v. Goodrich* or *The Elmville*, 73 L. J. P. 104; [1904] P. 319.

Where the holder is excused by ignorance from giving notice until after the usual day, the common allegation of notice is still sufficient if actually given as soon as possible. *Firth v. Thrush*, 8 B. & C. 387. But, generally, excuse of any notice does not prove an averment of notice.

Account stated.] Where the drawer, knowing the plaintiff to be the indorsee of an overdue bill, promises to pay him it, the plaintiff may recover on an account stated. *Oliver v. Dovatt*, 2 M. & Rob. 230.

Payee or Indorsee against Acceptor supra Protest, or for Honour.

Statute.] Sect. 15. "The drawer of a bill and any indorser may insert therein the name of a person to whom the holder may resort in case of need, that is to say, in case the bill is dishonoured by non-acceptance or non-payment. Such person is called the referee in case of need. It is in the option of the holder to resort to the referee in case of need or not as he may think fit."

Sect. 65. "(1.) Where a bill of exchange has been protested for dishonour by non-acceptance, or protested for better security, and is not overdue, any person, not being a party already liable thereon, may, with the consent of the holder, intervene and accept the bill *supra* protest, for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

"(2.) A bill may be accepted for honour for part only of the sum for which it is drawn.

"(3.) An acceptance for honour *supra* protest in order to be valid must—

"(a.) be written on the bill, and indicate that it is an acceptance for honour :

"(b.) be signed by the acceptor for honour.

"(4.) Where an acceptance for honour does not expressly state for whose honour it is made, it is deemed to be an acceptance for the honour of the drawer.

"(5.) Where a bill payable after sight is accepted for honour, its maturity is calculated from the date of the noting for non-acceptance, and not from the date of the acceptance for honour."

Sect. 66. "(1.) The acceptor for honour of a bill by accepting it engages

that he will, on due presentment, pay the bill according to the tenor of his acceptance, if it is not paid by the drawee, provided it has been duly presented for payment, and protested for non-payment, and that he receives notice of these facts.

"(2.) The acceptor for honour is liable to the holder and to all parties to the bill subsequent to the party for whose honour he has accepted."

Sect. 67. "(1.) Where a dishonoured bill has been accepted for honour *supra* protest, or contains a reference in case of need, it must be protested for non-payment before it is presented for payment to the acceptor for honour, or referee in case of need.

"(2.) Where the address of the acceptor for honour is in the same place where the bill is protested for non-payment, the bill must be presented to him not later than the day following its maturity; and where the address of the acceptor for honour is in some place other than the place where it was protested for non-payment, the bill must be forwarded not later than the day following its maturity for presentment to him.

"(3.) Delay in presentment or non-presentment is excused by any circumstance which would excuse delay in presentment for payment or non-presentment for payment."

"(4.) When a bill of exchange is dishonoured by the acceptor for honour, it must be protested for non-payment by him."

Sect. 68. "(1.) Where a bill has been protested for non-payment, any person may intervene and pay it *supra* protest for the honour of any party liable thereon, or for the honour of the person for whose account the bill is drawn.

"(2.) Where two or more persons offer to pay a bill for the honour of different parties, the person whose payment will discharge most parties to the bill shall have the preference.

"(3.) Payment for honour *supra* protest, in order to operate as such and not as a mere voluntary payment, must be attested by a notarial act of honour which may be appended to the protest or form an extension of it.

"(4.) The notarial act of honour must be founded on a declaration made by the payer for honour, or his agent in that behalf, declaring his intention to pay the bill for honour, and for whose honour he pays.

"(5.) Where a bill has been paid for honour, all parties subsequent to the party for whose honour it is paid are discharged, but the payer for honour is subrogated for, and succeeds to both the rights and duties of, the holder as regards the party for whose honour he pays, and all parties liable to that party.

"(6.) The payer for honour on paying to the holder the amount of the bill and the notarial expenses incidental to its dishonour is entitled to receive both the bill itself and the protest. If the holder do not on demand deliver them up he shall be liable to the payer for honour in damages.

"(7.) Where the holder of a bill refuses to receive payment *supra* protest he shall lose his right of recourse against any party who would have been discharged by such payment."

Sect. 96 repeals stats. 2 & 3 W. 4, c. 98, and 6 & 7 W. 4, c. 58, and the provisions of those statutes are replaced by the above sections.

An acceptor for the honour of the drawer is estopped from setting up what the drawer himself would be estopped from setting up, and he cannot therefore dispute the drawer's signature. *Phillips v. Im Thurn*, 18 C. B. (N. S.) 694; 35 L. J. C. P. 220; L. R. 1 C. P. 463.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a bill, the plaintiff must prove the following matters, if traversed: 1. The indorsement by the defendant; 2. The indorsements between that of the defendant and the plaintiff, when stated in the statement of claim; 3. The presentment to

the drawee or acceptor, and the dishonour; 4. Due notice of the dishonour to the defendant.

As to the requisites of a valid indorsement, see sect. 32. As to indorsement in blank and special indorsement, sect. 34. As to restrictive indorsement, sect. 35.

By sect. 2, "Indorsement means an indorsement completed by delivery." By sect. 21 (1) delivery is necessary to complete an indorsement. As to what amounts to delivery, see sect. 21 (2).

Sect. 55. "(2.) The indorser of a bill by indorsing it—

"(a.) Engages that on due presentment it shall be accepted and paid according to its tenor, and that if it be dishonoured he will compensate the holder or a subsequent indorser who is compelled to pay it, provided that the requisite proceedings on dishonour be duly taken;

"(b.) Is precluded from denying to a holder in due course the genuineness and regularity in all respects of the drawer's signature and all previous indorsements;

"(c.) Is precluded from denying to his immediate or subsequent indorsee that the bill was at the time of his indorsement a valid and subsisting bill, and that he had then a good title thereto." See *Chamberlain v. Young*, 63 L. J. Q. B. 28; [1893] 2 Q. B. 206.

Sect. 56. "Where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."

Sect. 71. "(2.) Where the holder of a set indorses two or more parts to different persons, he is liable on every such part, and every indorser subsequent to him is liable on the part he has himself indorsed as if the said parts were separate bills."

It seems that sect. 56 does not apply to promissory notes.

As between indorsee and indorser, to make a valid indorsement the holder must not only write his name and manually deliver the bill with intent to transfer the property therein, but he must intend to stand in the ordinary position of indorser, and guarantee payment of the bill, if the acceptor make default. *Denton v. Peters*, L. R. 5 Q. B. 475. This defence was held to arise on a traverse of the indorsement. S. C. Sects. 55 (2), 56 apply only to a bill which is perfect at the time of the indorsement. *Jenkins v. Coomber*, 67 L. J. Q. B. 780; [1898] 2 Q. B. 168; *Shaw v. Holland*, 82 L. J. K. B. 592; [1913] 2 K. B. 15. But see *In re Gooch*, [1921] 2 K. B. 593, where (distinguishing *Jenkins v. Coomber*, *supra*, and *Shaw v. Holland*, *supra*, and following *Glenie v. Tucker (or Smith)*, 77 L. J. K. B. 193; [1908] 1 K. B. 263) an indorser was held liable on a negotiated bill, which, after he indorsed it, the drawer signed and indorsed as payee, but writing his name below that of the indorser.

By sect. 20 (1), a simple signature on blank stamped paper delivered by the signer in order to be converted into a bill, operates as a *prima facie* authority to fill it up to any amount the stamp will cover, using the signature as that of the drawer, or the acceptor, or an indorser. But if a signature be fraudulently obtained on the back of a bill without any intention in the writer to indorse the bill, he will not, unless he has been guilty of negligence, be liable as indorser, even at the suit of a *bona fide* holder of the bill; and this defence has been held to arise on a traverse of the indorsement. *Foster v. Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310. In this case the indorsement of the defendant, a very old man, was obtained on the back of a bill, which he was induced to sign under the fraudulent misrepresentation that it was a guarantee, and the court held that the defendant was not liable, if he had been guilty of no negligence.

The Rules, 1883, O. xix. r. 15 would probably now require the defences above stated to be specially pleaded.

By sect. 36 (4), a bill is in general presumed to have been indorsed before it became due. A bill being drawn and indorsed in the name of the firm

under which defendant and another carried on business, a question arose whether the indorsement was before or after the dissolution of the partnership had been advertised. The bill was dated before the advertisement, but the indorsement was not dated. Held, that the date was *primâ facie* the true date, and that it was properly left to the jury to say whether it was indorsed before or after the advertisement; and that, as it was drawn payable to the defendant's own order, the jury might reasonably infer that it was indorsed shortly after the drawing. *Anderson v. Weston*, 6 Bing. N. C. 296; 9 L. J. C. P. 194.

An indorsement in the form, "pay J. S., or order, value in account with H. C. D.," was, in an action by a subsequent indorsee against the indorser, held not to be a restrictive indorsement; it merely means that value has been received in a certain manner and has the same effect as if this were stated on the face of the bill. *Buckley v. Jackson*, L. R. 3 Ex. 135.

In suing an indorser on non-payment of the bill by the drawee, it is unnecessary to state an acceptance; and, if stated, it need not be proved; *Tanner v. Bean*, 4 B. & C. 312; 3 L. J. (O. S.) K. B. 222. It is only necessary to prove a presentment for payment at the place, if any, pointed out in the acceptance. *Parks v. Edge*, 1 Cr. & M. 429; 2 L. J. Ex. 94. The rules with regard to the presentment of the bill and notice of dishonour are, in general, the same in this action as in an action by the payee against the drawer.

No evidence of a demand upon the drawer or prior indorsers is necessary. *Bromley v. Frazier*, Str. 441; *Heylyn v. Adamson*, 2 Burr. 669.

Sect. 50, "(2.) Notice of dishonour is dispensed with. . . .

"(d.) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill; (2) where the indorser is the person to whom the bill is presented for payment; (3) where the bill was accepted or made for his accommodation."

Proof of notice of dishonour will be dispensed with by a promise of the defendant to pay; *Wilkes v. Jacks*, Peake, 202; provided it be an unambiguous one; thus, the following letter from the indorser was held not to waive the proof of notice: "I cannot think of remitting till I receive the draft; therefore, if you think proper you may return it to Trevor & Co., if you think me unsafe." *Borradaile v. Lowe*, 4 Taunt. 93. A promise to pay not made to the plaintiff, but to another person who was holder of the bill at the time, will be sufficient. *Potter v. Rayworth*, 13 East, 417. So, allowing judgment to go by default in an action brought by the then holder of the same bill dispenses with proof of notice of dishonour. *Rabey v. Gilbert*, 6 H. & N. 536; 30 L. J. Ex. 170. But in the Scottish case of *Mactavish's Judicial Factor v. Michael's Trustees*, [1912] S. C. 425, a payment on account by an indorser under the erroneous belief that she was liable not as an indorser but as a joint acceptor was held not to be a waiver of the statutory requirements as to notice of dishonour.

By sect. 37, where a bill is negotiated back to a prior indorser, such person is not in general entitled to enforce payment of the bill against any intervening party to whom he was previously liable. But circumstances may be specially pleaded, showing that the defendant could not sue the plaintiff on his indorsement. *Wilders v. Stevens*, 15 M. & W. 208; 15 L. J. Ex. 108; *Wilkinson v. Unwin*, 50 L. J. Q. B. 338; 7 Q. B. D. 636. And, in an action by indorsee against indorser, where the issue was only on the want of notice to the defendant of non-payment by drawee, defendant was not permitted to show that the plaintiff (who had given due notice) and the drawer were one and the same person; the defence should have been specially pleaded. *Williams v. Clarke*, 16 M. & W. 834.

Although a prior indorser is *primâ facie* liable to indemnify a subsequent one, yet the whole circumstances of the making, &c., of the note or bill may be referred to in order to show the true relation of the parties *inter se*, and

the relative position of the parties may be thereby altered. Where three directors of a company, in order to become sureties for the company to a bank, successively indorsed three notes of the company, it was held that they were not liable to indemnify each other according to the priority of their indorsements, but were only liable to contribute equally *inter se*. *Macdonald v. Whitfield*, 52 L. J. P. C. 70; 8 App. Cas. 733.

Evidence under money claims.] An indorsement is *prima facie* evidence of money lent by the indorsee to his immediate indorser. *Kessebower v. Tims*, Bayley on Bills, 6th ed. 363. But where the indorser told his indorsee, just *before presentment*, that the bill would not be paid, that notice need not be sent to him, and that he would send the money on a future day, this was held no evidence on an account stated; it being no proof of a debt due from the indorser at the time of the promise, but only a conditional promise in a certain event. *Burgh v. Legge*, 5 M. & W. 418; 8 L. J. Ex. 258. Though as between indorser and his indorsee the bill is evidence of an account stated, this may be rebutted by showing that the defendant indorsed in blank, and delivered it to F., who carried it to the plaintiff to be discounted. *Burmester v. Hogarth*, 11 M. & W. 97; 12 L. J. Ex. 178.

Damages Generally.

Statute.] Sect. 57, "Where a bill is dishonoured, the measure of damages, which shall be deemed to be liquidated damages, shall be as follows:—

- "(1.) The holder may recover from any party liable on the bill, and the drawer who has been compelled to pay the bill may recover from the acceptor, and an indorser who has been compelled to pay the bill may recover from the acceptor or from the drawer, or from a prior indorser—(a) The amount of the bill; (b) Interest thereon from the time of presentment for payment if the bill is payable on demand, and from the maturity of the bill in any other case; (c) The expenses of noting, or, when protest is necessary, and the protest has been extended, the expenses of protest.
- "(2.) In the case of a bill which has been dishonoured abroad, in lieu of the above damages, the holder may recover from the drawer or an indorser, and the drawer or an indorser who has been compelled to pay the bill may recover from any party liable to him, the amount of the re-exchange with interest thereon until the time of payment.
- "(3.) Where by this act, interest may be recovered as damages, such interest may, if justice require it, be withheld wholly or in part, and where a bill is expressed to be payable with interest at a given rate, interest as damages may or may not be given at the same rate as interest proper."

Sect. 57 (1) does not apply to the case of a foreign bill dishonoured and protested here, on which the drawer, A., is liable to the holder in damages for re-exchange; A. may, notwithstanding this section, recover these damages against the acceptor under sect. 97 (2). *Ex pte. Gillespie*, 56 L. J. Q. B. 74; 18 Q. B. D. 286. But the expenses of protest for better security on the bankruptcy of the acceptor before maturity, are not recoverable from the acceptor; *Ex pte. Bank of Brazil*, 62 L. J. Ch. 578; [1893] 2 Ch. 438; nor is commission paid to the drawer's bankers, for acceptance by them, *supra protest*, for the honour of the drawer. S. C. Where a bill has been dishonoured abroad, sect. 57 (2) limits the damages to the re-exchange and interest thereon, and the holder has no option to recover interest under sect. 57 (1). *In re Commercial Bank of S. Australia*, 57 L. J. Ch. 131; 36 Ch. D. 522.

The re-exchange is the value of the foreign coin expressed in English money at the rate of exchange on the day of dishonour, with interest and expenses; see *Suse v. Pompe*, 8 C. B. (N. S.) 538; 30 L. J. C. P. 75; and

evidence of custom amongst merchants, giving the holder the option of recovering the sum which he gave for the bill in England or the re-exchange, is not admissible, as it would contradict the obligation implied by the written instrument. S. C. See further, as to the right to re-exchange, or to a fixed sum by custom in lieu thereof, *Willans v. Ayers*, 47 L. J. P. C. 1; 3 App. Cas. 133. As to the mode of calculating interest on bills and notes, see *Action for interest*, *post*.

As to the damages recoverable by the drawer against the acceptor for dishonouring bills accepted under the terms of a letter of credit, see *Prehn v. Royal Bank of Liverpool*, 39 L. J. Ex. 41; L. R. 5 Ex. 92.

Defences, generally, to Actions on Bills of Exchange.

By Rules, 1883, O. xxi. r. 2, "in actions upon bills of exchange, promissory notes, or cheques, a defence in denial must deny some matter of fact; e.g., the drawing, making, indorsing, accepting, presenting, or notice of dishonour of the bill or note." See, also, O. xix. r. 17. The proofs required on these traverses have already been considered. The following are some of the most usual defences to actions on bills, not already noticed.

Negotiation of overdue or dishonoured bill.] By sect. 36, "(2.) Where an overdue bill is negotiated, it can only be negotiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had.

"(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact."

Sub-sect. (3) applies to cheques, sect. 73, but not to promissory notes, sect. 86 (3).

"(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

"(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this subsection shall affect the rights of a holder in due course" (*vide* sect. 29).

In sub-sect. (2) and throughout the act the term "defect of title" is used as equivalent to an equity attaching to the bill itself. See *Holmes v. Kidd*, 3 H. & N. 891; 28 L. J. Ex. 113. But the indorsee taking it overdue does not take it subject to claims arising out of collateral matters; *Burrough v. Moss*, 10 B. & C. 588; *Oulds v. Harrison*, 10 Ex. 572; 24 L. J. Ex. 66. Thus, the indorsee of an overdue bill of exchange is not liable to have a debt from the drawer to the acceptor set off against his bill. S. C.

Loss of bill.] Unless the loss is specially pleaded, the plaintiff may, after proving the loss, give secondary evidence of the bill. *Blackie v. Pidding*, 6 C. B. 196. See sects. 69, 70, as to lost bills.

Wrong stamps, &c.] By sect. 97 (3) (a), the provisions of the Stamp Acts are not affected by the B. of Ex. Act, 1882.

Alteration.] By sect. 64, "(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"Provided that,

"Where a bill has been materially altered, but the alteration is not

apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour.

"(2.) In particular the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

The defence of alteration under this section arises apart from the objection that a bill altered in any material particular after it has been issued is a fresh instrument and requires a new stamp. As to cancellation of acceptance by mistake, *vide* sect. 63 (3).

The drawee, L., accepted a bill for £500, which was after acceptance fraudulently altered by the drawer into a bill for £3,500; the bill bore a stamp sufficient to cover £3,500, and had spaces on its face in which the words and figures were inserted by the drawer; in an action on the bill by a holder in due course it was held that L. was liable to the amount of £500 only. *Scholfield v. Londesborough (Earl)*, 65 L. J. Q. B. 593; [1896] A. C. 514. See *Imperial Bank of Canada v. Bank of Hamilton*, 72 L. J. P. C. 1; [1903] A. C. 49.

The alteration is "apparent" if the party liable on the bill can at once discern it on the face of the bill, though it is not obvious to all the world. *Leeds Bank v. Walker*, 52 L. J. Q. B. 590; 11 Q. B. D. 84. The insertion of the word "Limited" after the name of a company on the face of a promissory note was held in *Bank of Montreal v. Exhibit & Trading Co.*, [1906] 11 Com. Cas. 250, not to be an "apparent" alteration, and that consequently by sect. 64 the note was payable according to its original tenor, *i.e.*, as if the word "Limited" had not been inserted.

The alteration may be material although the contract is unaffected thereby; in such case it is necessary to inquire what was the object of the part which is altered. *Suffell v. Bank of England*, 51 L. J. Q. B. 401; 9 Q. B. D. 555. Thus, the number on a Bank of England note has been held to be a material part thereof. S. C.

After a joint and several note, made payable "with lawful interest," had been signed by three makers, two of the makers, with the assent of the plaintiff, the payee and holder, wrote on the left-hand corner of it, "with interest at six per cent.;" held that this avoided it as against the third maker who was sued alone. *Warrington v. Early*, 2 E. & B. 763; 23 L. J. Q. B. 47. So, the addition of a memorandum, which fixes the rate of exchange at which a foreign bill is payable, avoids it. *Hirschfield v. Smith*, 35 L. J. C. P. 177; L. R. 1 C. P. 340. And, where the defendant gave a blank acceptance for valuable consideration, it was held that the person to whom it was delivered was only entitled to draw a bill with a general acceptance, and that the insertion of a particular place of payment before the acceptance vitiated the bill, at all events as between the immediate parties. *Hanbury v. Lovett*, 18 L. T. 366; see also *Crotty v. Hodges, infra*. Altering a joint and several note signed by two into a note signed by three, by getting a third maker to join, vitiates the note as against one of the makers who did not assent to the alteration. *Gardner v. Walsh*, 5 E. & B. 83; 24 L. J. Q. B. 285. Where the defendant had paid two years' interest on an altered note, this was held to be evidence that the alteration was by his consent. *Cariss v. Tattersall*, 2 M. & G. 890; 10 L. J. C. P. 187. It is for the party who sues on an instrument evidently altered, to give some evidence to explain the alteration. *Clifford v. Parker*, 2 M. & G. 909; 10 L. J. C. P. 227. In a suit by drawer against acceptor: Plea, 1, traverse of acceptance; 2, alteration after acceptance; the proof was, that the bill was drawn in France on the defendant in London, and the defendant had expressly accepted the bill for a less sum than in the body of it, and that the sum had been altered accordingly, but by whom or when did not appear: held that plaintiff ought to recover, for it might be presumed that the defendant consented to alter the bill, and *non constat*, but that the alteration was

made in France, so as not to require an impressed stamp. *Hamelin v. Bruck*, 9 Q. B. 306; 15 L. J. Q. B. 343. The addition of the words "on demand," to a promissory note which expressed no time for payment, was held to be an immaterial alteration. *Aldous v. Cornwell*, 37 L. J. Q. B. 201; L. R. 3 Q. B. 573. See further in 1 Smith's L. Cases, notes to *Master v. Miller*.

An alteration of such a kind as to discharge the acceptor is admissible in evidence under a denial of the acceptance; when the bill is declared on in its altered form. *Hirschman v. Budd*, 42 L. J. Ex. 113; L. R. 8 Ex. 171, following *Cock v. Coxwell*, 2 C. M. & R. 291; 4 L. J. Ex. 307, and overruling *Parry v. Nicholson*, 13 M. & W. 778; 14 L. J. Ex. 119. Where, however, the instrument is sued on in its unaltered form, or the altered part does not appear in the claim, it is necessary to plead the alteration specially. *Mason v. Bradley*, 11 M. & W. 590; 12 L. J. Ex. 425. The defendant authorized W. to put his name to a general acceptance on a blank stamp; this was done, and on filling the bill up, the payee added a place of payment to the acceptance, the bill being declared on without stating the place of payment: on a traverse of the acceptance, the defendant was held entitled to succeed, on the ground apparently that the acceptance never existed on a perfect bill as a general acceptance; and a special one was not authorized by the defendant. *Crotty v. Hodges*, 4 M. & Gr. 561. And see *Hanbury v. Lovett*, *supra*.

Where the drawer made an alteration fatal to the bill, as between him and the acceptor, he may recover on a claim for the original consideration; *Atkinson v. Hawdon*, 2 Ad. & E. 628; *aliter*, as between indorsee and drawer, the alteration being made by the former. *Alderson v. Langdale*, 3 B. & Ad. 660. A note so altered as to avoid it may be used by the payee as evidence of an account stated by the maker at the time it was given. *Gould v. Coombs*, 1 C. B. 543; 14 L. J. C. P. 175.

Failure or want of consideration.] Sect. 27 defines valuable consideration for a bill and a holder for value.

Sect. 28. "(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor and for the purpose of lending his name to some other person.

"(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not."

Want of consideration alone is only a defence, when the parties to the action are the parties as between whom there was the alleged want of consideration, or as between parties who are in privity with them. A *bona fide* holder for value is not affected by any want of consideration as between antecedent parties to the bill or note.

Formerly, any facts or circumstances which invalidated the original consideration of a bill or note were admitted in support of a general plea of want of consideration; see *Mills v. Oddy*, 2 C. M. & R. 103; 4 L. J. Ex. 168; but it would seem that the facts relied on should now be specially pleaded. Rules, 1883, O. xix. r. 15.

Where a debt is due on a judgment between the parties, there is a good consideration, as the taking the security imports a promise on the part of the judgment debtor to suspend proceedings on the judgment till the maturity of the bill or note; *Baker v. Walker*, 14 M. & W. 465; 14 L. J. Ex. 371; the same principle applies where there is a debt from the third person to the payee. *Poplewell v. Wilson*, Str. 264. A solicitor's bill, though not delivered according to law, is a good consideration. *Jeffreys v. Evans*, 14 M. & W. 210; 14 L. J. Ex. 363. In an action by payee against the acceptor of a bill at three months, drawn in consideration of money to be paid in one month by payee to drawer, and accepted for the accommodation of the drawer, if the money be not paid, the consideration fails, and the plaintiff cannot recover. *Astley v. Johnson*, 5 H. & N. 137; 29 L. J. Ex. 161. A note

given by the defendant on the faith of a misrepresentation by the plaintiff of either matter of fact or of law, though made without fraud, may be impeached as for want of consideration. *Southall v. Rigg*, and *Forman v. Wright*, 11 C. B. 481; 20 L. J. C. P. 145. So, a note given for past gratuitous services, and in consideration for future services, as to which there was no binding contract. *Hulse v. Hulse*, 17 C. B. 711; 25 L. J. C. P. 177. But the compromise of a claim, made *bonâ fide*, though unfounded, and known by the defendant to be so, but for which the claimant threatened to sue, is a good consideration. *Cook v. Wright*, 1 B. & S. 559; 30 L. J. Q. B. 321. See *Callisher v. Bischoffsheim*, 39 L. J. Q. B. 181; L. R. 5 Q. B. 449; and *Miles v. New Zealand Alford Estate Co.*, 55 L. J. Ch. 801; 32 Ch. D. 266, dissenting from the observations of Brett, L.J., in *Ex pte. Banner*, 17 Ch. D. 480, 490. So is forbearance by the plaintiff, at the defendant's request, to sue A., although there was no contract by the plaintiff to abstain from suing. *Crears v. Hunter*, 56 L. J. Q. B. 518; 19 Q. B. D. 341.

In an action by indorsee against acceptor, it is not even *primâ facie* evidence of want of consideration between the defendant and the drawer, to show that the drawer, on the day before the bill became due, procured all the indorsements to be made without consideration, in order that the action might be brought by the indorsee, and on the understanding that the money should be divided between one of the indorsees and the drawer. *Whitaker v. Edmunds*, 1 Ad. & E. 638. Where the defence to an action on a note states an executory consideration for it, which was never executed, the defendant is not precluded from proving his defence, although the note professes, on the face of it, to be founded on a past consideration. *Abbott v. Hendricks*, 1 M. & Gr. 791; 10 L. J. C. P. 51. And generally the consideration or alleged "value received" apparent on the face of a note may be contradicted, but not the contract or promise itself. *Foster v. Jolly*, 1 C. M. & R. 703; 4 L. J. Ex. 65.

In general, the declarations of a former holder of a bill are not admissible to prove the want of consideration. *Shaw v. Broom*, 4 D. & Ry. 730; 1 L. J. (O. S.) C. P. 2. But where the plaintiff and the party whose declarations are offered in evidence, are identified in title; as where the plaintiff took the bill from him after it became due; such declarations are admissible. *Benson v. Marshall*, cited *Id.* 732; *Beauchamp v. Parry*, 1 B. & Ad. 89; 8 L. J. (O. S.) K. B. 367. So, where the plaintiff, though he did not take the bill after it was due, sues as agent for the party who made the declarations. *Welstead v. Levy*, 1 M. & Rob. 138.

Fraud.] Fraud, which makes the contract void or voidable as against the defendant, must be specially pleaded. Rules, 1883, O. xix. r. 15. Formerly, when the effect of the fraud was that the defendant never made the contract sued on, the defence arose on a traverse of the indorsement or acceptance, as the case might be. *Foster v. Mackinnon*, L. R. 4 C. P. 704; 38 L. J. C. P. 310. So, when the fraud was one which avoided the consideration, it might be given in evidence under a general plea denying the consideration. *Mills v. Oddy*, 2 C. M. & R. 103; 4 L. J. Ex. 168. But a special defence would be required now, under r. 15, *supra*. The maker of a note pleaded that it was made and delivered to W. only to get it discounted, and that W. fraudulently indorsed it to the plaintiff, who gave no consideration and knew of the fraud: replication *de injuriâ*; letters written by W., while holder of the note, are not admissible against the plaintiff to prove the fraud, without first establishing, *aliunde*, a privity between the plaintiff and him. *Phillips v. Cole*, 10 Ad. & E. 106. A knowledge by the plaintiff indorsee, of fraud in the concoction of a bill, is no defence if he received it for good consideration from an innocent indorser. *May v. Chapman*, 16 M. & W. 355. As to how far a company are affected by knowledge of their director, from whom they have bought bills which had

been fraudulently obtained by him, see *Ex pte. Oriental Commercial Bank*, 39 L. J. Ch. 588; L. R. 5 Ch. 358.

The holder without indorsement of a draft payable to order, though taken by him *bonâ fide* and for value, has no better title than the person from whom he took it; and such holder is affected by fraud of which he has notice before he obtains the formal indorsement. *Whistler v. Forster*, 14 C. B. (N. S.) 248; 32 L. J. C. P. 161.

Forgery.] See sect. 24. Forgery of the defendant's signature is, of course, evidence under a traverse of the making, &c.; but, for the purpose of proving the forgery, the defendant cannot be permitted to prove that other bills, with forged signatures of his, had been in the hands of the plaintiff and circulated by him. *Griffiths v. Payne*, 11 Ad. & E. 131; 9 L. J. Q. B. 34.

Cancellation so imperfectly effected that the bill is still apparently uncancelled, affords no answer as against a *bonâ fide* holder. Therefore, where the acceptor of a bill tore it in two for the purpose of destroying it before circulation, and the drawer fraudulently rejoined the pieces, and passed the bill to a *bonâ fide* holder for value, the acceptor was held liable, whether the fraud amounted to forgery or not. *Ingham v. Primrose*, 7 C. B. (N. S.) 82; 28 L. J. C. P. 294. The decision in this case was, however, dissented from by Brett, L.J., in *Baxendale v. Bennett*, 47 L. J. Q. B. 624, 627; 3 Q. B. D. 525, 532, 533. As to the alteration of the figures in the margin of a bill accepted in blank, see *Garrard v. Lewis*, 10 Q. B. D. 30.

Illegality.] See *Defences to Actions on Simple Contracts,—Illegality, post.* Where a bill has been accepted for good consideration, it seems that in an action against the acceptor, it is no defence that the plaintiff took the bill for illegal consideration. *Flower v. Sadler*, 10 Q. B. D. 572, 575.

Want of consideration.—Onus probandi.] Sect. 27 defines valuable consideration and who is a holder for value.

Sect. 30. "(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

"(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course, but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill."

This sub-sect. does not apply where the holder of the negotiable instrument who brings the action is the person to whom it was originally delivered and in whose hands it still remains; the burden of proof in such a case not being shifted from, but remaining on, the defendant. *Talbot v. Von Boris*, 80 L. J. K. B. 661; [1911] 1 K. B. 854. In a case alleged to fall within the latter part of the sub-sect., the judge is not bound to decide whether fraud has been proved in order to throw this burden on the plaintiff, but only whether there is any evidence of fraud for the jury. *Harvey v. Towers*, 5 Ex. 658; 20 L. J. Ex. 318; *Berry v. Alderman*, 14 C. B. 95; 23 L. J. C. P. 34. When the plea alleged that the bill was founded on a wager, and that the indorsements were without value, proof of a wager, void but not unlawful, was held to show only want of consideration and not illegality, and to raise no presumption that the plaintiff was not a *bonâ fide* holder for value; it lay on the defendant, therefore, to prove this. *Fitch v. Jones*, 5 E. & B. 238; 24 L. J. Q. B. 293. Where fraud or illegality, &c., is admitted or proved, the plaintiff must prove that value has been given, in good faith and without notice of the fraud. *Tatam v. Haslar*, 58 L. J. Q. B. 432; 23 Q. B. D. 345.

In cases prior to the J. Acts and B. of Ex. Act, 1882, it was held that an admission of fraud or illegality on the record throws on the plaintiff the

burden of proof as to consideration, but not as to absence of notice of the fraud or illegality, though the reason of the distinction is not very clear; but it is very doubtful if, especially having regard to the terms of sect. 30 (2), *supra*, they would now be followed.

In *Hogg v. Skeen*, 18 C. B. (N. S.) 426; 34 L. J. C. P. 153, some of the defendants, acceptors, pleaded non-acceptance: held that proof under this issue, that the acceptance was by one of the defendants, who had let judgment go by default, in fraud of the others, his partners, but without showing the plaintiff's privity, obliged the plaintiff to show that he gave value for the bill; in this case *Musgrave v. Drake*, 5 Q. B. 185; 13 L. J. Q. B. 16, was distinguished. It would seem that Rules, 1883, O. xix. r. 15, would require this defence to be specially pleaded. A bill was sent to the plaintiff by a clerk with a message, which, if delivered, would have shown that the plaintiff had such notice as would have made him not a *bonâ fide* holder for value; the bill was delivered, but the clerk was not called, and it was not proved whether the message had been given or not: held, in an action of trover, that the evidence was not sufficient to rebut the presumption that plaintiff was a *bonâ fide* holder. *Middleton v. Barned*, 4 Ex. 241.

Illegality of consideration; bonâ fides of holder.] See *Defence in actions on simple contracts.—Illegality, post.* See sect. 29 (2), sect. 30 (2), and sect. 90. Where a stolen note was for full value and *bonâ fide* changed by the plaintiff, a money-changer, who had then no knowledge that it had been stolen, although he had received notices a year previously of this and other stolen notes, and kept such notices filed in his office, but did not examine them, he was, notwithstanding this negligence, held entitled to recover. *Raphael v. Bank of England*, 17 C. B. 161; 25 L. J. C. P. 33; *Bank of Bengal v. Macleod*, 7 Moo. P. C. 35. See also *L. Joint Stock Bank v. Simmons*, 61 L. J. Ch. 723; [1892] A. C. 201. Gross negligence may, however, be evidence of *mala fides*, though not equivalent to it. *Goodman v. Harvey*, 4 Ad. & E. 870; 6 L. J. K. B. 260. Buying the bill at a considerable undervalue, with a wilful avoidance of inquiry about it, may be evidence of notice of fraud in the concoction of the bill. *Jones v. Gordon*, 47 L. J. Bk. 1; 2 App. Cas. 616.

Where the bill was given for money lost by gaming, or upon a usurious contract, various statutes made it a void security, even in the hands of a *bonâ fide* holder; but, by 5 & 6 W. 4, c. 41, so much of the former statutes as made the securities *void* was repealed, and it was enacted that they should be deemed to have been given for an illegal consideration. So much of sects. 1, 2, as relates to stat. 9 A. c. 19 (which applies to gaming and betting) was not repealed by the Stat. Law Rev. Act, 1874; and under these sections where a cheque drawn by H. was given by him to A. in payment of wagers lost on horse races, and indorsed by A. to W. for value, with notice of its original consideration, W. cannot recover thereon. *Woolf v. Hamilton*, 67 L. J. Q. B. 917; [1898] 2 Q. B. 337. If A. gives B. a cheque in respect of racing bets, and B. receives payment thereof, A. cannot recover the amount back from B. under sect. 2, B. not being a "holder" of the cheque within the meaning of that section. *Lynn v. Bell*, Ir. R. 10 C. L. 487; *Nicholls v. Evans*, 83 L. J. K. B. 301; [1914] 1 K. B. 118; *Dey v. Mayo*, 89 L. J. K. B. 241; [1920] 2 K. B. 346. The term "holder" includes other persons in lawful possession of the bill or note, though they may not be holders in due course; it therefore includes a bank who receives the bill or note for collection. *Dey v. Mayo, supra*. If A. gives a cheque to B., who indorses it to C., who takes it for value and with notice that it was given in payment of a racing debt, and C. receives payment, A. can recover the amount from B. *Golding v. Bradlow*, 89 L. J. K. B. 19; [1919] 2 K. B. 238; approved in *Dey v. Mayo, supra*. The payee of a promissory note given him in repayment of money paid by him at the request of the maker, L., in satisfaction of L.'s gaming debts, might have recovered thereon. *Ex pte. Pyke*, 47 L. J. Bk. 100; 8 Ch. D. 754. Since 55 & 56 V. c. 9, s. 1,

however, there would be no consideration for the note. Before the repeal of the usury law, the defendant accepted a bill of exchange to secure a loan at usurious interest; after the repeal, he accepted fresh bills for the amount of the loan and the usurious interest, and it was held (Martin, B., *diss.*) that there was good consideration for the new bills. *Flight v. Reed*, 1 H. & C. 703; 32 L. J. Ex. 265. In *Rimini v. Van Praagh*, 42 L. J. Q. B. 1; L. R. 8 Q. B. 1, Cockburn, C.J., intimated that the judgment of Martin, B., in this case, was right. A cheque given in France for gaming debts, and valid there, cannot be sued on here. *Moulis v. Owen*, 76 L. J. K. B. 396; [1907] 1 K. B. 746.

A promissory note given in consideration of the payee's forbearing to prosecute a charge of misdemeanor against the maker cannot be enforced. *Clubb v. Hutson*, 18 C. B. (N. S.) 414. See also *Brook v. Hook*, 40 L. J. Ex. 50; L. R. 6 Ex. 89.

Mere wagers, not made *unlawful* by any statutes against gaming, &c., are made *void*, by 8 & 9 V. c. 109, s. 18, which avoids all contracts, parol or in writing, "by way of gaming or wagering." But, the Act does not in terms avoid a security given to pay a wager; it would, therefore, be only without consideration. See *Fitch v. Jones*, 24 L. J. Q. B. 293; 5 E. & B. 238, and *Beeston v. Beeston*, 45 L. J. Ex. 230; 1 Ex. D. 13.

On issue taken on a defence that a note was given for an illegal consideration, the plaintiff is not bound to produce the note as part of his own case. *Read v. Gamble*, 10 Ad. & E. 597, n.

By sect. 30 (2), illegality in the concoction or transfer of a bill, as well as fraud, felony, &c., will, if proved, put the holder on proof of consideration.

Agreement at variance with the bill.] The terms of a bill or note cannot be varied by oral evidence to contradict it, even as between original or immediate parties to it; as by an agreement to renew the bill at maturity. *New London Credit Syndicate v. Neale*, 67 L. J. Q. B. 285; [1898] 2 Q. B. 487; or that, should the goods in respect of which the note is given not be equal to sample, the maker should not be called upon to pay the note. *Hitchings & Coulthurst Co. v. Northern Leather Co. of America*, 83 L. J. K. B. 1819; [1914] 3 K. B. 907. But it may be varied by a contemporaneous memorandum in writing, whether on the same or a separate paper. *Leeds v. Lancashire*, 2 Camp. 235; *Bowerbank v. Monteiro*, 4 Taunt. 844. The two together may thus form one agreement, and must be treated as such. The defence need not allege that the contemporaneous agreement was in writing; *Young v. Austen*, 38 L. J. C. P. 233; L. R. 4 C. P. 553; *Corkling v. Massey*, 42 L. J. C. P. 153; L. R. 8 C. P. 395; but it will not be proved unless an agreement in writing is given in evidence in support of it at the trial. *Young v. Austen*, *supra*; *Abrey v. Cruz*, 39 L. J. C. P. 9; L. R. 5 C. P. 37.

In order that the agreement and promissory note may form one agreement, the agreement or memorandum must be between the same parties, and not merely collateral. Thus, in a suit by payee against maker, it is no answer that by an independent contemporary written agreement between the plaintiff on one side, and the defendant and others on the other side, it was agreed that the note should not be payable except in a certain contingency. *Webb v. Spicer*, 13 Q. B. 894; 19 L. J. Q. B. 34; 3 H. L. C. 510. Where a plea alleged a subsequent agreement to vary a note, it could be supported only by proof of an agreement founded on good consideration. *McManus v. Bark*, 39 L. J. Ex. 65; L. R. 5 Ex. 65.

Payment.] Sect. 33. "Where a bill purports to be indorsed conditionally the condition may be disregarded by the payer, and payment to the indorsee is valid whether the condition has been fulfilled or not."

Sect. 59. "(1.) A bill is discharged by payment in due course by or on behalf of the drawee or acceptor.

"'Payment in due course' means payment made at or after the maturity

of the bill to the holder thereof in good faith and without notice that his title to the bill is defective.

"(2.) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser, it is not discharged; but

"(a.) Where a bill payable to, or to the order of, a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not re-issue the bill:

"(b.) Where a bill is paid by an indorser, or where a bill payable to drawer's order is paid by the drawer, the party paying it is remitted to his former rights as regards the acceptor or antecedent parties, and he may, if he thinks fit, strike out his own and subsequent indorsements, and again negotiate the bill.

"(3.) Where an accommodation bill is paid in due course by the party accommodated the bill is discharged."

See sect. 60 as to the payment by the banker on whom it is drawn of a bill payable on demand.

Sect. 71 (3) relates to the payment of bills drawn in sets.

"(5.) When the acceptor of a bill drawn in a set pays it without requiring the part bearing his acceptance to be delivered up to him, and that part at maturity is outstanding in the hands of a holder in due course, he is liable to the holder thereof.

"(6.) Subject to the preceding rules, where any one part of a bill drawn in a set is discharged by payment or otherwise, the whole bill is discharged."

Payment or satisfaction must be specially pleaded. For presumptive evidence in support of such plea, see *Presumptive Evidence—Presumption of Payment*, ante, p. 33. Payment of the exact sum due on a note by the defendant in full satisfaction of debt and damages is sufficient, and entitles the defendant to a verdict, and the jury are not bound to give interest, or even nominal damages, for the detention of the debt. *Beaumont v. Greathead*, 2 C. B. 494; 15 L. J. C. P. 130. This was an action of debt; but in an action by indorsee against acceptor, a plea *puis darrein continuance*, that an earlier indorser had paid to plaintiff, then the holder, who accepted the full amount of the bill, and also interest thereon, in full satisfaction of the bill, and all moneys due in respect thereof, not mentioning damages or costs, was bad. *Goodwin v. Cremer*, 18 Q. B. 757; 22 L. J. Q. B. 30; see also *Ash v. Pouppeville*, 37 L. J. Q. B. 55; L. R. 3 Q. B. 86. Satisfaction to one of several partners is a satisfaction to all. *Jacaud v. French*, 12 East, 317; see also 53 & 54 V. c. 39, s. 5. Payment by one, not sued, of several joint and several makers of a promissory note, is payment by the defendant. *Beaumont v. Greathead*, supra. Renewal of a joint and several note by one of the makers, and payment of such renewed note, is payment by all of the first note. *Thorne v. Smith*, 10 C. B. 659; 20 L. J. C. P. 71. But the mere acceptance by the payee, from one of two joint and several makers of a note, of a mortgage and covenant to pay the amount of the note, is no defence to an action against the other; for the securities are not co-extensive; and proof that the mortgage was given to secure the same debt does not prove that it was accepted in lieu and satisfaction of the note. *Ansell v. Baker*, 15 Q. B. 20.

A judgment and execution, without satisfaction, against a subsequent party to a bill, will be no discharge of a prior party; it is only an extinguishment between the parties to the judgment. *Hayling v. Mullhall*, 2 W. Bl. 1235; as explained in *English v. Darley*, 2 B. & P. 62. So the acceptor was liable at the suit of an indorsee, although judgment had been obtained against the acceptor on the bill at the suit of a subsequent indorsee, and he had been taken in execution on that judgment. *Woodward v. Pell*, 38 L. J. Q. B. 30; L. R. 4 Q. B. 55. But a composition with the acceptor, and the taking of a third person's note as a security for it, operates as a satisfaction of the bill. *English v. Darley*, supra; *Lewis v. Jones*, 4 B. & C. 506; 3 L. J. (O. S.) K. B. 270. Where the plaintiff paid money to A. for a bill accepted

by a third party and indorsed in blank, the plaintiff intending to buy the bill and be the holder thereof, and A. believing he was paying the amount for the acceptor, the court held that, if the plaintiff did not make the payment in order to discharge the acceptor, nor by his expressions and conduct led A. so to suppose, he might recover on the bill. *Lyon v. Maxwell*, 18 L. T. 28. Where the first bill is "renewed" by a second, no action can be maintained during the currency of the latter. *Kendrick v. Lomax*, 2 C. & J. 405; 1 L. J. Ex. 145. But where the plaintiff held a bill accepted by defendant, who, when it became due, asked for time, and three months afterwards gave plaintiff another bill for the same amount, plaintiff telling him at the same time that something was due for interest, and continuing to hold the first bill, and the second bill was paid after it became due, it was held that the plaintiff was entitled to sue on the first bill to recover the interest. *Lumley v. Musgrave*, 4 Bing. N. C. 9; 7 L. J. C. P. 49. Where one of three partners, after a dissolution of partnership, undertook, by deed, to pay a partnership debt on two bills of exchange drawn by them, and the owner consented to take the separate notes of the one partner for the amount, *reserving his right against all three*, and retaining possession of the original bills, it was held that, the separate notes having proved unproductive, he might resort to his remedy against the other partners, and that the taking of the separate notes, and afterwards renewing them several times successively, did not amount to satisfaction of the joint debt. *Bedford v. Deakin*, 2 B. & A. 210. Where, on a bill of exchange being dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first; and the payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to the plaintiff; it was held that the second bill was merely a collateral security, and that the receipt of it by the payee did not exonerate the drawer of the first. *Pring v. Clarkson*, 1 B. & C. 14; 1 L. J. (O. S.) K. B. 24; see also *Adams v. Bingley*, 1 M. & W. 192; 5 L. J. Ex. 136.

The principle of sect. 59 (2) applies to a part payment, and to cases in which the bill is not strictly an accommodation bill. *Cook v. Lister*, 13 C. B. (N. S.) 543; 32 L. J. C. P. 121. But, where an accommodation acceptor pleaded payment by the drawer in an action by an indorsee, proof that the drawer had handed a forged acceptance to the indorsee for the purpose of retiring the outstanding bill, and that the indorsee, being his banker, had credited the drawer for the amount in his banking account, was held insufficient to prove payment, the forged acceptance being, in fact, no payment at all. *Bell v. Buckley*, 11 Ex. 631; 25 L. J. Ex. 163. Payment by drawer, who is also payee, to the plaintiff himself, his indorsee, is no answer to an action against the acceptor for value, if the bill were left in the plaintiff's hand, to sue on it as trustee for the drawer; *Williams v. James*, 15 Q. B. 498; 19 L. J. Q. B. 445; nor if he sue against the will of the drawer. *Jones v. Broadhurst*, 9 C. B. 173. If the acceptor discount his own acceptance for the drawer, this is not payment so as to har an action on the bill against the drawer by a *bonâ fide* indorsee for value, who has taken under an indorsement by the acceptor. *Attenborough v. Mackenzie*, 25 L. J. Ex. 224. "Retiring" a bill by acceptor is equivalent to payment, and stops the circulation; but retiring by an indorser only takes it out of circulation as regards himself, and he retains the same remedies as if he had paid his indorsee in due course. *Elsam v. Denny*, 15 C. B. 87; 23 L. J. C. P. 190.

Where B., a banker or other agent, is employed by H., the holder of a bill, to receive payment of it from the acceptor, and receives payment from him clogged with a condition, without assent to which H. is not entitled to retain the money paid, B. is not entitled to treat such conditional payment as if it were an absolute payment, and to cancel the bill as paid, before he has received H.'s assent to the condition. *Bank of Scotland v. Dominion Bank (Toronto)*, [1891] A. C. 592. If before receiving such assent B.

allow the bill to be cancelled, he is liable to H. for the damage he thereby sustains. S. C.

On a defence of payment, neither the plaintiff nor the defendant is bound to produce the security; and where a plea stated, by way of introduction to an allegation of payment, that the note was given in lieu of a former one, and the plaintiff replied *de injuriâ* generally, it was held enough to show payment without proving the superfluous introductory statement. *Shearm v. Burnard*, 10 Ad. & E. 593; 8 L. J. Q. B. 261. But if on a special defence of satisfaction it become necessary for the defendant to prove the bill or note, he cannot give secondary evidence of it without having given notice to produce it. *Goodered v. Armour*, 3 Q. B. 956; 12 L. J. Q. B. 56.

By sect. 24 a person claiming under a forged indorsement cannot give a discharge for the bill, except under sect. 60, in the case of a banker.

Statute of Limitations.] See *Defences in Actions on Simple Contracts; Limitations, Statutes of, post.*

Voluntary discharge and waiver.] Sect. 61. "When the acceptor of a bill is or becomes the holder of it at or after its maturity, in his own right, the bill is discharged." "In his own right" here means "having a right not subject to that of any one else but his own—good against all the world," and is not used in contradistinction to a right in a representative capacity. *Nash v. De Freville*, 69 L. J. Q. B. 484; [1900] 2 Q. B. 72.

Sect. 62. "(1.) When the holder of a bill at or after its maturity absolutely and unconditionally renounces his rights against the acceptor, the bill is discharged.

"The renunciation must be in writing, unless the bill is delivered up to the acceptor.

"(2.) The liabilities of any party to a bill may in like manner be renounced by the holder before, at, or after its maturity; but nothing in this section shall affect the rights of a holder in due course without notice of the renunciation."

Sect. 63. "(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

"(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such case any indorser who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

"(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder is inoperative; but where a bill or any signature thereon appears to have been cancelled the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority."

A promissory note payable on demand with interest, is "at maturity," within sect. 62, as soon as it is given, *Edwards v. Walters*, 65 L. J. Ch. 557; [1896] 2 Ch. 157; *In re George*, 59 L. J. Ch. 709; 44 Ch. D. 627.

The renunciation must itself be the record of an absolute and unconditional renunciation of rights, not a mere note of the renunciation, or of an intention to renounce: S. C. As to signature, *vide*, S. C.

The renunciation must be unequivocal:—Thus, a declaration by the holder, that "he should look to the drawer for payment, and that he wanted no more of the acceptor than another debt not connected with the bill," will not be sufficient to discharge the acceptor. *Parker v. Leigh*, 2 Stark. 228; *Adams v. Gregg*, *Id.* 531.

Delivery up of the bill to the devisee of the acceptor is not within sect. 62. *Edwards v. Walters*, *supra*. *Semble*, delivery to his personal representative is sufficient. S. C.

Alteration of the position of the parties, giving time, &c.] Giving time to or releasing a principal discharges a surety; and therefore giving time to

the acceptor discharges the drawer and indorsers. *English v. Darley*, 2 B. & P. 61. So giving time to any prior party discharges subsequent ones. *Hall v. Cole*, 4 Ad. & E. 577; 5 L. J. K. B. 100. This defence must be pleaded specially, so that the pleadings on the record sufficiently apprise the parties of the nature of the requisite proofs. There must be a binding agreement founded on a good consideration, on which an action would lie, if broken. *Moss v. Hall*, 5 Ex. 46; 19 L. J. Ex. 205. An agreement between the drawer of an accommodation bill, and the holder for its renewal, does not discharge the acceptor who refuses to accept a bill in renewal thereof. *Torrance v. Bank of British N. America*, L. R. 5 P. C. 246. Forbearance to sue the acceptor is not of itself equivalent to giving time. *Walwyn v. St. Quintin*, 1 B. & P. 652; *English v. Darley*, *supra*; *Price v. Kirkham*, 3 H. & C. 437; 34 L. J. Ex. 35. An agreement between the plaintiff and a stranger to give time to the acceptor will not discharge an indorser, unless the acceptor, the principal debtor, was party to the agreement. *Lyon v. Holt*, 5 M. & W. 250; *Fraser v. Jordan*, 8 E. & B. 303; 26 L. J. Q. B. 288. Taking a *cognovit* from the acceptor, after action brought, by which the time of obtaining judgment against him is not deferred, is not a giving of time. *Jay v. Warren*, 1 C. & P. 532; *Lee v. Levy*, 4 B. & C. 390; 3 L. J. (O. S.) K. B. 251.

It is a good equitable defence that the defendant made the note jointly with A. as surety only for him, of which the plaintiff had notice at the time and that the plaintiff gave time to A. without the defendant's knowledge; *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J. Q. B. 156; *Taylor v. Burgess*, 5 H. & N. 1; 29 L. J. Ex. 7; *Greenough v. M'Clelland*, 30 L. J. Q. B. 15; even though, although the plaintiff knew the defendant was only surety, he did not agree, nor did the defendant stipulate, that he should be treated by the plaintiff as surety only, or otherwise than as a maker of the note. S. C. In equity, giving time to the drawer or indorser of an accommodation acceptance, with notice that it is such, releases the acceptor. *Bailey v. Edwards*, 4 B. & S. 761; 34 L. J. Q. B. 41; *Edwin v. Lancaster*, 6 B. & S. 571. It is sufficient if the plaintiff knew the position of the defendant before time is given, though he did not know it at the time of the contract. *Oriental Financial Cor. v. Overend, Gurney & Co.*, 41 L. J. Ch. 332; L. R. 7 Ch. 142; L. R. 7 H. L. 348.

If, however, the agreement for giving time to or releasing the principal be qualified by a reservation of remedies against the surety, the surety is not discharged. *Bateson v. Gosling*, 41 L. J. C. P. 53; L. R. 7 C. P. 9; *Muir v. Crawford*, L. R. 2 H. L. Sc. 456.

The indorser of a bill who has paid it at maturity is entitled to the benefit of any securities deposited to secure the payment thereof by prior parties thereto. *Duncan v. N. & S. Wales Bank*, 50 L. J. Ch. 355; 6 App. Cas. 1.

Infancy.] An acceptance given by an infant, even for necessities, is void. *Williamson v. Watts*, 1 Camp. 552; *In re Soltykoff*, 60 L. J. Q. B. 339; [1891] 1 Q. B. 413. Although not liable on a bill or cheque given for necessities, the infant may be liable on the consideration. S. C. By 55 & 56 V. c. 4, s. 5, any instrument, negotiable or other, given by an infant, after he has come of age, to secure payment of money which in whole or part represents a loan made to him during infancy, shall, so far as represents such loan, be void absolutely against all persons whomsoever.

ACTION ON CHEQUES.

Statute.] Sect. 73. "A cheque is a bill of exchange drawn on a banker payable on demand.

"Except as otherwise provided in this Part" (*i.e.*, Part III. comprising sects. 73 to 82), "the provisions of this Act applicable to a bill of exchange payable on demand apply to a cheque."

Sect. 74. " Subject to the provisions of this Act—

" (1.) Where a cheque is not presented for payment within a reasonable time of its issue, and the drawer or the person on whose account it is drawn had the right at the time of such presentment as between him and the banker to have the cheque paid and suffers actual damage through the delay, he is discharged to the extent of such damage, that is to say, to the extent to which such drawer or person is a creditor of such banker to a larger amount than he would have been had such cheque been paid.

" (2.) In determining what is a reasonable time regard shall be had to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

" (3.) The holder of such cheque as to which such drawer or person is discharged shall be a creditor, in lieu of such drawer or person, of such banker to the extent of such discharge, and entitled to recover the amount from him."

Sect. 75. " The duty and authority of a banker to pay a cheque drawn on him by his customer are determined by—

" (1.) Countermand of payment :

" (2.) Notice of the customer's death."

Countermand of payment is a question of fact. It means not merely a change of purpose on the part of the customer, but in addition the notification thereof to the bank. There is no such thing as a constructive countermand in such a transaction. A telegram stopping a cheque may be acted upon by the bank to the extent of postponing payment until enquiry can be made, but *quære* whether the bank is, as a matter of law, bound to act upon an unauthenticated telegram as sufficient authority for refusing payment. *Curtice v. London City & Midland Bank*, 77 L. J. K. B. 341; [1908] 1 K. B. 293. Notice to the particular branch of the bank on which a cheque is drawn to stop payment thereof does not prevent the bank recovering against the drawer if in good faith and without notice the cheque has been paid to an indorsee by another branch of the same bank. *London, Provincial & S. W. Bank v. Buszard*, 35 T. L. R. 142.

Sect. 60. " When a bill payable to order on demand is drawn on a banker, and the banker on whom it is drawn pays the bill in good faith and in the ordinary course of business, it is not incumbent on the banker to show that the indorsement of the payee, or any subsequent indorsement, was made by or under the authority of the person whose indorsement it purports to be, and the banker is deemed to have paid the bill in due course, although such indorsement has been forged or made without authority."

16 & 17 V. c. 59, s. 19, also provides " that any draft or order drawn upon a banker for a sum of money payable to order on demand which shall, when presented for payment, purport to be indorsed by the person to whom the same shall be drawn payable, shall be a sufficient authority to such banker to pay the amount of such draft or order to the bearer thereof; and it shall not be incumbent on such banker to prove that such indorsement, or any subsequent indorsement, was made by or under the direction or authority of the person to whom the said draft or order was or is made payable either by the drawer or any indorser thereof." This provision, which is still in force, has been extended to any document issued by the Paymaster-General, in pursuance of 35 & 36 V. c. 44, which authorizes the payment of money. *Id.*, s. 11.

These sections apply to bankers only. *Halifax Union v. Wheelwright*, 44 L. J. Ex. 121; L. R. 10 Ex. 183. An indorsement " *per proc.*," or " as agent," is within them. *Charles v. Blackwell*, 46 L. J. C. P. 368; 2 C. P. D. 151. Where a banker, A., has two customers, B. and C., a cheque drawn by B. on A., and indorsed by C. without authority, and paid by him to his account with A., and credited by A. to C., is paid by A. to C. within these sections. *Bissell v. Fox*, 53 L. T. 119; *L. City & Midland Bank v. Gordon*, 72 L. J. K. B. 451; [1903] A. C. 240. They protect only

the banker on whom the cheque is drawn, and the drawer may, in an action for money had and received, recover the amount of the cheque from any person who has obtained payment thereof, through a forged indorsement. *Ogden v. Benas*, 43 L. J. G. P. 259; L. R. 9 C. P. 513; *Bobbett v. Pinkett*, 45 L. J. Ex. 555; 1 Ex. D. 368; *Gt. W. Ry. v. L. & County Banking Co.*, 70 L. J. K. B. 915; [1901] A. C. 414. So might the owner of a cheque, even against a banker who had received the money for a customer. *Arnold v. Cheque Bank*, 1 C. P. D. 578; *L. City & Midland Banking Co. v. Gordon*, *supra*. See also *Lacave v. Credit Lyonnais*, 66 L. J. Q. B. 226; [1897] 1 Q. B. 148. Now, however, by sect. 82, where the cheque is crossed, "a banker who has in good faith and without any negligence received payment for a customer," is protected in such a case. See also 6 Ed. 7, c. 17, s. 1. A banker who receives for collection from a private customer a cheque payable to and indorsed by a public official is put upon inquiry, and acts negligently if he credits the customer's account with the proceeds without making such inquiry. *Ross v. L. County Westminster, &c., Bank*, 88 L. J. K. B. 927; [1919] 1 K. B. 678. A banker's draft addressed by one branch of a bank to another branch is a draft or order within 16 & 17 V. c. 59, s. 19, *supra*; *L. City & Midland Banking Co. v. Gordon*, 72 L. J. K. B. 451; [1903] A. C. 240; and may be a "cheque" within sect. 73 of the B. of Ex. Act, 1882. *Ross v. L. County Westminster, &c., Bank*, *supra*.

The only effect of the initialling of a cheque by the drawer's banker is to show "on the face that it is drawn in good faith on funds sufficient to meet its payment," and to add the credit of the bank. *Gaden v. Newfoundland Savings Bank*, 68 L. J. P. C. 57; [1899] A. C. 281.

There is now no restriction on the amount of a cheque, for 48 G. 3, c. 88, s. 2, is repealed by the B. of Ex. Act, 1882, s. 96.

A cheque is none the less an unconditional order to pay that it has at the foot or on the back thereof a form of receipt the words of which are not address to the bankers and do not affect the order to them. *Nathan v. Ogdens*, 93 L. T. 553.

A cheque is not invalid by reason of being ante or post-dated, see sect. 13 (2). Nor is it now illegal, under the stamp laws, to post-date a cheque, whether payable to bearer or order; but a partner in a non-trading firm cannot bind his firm by drawing a post-dated cheque in the name of the firm. *Forster v. Mackreth*, 36 L. J. Ex. 94; L. R. 2 Ex. 163. The drawer is under no obligation for the benefit of a third person to stop its payment before it is due. *Ex pte. Richdale, infra*.

Semble, a dividend warrant is an unconditional order to pay on demand, and therefore a bill of exchange within sect. 3 of the Act, notwithstanding that at the foot of the warrant there is a note that "it will not be honoured after three months from date of issue unless specially indorsed for payment by the secretary." *Thairlwall v. G. N. Ry.*, 79 L. J. K. B. 924; [1910] 2 K. B. 509.

As to the effect of taking an overdue cheque, see sect. 36 (2, 3); *L. & County Banking Co. v. Groome*, 51 L. J. Q. B. 224; 8 Q. B. D. 288.

Payee, bearer, or indorsee against drawer.] The plaintiff may be put to prove the drawing and the presentment to, and non-payment by, the banker, and also notice to the drawer of the non-payment, unless the facts excuse such notice.

A banker who has carried to the credit of his customer's account the amount of a cheque handed to him for that purpose becomes a holder thereof for value, and may sue the drawer thereon, whether the account is overdrawn; *Currie v. Misa*, 44 L. J. Ex. 94; L. R. 10 Ex. 153; affirmed on another ground, 45 L. J. Q. B. 852; 1 App. Cas. 554; *M'Lean v. Clydesdale Banking Co.*, 9 App. Cas. 95; or not; *Ex pte. Richdale*, 51 L. J. Ch. 462; 19 Ch. D. 409. The banker may recover the full amount of the cheque from the drawer, although on its dishonour he debited his customer's account with

the amount. *R. Bank of Scotland v. Tottenham*, 64 L. J. Q. B. 99; [1894] 2 Q. B. 715.

Sect. 45 (2) provides that presentment must be within a reasonable time after issue, having regard to the usage of trade and particular circumstances. As between holder and drawer mere delay in presenting for payment, short of six years, is no answer, unless the defendant has been prejudiced by it; as by the failure of the bank after the drawing of the cheque. *Robinson v. Hawksford*, 9 Q. B. 52; 15 L. J. Q. B. 377; *Laws v. Rand*, 3 C. B. (N. S.) 442; 27 L. J. C. P. 76; in which case the drawer is released from liability; sect. 74 (1). The reasonable time under sect. 74 (1, 2), for presentation in order to avoid this risk, is the day following the day of receipt. *Moule v. Brown*, 4 Bing. N. C. 266; 7 L. J. C. P. 111; *Alexander v. Burchfield*, 7 M. & Gr. 1061; 11 L. J. C. P. 253. But if the holder of the cheque do not live in the same place as the drawee, he may send it to his banker or other agent by the post of the next day after he received it, and the agent should present it not later than the day after he received it; *Rickford v. Ridge*, 2 Camp. 537; *Hare v. Henty*, 10 C. B. (N. S.) 65; 30 L. J. C. P. 302; *Prideaux v. Criddle*, 38 L. J. Q. B. 232; L. R. 4 Q. B. 455; and this holds good as between banker and customer. *S. C. C.*; *Bailey v. Bodenham*, 16 C. B. (N. S.) 288; 33 L. J. C. P. 262. In *In re Boyse*, 56 L. J. Ch. 135; 33 Ch. D. 612, it was held that a delay in presentment exceeding six years was no answer.

The process of presenting cheques through the bankers' clearing house is described in the special verdict in *Warwick v. Rogers*, 5 M. & Gr. 340, 348. Such presentment has been held to be good. Presentment of a cheque to a banker through the post is a proper mode of presentment. *Heywood v. Pickering*, 43 L. J. Q. B. 145; L. R. 9 Q. B. 428, following *Prideaux v. Criddle*, *supra*. If so presented and the banker delay to return the cheque or to remit the money, any loss thereby occasioned will, as between the holder and the drawer, fall on the latter. *Heywood v. Pickering*, *supra*.

By sect. 50 (2) (c), (4), notice of dishonour is excused where the banker is as between himself and the drawer under no obligation to pay the cheque, or (5) where the drawer has countermanded payment. See *Carew v. Duckworth*, 38 L. J. Ex. 149; L. R. 4 Ex. 313.

A person taking a cheque payable to order, but without indorsement, has no better title than the person from whom he took it, although he took it *bonâ fide* and without notice; and he is affected by that person's fraud, of which he had notice before he obtained a formal indorsement. *Whistler v. Forster*, 14 C. B. (N. S.) 248; 32 L. J. C. P. 161.

Indorsee against indorser.] Where the cheque has been indorsed, and the indorser is sued by the holder, the plaintiff is bound to show due diligence in endeavouring to obtain payment, and giving notice of non-payment to the defendant. By sect. 45 (2) the cheque must be presented within a reasonable time or the indorser will be discharged. As to reasonable time, see *Moule v. Brown*, 4 Bing. N. C. 266; 7 L. J. C. P. 11; *Alexander v. Burchfield*, 7 M. & Gr. 1061; 11 L. J. C. P. 253.

By sect. 56, "where a person signs a bill otherwise than as drawer or acceptor, he thereby incurs the liabilities of an indorser to a holder in due course."

Banker's liability in respect of cheques.] Although by sect. 53 (1) "a bill of itself does not operate as an assignment of funds in the hands of the drawer available for payment thereof, and the drawee of a bill who does not accept as required by this Act, is not liable" thereon, yet there is an implied contract by a banker with his customer to cash cheques within a reasonable time after he has effects; *Marzetti v. Williams*, 1 B. & Ad. 415; 9 L. J. (O. S.) K. B. 42; and the customer, if a trader, is entitled to temperate damages on his cheque being, under such circumstances, dishonoured, without showing special damage; *Rolin v. Steward*, 14 C. B. 595;

23 L. J. C. P. 148; but evidence of special damage, that is, loss of credit and custom from particular individuals, cannot be recovered unless alleged in the claim. *Fleming v. Bank of New Zealand*, 69 L. J. P. C. 120; [1900] A. C. 577. A banker who had been in the habit of cashing cheques of the plaintiff when there were securities of his at the bank, though the cash balance was against him, was held liable for dishonouring his cheques. *Cumming v. Shand*, 5 H. & H. 95; 29 L. J. Ex. 129. So, where the customer placed in his bankers' hands a sum to meet a particular bill, and the bankers, instead of meeting the bill, placed it to the credit of an overdrawn account, it was held that the bankers were liable for the amount of the bill. *Hill v. Smith*, 12 M. & W. 618; 13 L. J. Ex. 243. But the bankers may, unless they have agreed otherwise, without notice to their customer, combine accounts he has with several branches of the bank, and dishonour his cheques, if on the whole state of account he have not sufficient assets; *Garnett v. McKewan*, 42 L. J. Ex. 1; L. R. 8 Ex. 10; for such branches form but one bank; *Prince v. Oriental Bank Cor.*, 47 L. J. P. C. 42; 3 App. Cas. 325; except for the purpose of honouring cheques drawn on a particular branch; *Woodland v. Fear*, 7 E. & B. 519; 26 L. J. Q. B. 202; *London, Provincial & S. W. Bank v. Buszard*, 35 T. L. R. 142; and of calculating the time for giving notice of dishonour. *Clode v. Bayley*, 12 M. & W. 51; 13 L. J. Ex. 17. Where all debts of a customer, R., in the hands of his banker, W., have been attached under Rules S. C., 1883, O. lxx. r. 1, to answer the judgment debt of H. against R., W. is not bound to honour any cheque drawn on him by R., although R.'s balance in W.'s hands exceeds the judgment debt. *Rogers v. Whiteley*, 61 L. J. Q. B. 512; [1892] A. C. 118. *Secus*, after W. has paid into court the amount of the judgment debt. *Yates v. Terry*, 71 L. J. K. B. 282; [1902] 1 K. B. 527. As to what amounts to the closing of a customer's account, see *Berry v. Halifax, &c., Banking Co.*, 70 L. J. Ch. 85; [1901] 1 Ch. 188.

Where A. hands his banker, B., a cheque drawn by C. on B., with directions to place it to A.'s account, B. takes the cheque as agent for A., to be dealt with as a cheque upon another banker, and if B. dishonours the cheque and gives A. notice in due course, B. is not liable. *Boyd v. Emmerson*, 2 Ad. & E. 184; 4 L. J. K. B. 43. *Secus*, if B. on receiving the cheque had agreed to cash or give credit for it. S. C.

A customer is bound by the custom of bankers. *Emanuel v. Roberts*, 9 B. & S. 121. In this case bankers were, on this ground, held justified in dishonouring a cheque which had been previously presented at the bank before it was due, and then marked "post-dated" by them. In consequence, however, of the repeal of the enactments prohibiting the post-dating of cheques, this custom no longer exists, and a banker will now pay a cheque when due, although it has been marked "post-dated."

As to banker's liability where fraudulent alterations have been made in bills and cheques, see *Action for money had and received, post*.

Crossed cheques.—Statute.] Sect. 76. "(1.) Where a cheque bears across its face an addition of—

"(a.) The words 'and company' or any abbreviation thereof between two parallel transverse lines, either with or without the words 'not negotiable'; or

"(b.) Two parallel transverse lines simply, either with or without the words 'not negotiable';

that addition constitutes a crossing, and the cheque is crossed generally.

"(2.) Where a cheque bears across its face an addition of the name of a banker, either with or without the words 'not negotiable,' that addition constitutes a crossing, and the cheque is crossed specially, and to that banker."

Sect. 77. "(1.) A cheque may be crossed generally or specially by the drawer.

"(2.) Where a cheque is uncrossed, the holder may cross it generally or specially.

"(3.) Where a cheque is crossed generally the holder may cross it specially.

"(4.) Where a cheque is crossed generally or specially, the holder may add the words 'not negotiable.'

"(5.) Where a cheque is crossed specially, the banker to whom it is crossed may again cross it specially to another banker for collection.

"(6.) Where an uncrossed cheque, or a cheque crossed generally, is sent to a banker for collection, he may cross it specially to himself."

Sect. 78. "A crossing authorized by this Act is a material part of the cheque; it shall not be lawful for any person to obliterate or, except as authorized by this Act, to add to or alter the crossing."

Sect. 79. "(1.) Where a cheque is crossed specially to more than one banker except when crossed to an agent for collection, being a banker, the banker on whom it is drawn shall refuse payment thereof.

"(2.) Where the banker on whom a cheque is drawn which is so crossed, nevertheless pays the same, or pays a cheque crossed generally, otherwise than to a banker, or if crossed specially, otherwise than to the banker to whom it is crossed, or his agent for collection, being a banker, he is liable to the true owner of the cheque for any loss he may sustain owing to the cheque having been so paid.

"Provided, that where a cheque is presented for payment which does not at the time of presentment appear to be crossed, or to have had a crossing which has been obliterated, or to have been added to, or altered otherwise than as authorized by this Act, the banker paying the cheque in good faith, and without negligence shall not be responsible, or incur any liability, nor shall the payment be questioned by reason of the cheque having been crossed, or of the crossing having been obliterated or having been added to or altered otherwise than as authorized by this Act, and of payment having been made otherwise than to a banker or to the banker to whom the cheque is or was crossed, or to his agent for collection being a banker, as the case may be."

Sect. 80. "Where the banker, on whom a crossed cheque is drawn, in good faith and without negligence pays it, if crossed generally, to a banker, and if crossed specially, to the banker to whom it is crossed, or his agent for collection being a banker, the banker paying the cheque, and, if the cheque has come into the hands of the payee, the drawer, shall respectively be entitled to the same rights and be placed in the same position as if payment of the cheque had been made to the true owner thereof."

Sect. 81. "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

Sect. 82. "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

Sect. 95. "The provisions of this Act as to crossed cheques shall apply to a warrant for payment of dividend."

The above sections replace the Crossed Cheques Act, 1876 (39 & 40 V. c. 81), which was in very similar terms.

By the Revenue Act, 1883 (46 & 47 V. c. 55), s. 17, the above sections, 76—82, "shall extend to any document, issued by a customer of any banker, and intended to enable any person or body corporate, to obtain payment from such banker, of the sum mentioned in such document, and shall so extend, in like manner, as if the said document were a cheque"; it does not, however, "render such document a negotiable instrument." It applies to such documents drawn on the Paymaster-General by public officers.

The holder who may cross a cheque or add a special crossing to a general one under sect. 77 (3) need not be a holder for value. *Akrokerri Mines v. Economic Bank*, 73 L. J. K. B. 742; [1904] 2 K. B. 465.

As the crossing is by sect. 78 a material part of the cheque, any alteration thereof will in general (see sect. 64 (1)) avoid the cheque.

A banker who in exchange for a cheque drawn on himself, and crossed generally, gives a cheque for the same amount drawn by him on another bank and crossed generally, "pays" the former cheque within sect. 79 (2). *Meyer v. Sze Hai Tong, &c., Co.*, 83 L. J. P. C. 103; [1913] A. C. 847. The true owner of the cheque may by his conduct be estopped from denying his agent's authority to accept that mode of payment. S. C.

The above sections do not affect the negotiability of a cheque, whether crossed generally or specially, unless also marked "not negotiable." See *Smith v. Union Bank of London*, 45 L. J. Q. B. 149; 1 Q. B. D. 31. Hence it seems that the *bonâ fide* holder for value of a cheque crossed only, without the addition of the words "not negotiable," is the true owner thereof, to whom the banker paying the cheque otherwise than as directed by the crossing is liable under sect. 79 (2), and that the payee or other person who was formerly holder, but lost the cheque while in a negotiable state, has no remedy given him by the section. See S. C. If, however, the cheque is also marked "not negotiable," then, although it continues to be transferable so that the holder for the time being can sue thereon, yet, by sect. 81, the holder can have no better title than his transferor had. *Gt. W. Ry. v. L. & County Banking Co.*, *infra*. A banker, however, who *bonâ fide* and without negligence collects such a cheque for a customer, is protected by sect. 82. See S. C.; *Matthiessen v. L. & County Bank*, 48 L. J. C. P. 529; 5 C. P. D. 7; *Crumplin v. London Joint Stock Bank*, 19 Com. Cas. 69. The protection of sect. 82 applies, although the customer's account is overdrawn when the cheque is paid in. *Clarke v. L. & County Banking Co.*, 66 L. J. Q. B. 354; [1897] 1 Q. B. 552. But it extended only to a cheque paid in for collection; where the banker B. at once credited the customer C. with the amount and allowed him to draw against it, before the cheque was cleared, B. was not protected by sect. 82. *L. City & Midland Banking Co. v. Gordon*, 71 L. J. K. B. 215; [1902] 1 K. B. 242; 72 L. J. K. B. 451; [1903] A. C. 240. Where, however, B., although at once crediting C. in his ledger, did not enter it in C.'s pass-book or allow C. to draw against it until it had been cleared, B. was protected. *Akrokerri Mines v. Economic Bank*, 73 L. J. K. B. 742; [1904] 2 K. B. 465. Now by 6 E. 7, c. 17, s. 1, "a banker receives payment of a crossed cheque for a customer within the meaning of" sect. 82, "notwithstanding that he credits his customer's account with the amount of the cheque before receiving payment thereof."

There is no protection in respect of the collection of cheques paid by C. to his account with his banker B., uncrossed, and which are afterwards crossed by B. *L. City & Midland Banking Co. v. Gordon*, *supra*. As to what is negligence within sect. 82, see *Bissell v. Fox*, 51 L. T. 663; 53 L. T. 119. "The character in which a bank received payment of a cheque is a question of fact," *per* Ld. Macnaghten, [1903] A. C. 244. Sect. 82 applies only to the case of a customer of the bank. *Lacave v. Crédit Lyonnais*, 66 L. J. Q. B. 226; [1897] 1 Q. B. 148. Whether a person is such customer is a question of fact. *Gt. W. Ry. v. L. & County Banking Co.*, 69 L. J. Q. B. 741; [1900] 2 Q. B. 464. The decision in this case was reversed in *H. L.* on the ground that the person was not a customer. S. C., 70 L. J. K. B. 915; [1901] A. C. 414. To make a person A. a customer of a banker B. there must be some sort of account between them, either a deposit account, or a current account, or some similar relation. *Id.* The habitual lodging of cheques by A. with B. for presentation on behalf of A. and, when honoured, the crediting and payment of the amount to A. seems sufficient. *Id.*, *per* Ld. Brampton. "In my opinion a person becomes a customer of a bank when he goes to the bank with money or a cheque and asks to have

an account opened in his name, and the bank accepts the money or cheque and is prepared to open an account in the name of that person; after that he is entitled to be called a customer of the bank. I do not think it is necessary that he should have drawn any money or even that he should be in a position to draw money. I think such person becomes a customer the moment the bank receives the money or cheque and agrees to open an account." *Ladbroke v. Todd*, 19 Com. Cas. 256, 261, *per* Bailhache, J. Where, however, A., who has no account with B., hands B. a cheque drawn by C. on another bank, and B. by his direction places part of the amount to the credit of a customer D. and at once pays A. the balance in cash, A. does not thereby become a customer of B., and B. collects the amount of the cheque for B. himself, and not for A. *G. W. Ry. v. L. & County Banking Co.*, *supra*. And where such cheque, crossed "not negotiable," had been fraudulently obtained by A. from C., C. may recover from B. the amount of the cheque which B. had collected. *S. C.* A banker's draft addressed by one branch of a bank to another branch is not a cheque within sect. 82, or 46 & 47 V. c. 55, s. 17, *supra*. *L. City & Midland Banking Co. v. Gordon*, *supra*.

The drawer of a cheque may disallow payment made by his banker to a banker other than the one named in the crossing or he may ratify it, and thereby make the payment a good payment by himself to the holder. *Bobbett v. Pinkett*, 45 L. J. Ex. 555; 1 Ex. D. 368. The transferability of a cheque is not restricted by a direction, written on its face above a crossing to a bank, to pay the amount to the account of the payee at that bank. *National Bank v. Silke*, 60 L. J. Q. B. 199; [1891] 1 Q. B. 435. But the words "a/c payee," when the cheque is presented by someone other than the named payee, put the collecting bank on enquiry. *Ladbroke v. Todd*, 19 Com. Cas. 256; *House Property Co. v. London County and Westminster Bank*, 84 L. J. K. B. 1846.

Defences generally to Actions on Cheques.

Vide ante, Defences to Actions on Bills, p. 313.

ACTION ON PROMISSORY NOTES.

Statute.] The general provisions of the B. of Ex. Act, 1882, relating to promissory notes are as follows:—

Sect. 83. "(1.) A promissory note is an unconditional promise in writing, made by one person to another, signed by the maker, engaging to pay, on demand, or at a fixed or determinable future time, a sum certain in money, to, or to the order of, a specified person or to bearer.

"(2.) An instrument in the form of a note payable to maker's order is not a note within the meaning of this section unless and until it is indorsed by the maker.

"(3.) A note is not invalid by reason only that it contains also a pledge of collateral security with authority to sell or dispose thereof.

"(4.) A note which is, or on the face of it purports to be, both made and payable within the British Islands is an inland note. Any other note is a foreign note."

Sect. 84. "A promissory note is inchoate and incomplete until delivery hereof to the payee or bearer."

Sect. 85. "(1.) A promissory note may be made by two or more makers, and they may be liable thereon jointly, or jointly and severally, according to its tenour.

"(2.) Where a note runs 'I promise to pay,' and is signed by two or more persons, it is deemed to be their joint and several note."

Sect. 86. "(1.) Where a note payable on demand has been indorsed, it must be presented for payment within a reasonable time of the indorsement. If it be not so presented the indorser is discharged.

“(2.) In determining what is a reasonable time, regard shall be had to the nature of the instrument, the usage of trade, and the facts of the particular case.

“(3.) Where a note payable on demand is negotiated, it is not deemed to be overdue, for the purpose of affecting the holder with defects of title of which he had no notice, by reason that it appears that a reasonable time for presenting it for payment has elapsed since its issue.”

Sect. 89. “(1.) Subject to the provisions in this Part” (*i.e.*, Part IV., comprising sects. 83 to 89), “and, except as by this section provided, the provisions of this Act relating to bills of exchange apply, with the necessary modifications, to promissory notes.

“(2.) In applying those provisions, the maker of a note shall be deemed to correspond with the acceptor of a bill, and the first indorser of a note shall be deemed to correspond with the drawer of an accepted bill, payable to drawer’s order.

“(3.) The following provisions as to bills do not apply to notes; namely, provisions relating to—

“(a.) Presentment for acceptance;

“(b.) Acceptance;

“(c.) Acceptance *supra* protest;

“(d.) Bills in a set.

“(4.) Where a foreign note is dishonoured protest thereof is unnecessary.”

Sect. 91 (2) enables, but does not require, a corporation to make a note under its common seal.

Sect. 86 (3) prevents sect 36 (3) from applying to notes. It seems that by reason of the Stamp Acts sect. 56 does not apply to notes.

It follows from sect. 89 that the decisions on the corresponding sections relating to bills of exchange will apply to notes.

A promissory note is not invalidated by a clause therein allowing time, &c., to be given without prejudicing the rights of the holder. *Kirkwood v. Carroll*, 72 L. J. K. B. 208; [1903] 1 K. B. 531.

See the following cases as to what documents do or do not require to be stamped as promissory notes: *Balck v. Pilcher*, 25 T. L. R. 497; *Hodgkins v. Simpson*, 25 T. L. R. 53; *Oettinger v. Cohn*, 77 L. J. K. B. 299; [1908] 1 K. B. 582; and *Smith v. Dean*, 69 L. J. Q. B. 331.

Bank notes—Amount of note.] Bank notes must not be for less than £5; stat. 7 G. 4, c. 6, s. 3.

The plaintiff must be the holder of the note. Where a note was deposited with a stakeholder for the payee, and the stakeholder has refused to hand it over, the payee cannot sue on the note as holder. *Latter v. White*, 41 L. J. Q. B. 342; L. R. 5 H. L. 578.

Payee against Maker.

Liability of maker.] Sect. 88. “The maker of a promissory note by making it—

“(1.) Engages that he will pay it according to its tenour;

“(2.) Is precluded from denying to a holder in due course the existence of the payee and his then capacity to indorse.”

Proof of making the note.] The making of the note is proved by proving the handwriting of the defendant; or, if made by an agent, by proof of the handwriting and authority of such agent. An admission by the defendant that the handwriting is his will be sufficient proof, though it was made pending a treaty for a compromise. *Waldridge v. Kennison*, 1 Esp. 143. An offer on the part of the defendant, after the note has become due, to give another note to the plaintiff instead of it, is an admission of the plaintiff’s

title. *Bosanquet v. Anderson*, 6 Esp. 43. An admission of his signature by one of the parties, not being partners, will only be evidence against himself. *Gray v. Palmers*, 1 Esp. 135.

An agent who makes a note in his own name will be personally liable unless he distinctly show on the face of it that he signs as agent only. See sect. 26. Thus, "on demand we jointly and severally promise to pay E. H. or order £250, value received, for and on behalf of the W. N. Association; P. S., J. W., Directors," was held to mean jointly and personally, and, therefore, to make the persons signing individually liable. *Healey v. Story*, 3 Ex. 3; 18 L. J. Ex. 8; *Penkivill v. Connell*, 5 Ex. 381; 19 L. J. Ex. 305; *Bottomley v. Fisher*, 1 H. & C. 211; 31 L. J. Ex. 417. The same rule applies where the note is a joint one only. *Price v. Taylor*, 5 H. & N. 540; 29 L. J. Ex. 331; *Gray v. Raper*, L. R. 1 C. P. 694; and *Courtauld v. Sanders*, 16 L. T. 562. So, where a note is signed by the directors of a company, and the seal of the company is affixed, they are personally liable, unless it appear on the note that they signed for the company only. *Dutton v. Marsh*, 40 L. J. Q. B. 175; L. R. 6 Q. B. 361. But where the defendants, being directors of the company, signed the following note: "Three months after date we jointly promise to pay F. S. or order, £600, for value received in stock, on account of the L. & B. Company, Limited, J. M., H. W. W., J. H., Directors," it was held that it sufficiently appeared that the note was made in the name of the company, within 19 & 20 V. c. 47, s. 43; and that the defendants were not personally liable. *Lindus v. Melrose*, 3 H. & N. 177; 27 L. J. Ex. 326; *Aggs v. Nicholson*, 1 H. & N. 165; 25 L. J. Ex. 348. So a promissory note in the form, "On demand, I promise to pay A. & Co., or order, the sum of £1,500, with legal interest thereon until paid, value received. For Mistley, Thorpe, and Walton Ry. Co., J. S., Secretary," was held not to bind the secretary personally, although the directors were not empowered by their act of incorporation to bind the company by notes. *Alexander v. Sizer*, 38 L. J. Ex. 59; L. R. 4 Ex. 102. The Companies Act, 1908, s. 77, is similar, though wider in its terms; it is not affected by the B. of Ex. Act, 1882, *vide* sect. 97 (2 b). In *Chapman v. Smethurst*, 78 L. J. K. B. 654; [1909] 1 K. B. 927, the note was in these terms: "Six months after demand I promise to pay to M. C. the sum of £300 for value received together with 6 per cent. interest per annum. J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director." The words, "J. H. Smethurst's Laundry and Dye Works, Limited," and "Managing Director," were impressed with a rubber stamp, the rest of the note being in writing. It was held that J. H. Smethurst was not personally liable. In *Aggs v. Nicholson*, *supra*, the court also rested their decision on the fact, which they held was in effect pleaded, that the defendants did not deliver the note, nor the plaintiffs take it, except as a note on behalf of the company; this is pointed out by Bramwell, B., in *Price v. Taylor*, 5 H. & N. 540; 29 L. J. Ex. 331; and this would, at any rate, be an equitable defence; *per* Wilde, B., S. C. See *Courtauld v. Sanders*, 16 L. T. 468, where such a plea was pleaded; and *Wake v. Harrop*, 6 H. & N. 768; 30 L. J. Ex. 273; S. C. *in error*, 1 H. & C. 202; 31 L. J. Ex. 451.

Where a bill or note mentioned the proper name of a limited company, but the word "limited" was omitted in the signature, owing to the fact that the rubber stamp was longer than the part of the document where the signature was affixed, and so overlapped, it was held that the name of the company was "mentioned" in accordance with sects. 41 and 42 of the Companies Act, 1862—now sect. 63 of the Companies Act, 1908—and that the two directors were not personally liable. *Dermatine Co. v. Ashworth*, 21 T. L. R. 510. A limited company's name is correctly stated, although the abbreviation "Ltd." is used instead of the complete word "Limited." *Stacey v. Wallis*, 106 L. T. 544.

When a note payable to the maker's own order is indorsed, it becomes a note payable to *bearer*, or to the *indorsee*, or his order, according as the

indorsement is in blank or to a named person. *Hooper v. Williams*, 2 Ex. 13; 17 L. J. Ex. 315; *Absolon v. Marks*, 11 Q. B. 19; 17 L. J. Q. B. 7; *Brown v. De Winton*, and *Gay v. Lunder*, 6 C. B. 336; 17 L. J. C. P. 231. It makes no difference that there is a footnote to it making it payable at a particular place. *Masters v. Baretto*, 8 C. B. 433; 19 L. J. C. P. 50. By sect. 7 (2) a note may now be made payable to the holder of an office for the time being: this provision is new, see *Cowie v. Stirling*, 6 E. & B. 333; 25 L. J. Q. B. 335. "I promise to pay A. B. or order, three months after date, £100, as per memorandum of agreement," is on the face of it a negotiable promissory note; and if the effect of the agreement is to make it conditional, the defendant must show it by his statement of defence. *Jury v. Barker*, E. B. & E. 459; 27 L. J. Q. B. 255.

As to the effect of making a note in blank, *vide* sect. 20, and *Herdman v. Wheeler*, 71 L. J. K. B. 270; [1902] 1 K. B. 361.

Whether the payee of a note can be a holder in due course, see the conflicting views of Ld. Russell, C.J., in *Lewis v. Clay*, 67 L. J. Q. B. 224, and of Moulton, L.J., in *Lloyd's Bank v. Cooke*, 76 L. J. K. B. 666; [1907] 1 K. B. 794.

Presentment for payment.] By sect. 87 (1), "Where a promissory note is in the body of it made payable at a particular place, it must be presented for payment at that place in order to render the maker liable. In any other case, presentment for payment is not necessary in order to render the maker liable." When a place for payment is specified in the body of the note, presentment there must be proved, though the maker may not be there to pay, and may have absconded, and left no effects there or other means of payment. *Sands v. Clarke*, 8 C. B. 751; 19 L. J. C. P. 84. The words "payable at," &c., at the foot of a note is, from mercantile usage, a memorandum only; *Masters v. Baretto*, *supra*; and *Warrington v. Early*, 2 E. & B. 766; 23 L. J. Q. B. 48. In an action on a note payable on demand, a demand need not be alleged or proved; for the action itself is a demand. *Rumball v. Ball*, 10 Mod. 38. It is otherwise if payable after sight. *Holmes v. Kerrison*, 2 Taunt. 323. By sect. 10 (1) (a) promissory notes payable at sight, or on presentation, are payable on demand. If a note be made payable at a particular town, and the maker have no residence there, a presentment at the banking-house there will support an allegation that it was presented there to the maker. *Hardy v. Woodroffe*, 2 Stark. 319. If a note be payable at two places, presentment at either is sufficient. *Beeching v. Gower*, Holt, N. P. 313. Notice of dishonour to the maker is unnecessary, for he is in the position of the acceptor of a bill. Sect. 89 (2).

There are days of grace in the case of a promissory note; see sect. 89 (1) and sect. 14 (1). So, in respect of each instalment where the note is payable by instalments, even where upon default in payment of any instalment the whole shall become due. See sect. 83 (1) and sect. 9 (1) (c). This follows the old law. *Oridge v. Sherborne*, 11 M. & W. 374; 12 L. J. Ex. 313; *Miller v. Biddle*, 14 W. R. 110.

Evidence under money claims.] A promissory note is evidence on the money claims only between immediate parties. *Waynam v. Bend*, 1 Camp. 175. It is evidence of money lent by the payee to the maker. Bayley on Bills, 6th ed. 362. A promissory note dated August, 1844, purporting to be for the amount of interest due on another note for £117 down to 6th July, 1844, is evidence of an account stated in August, 1844, of a then subsisting debt of £117. *Perry v. Slade*, 8 Q. B. 115; 15 L. J. Q. B. 10. Where a note cannot be given in evidence for want of a proper stamp, the plaintiff may recover on the consideration of the note. *Farr v. Price*, 1 East, 58, and *Id.*, n. And, the note may be used as evidence of the terms of a loan of money, though avoided by an alteration without a fresh stamp. *Sutton v. Toomer*, 7 B. & C. 416.

The plaintiff cannot resort to the money counts if the note have been

lost. Nor can he resort to them where he has made a note his own by laches, for this operates as payment. *Camidge v. Allenby*, 6 B. & C. 373; 5 L. J. (O. S.) K. B. 95. See *Smith v. Mercer*, 37 L. J. Ex. 24; L. R. 3 Ex. 51; *Hopkins v. Ware*, 38 L. J. Ex. 147; L. R. 4 Ex. 268. A special defence may be necessary in both cases.

Indorsee against Maker.

In an action on a promissory note by an indorsee against the maker, the plaintiff will have to prove, in addition to the making of the note by the defendant, the indorsement stated in the statement of claim, if traversed.

Where indorsements are unnecessarily mentioned, as in claiming upon a note made to payee or bearer, they must, if traversed, be proved. *Waynam v. Bend*, 1 Camp. 175. But *semb.*, the finding on such issues will be immaterial, if the plaintiff appear to be bearer; and the indorsements may be struck out at the trial. See *Macgregor v. Rhodes*, 25 L. J. Q. B. 318; 6 E. & B. 266.

Where A. made a promissory note payable to B.'s order, on demand, and gave it him as security for a debt, for which A. afterwards gave B. a mortgage; A. transferred the mortgage to C., and received payment from him, and indorsed the note for value to D., who took without notice. A. was held to have no defence to an action on the note by D. *Glasscock v. Balls*, 59 L. J. Q. B. 51; 24 Q. B. D. 13.

Indorsee against Indorser.

In an action by an indorsee against the indorser of a promissory note, the traversable allegations are, the defendant's indorsement; the presentment to the maker; his default; and notice to the defendant of the dishonour.

Sect. 87. "(2.) Presentment for payment is necessary in order to render the indorser of a note liable.

"(3.) Where a note is in the body of it made payable at a particular place, presentment at that place is necessary in order to render an indorser liable; but when a place of payment is indicated by way of memorandum only, presentment at that place is sufficient to render the indorser liable, but a presentment to the maker elsewhere, if sufficient in other respects, shall also suffice."

It seems that sect. 56 does not apply to notes.

An indorsement admits all prior indorsements, and also the handwriting of the maker. *Lambert v. Oakes*, 1 Ld. Raym. 443; *Free v. Hawkins*, Holt, N. P. 550; *Macgregor v. Rhodes*, 6 E. & B. 266; 25 L. J. Q. B. 318.

A promissory note must be presented within a time which is reasonable, under all the circumstances. *Chartered Mercantile Bank of India, &c. v. Dickson*, L. R. 3 P. C. 574.

It has been before stated by and to whom, and within what time, notice of dishonour must be given, and what will be considered sufficient proof of the delivery of the notice and of its contents, &c. It has also been shown in what cases proof of notice may be dispensed with by an acknowledgment or otherwise. Where the payee of a note indorses it for the accommodation of the maker, it is still necessary to give notice to the payee in order to charge him as indorser, and oral evidence is not admissible that it was agreed between the parties that the note should not be put in force until after a given event. *Free v. Hawkins*, 8 Taunt. 92.

Evidence under money claims.] An indorsement is evidence of money lent by the indorsee to the indorser. *Keesebower v. Tims*, Bayley on Bills, 6th ed., 363.

ACTION ON POLICY OF INSURANCE.

LIFE INSURANCE.

The contract of life assurance is, in consideration of a lump sum or of periodical payments, to pay a sum certain upon the death of a given life, and is not a contract of indemnity, like that of marine and fire policies. As to the necessity for English probate to the assured's estate, see 52 & 53 V. c. 42, s. 19, and *Haas v. Atlas Insurance Co.*, 82 L. J. K. B. 506; [1913] 2 K. B. 209.

Form of policy.] The Stamp Act, 1891, s. 100, requires every person receiving or taking credit for any premium or consideration for any contract of insurance, to make out and execute a stamped policy of such insurance, within one calendar month from the receipt of the premium, under a penalty of £50.

By the Married Women's Property Act, 1882 (45 & 46 V. c. 75), s. 11, a married woman may effect a policy on her own life, or the life of her husband for her separate use, and a policy effected by any man on his own life, and expressed to be for the benefit of his wife or of his children, or any of them, or by any woman on her own life, for the benefit of her husband or of her children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts. The insured may appoint a trustee or new trustees of the policy by a memorandum in writing and the receipt of a trustee duly appointed, or in default of notice to the office, the receipt of the legal personal representative of the insured, shall be a discharge to the office. See *Holt v. Everall*, 45 L. J. Ch. 433; 2 Ch. D. 266; *In re Seyton*, 56 L. J. Ch. 775; 34 Ch. D. 511. *In re Browne's Policy*, 72 L. J. Ch. 85; [1903] 1 Ch. 188; *In re Griffith's Policy*, 72 L. J. Ch. 330; [1903] 1 Ch. 739; *In re Parker's Policies*, 75 L. J. Ch. 297; [1906] 1 Ch. 526. The policy forms part of the assured's estate, where the objects of the trust have been performed, or have become impossible, as where the wife in whose sole favour the policy was effected murdered her husband. *Cleaver v. Mutual, &c. Life Ass.*, 61 L. J. Q. B. 128; [1892] 1 Q. B. 147.

Where, after the proposal for insurance has been accepted by the insurance office, on the terms that no insurance shall take effect until the premium is paid, and before it is tendered there has been a material alteration in the health of the proposer, the office is not bound to issue a policy. *Canning v. Farquhar*, 55 L. J. Q. B. 225; 16 Q. B. D. 727.

A condition on a policy provided that if the policy had acquired a surrender value it should not immediately lapse if a renewal premium was not paid within the days of grace, but should be kept in force for 12 calendar months "from the date upon which the last premium became due." It was held that the premium became "due" within this clause on the day on or before which it was provided by the policy that it should be paid; not that date plus days of grace. *McKenna v. City Life Assurance Co.*, 88 L. J. K. B. 1223; [1919] 2 K. B. 491. "The condition allowing days of grace means that if the premium is paid during those days of grace it shall be treated as if it had been paid on the due date." S. C.

As to the payment of the premiums after the death of the assured, see *Stuart v. Freeman*, 72 L. J. K. B. 1; [1903] 1 K. B. 47.

Assignment of policy.] The Policies of Assurance Act, 1867 (30 & 31 V. c. 144), s. 1, enacts that "any person or corporation now being or hereafter

becoming entitled by assignment or other derivative title to a policy of life assurance, and possessing, at the time of action brought, the right in equity to receive and the right to give an effectual discharge to the assurance company liable under such policy for moneys thereby assured or secured, shall be at liberty to sue at law in the name of such person or corporation to recover such moneys."

By sect. 3, "no assignment made after [August 20, 1867] of a policy of life assurance shall confer on the assignee therein named, his executors, administrators, or assigns, any right to sue for the amount of such policy, or the moneys assured or secured thereby, until a written notice of the date and purport of such assignment shall have been given to the assurance company liable under such policy at their principal place of business for the time being, or, in case they have two or more principal places of business, then at some one of such principal places of business, either in England or Scotland or Ireland, and the date on which such notice shall be received shall regulate the priority of all claims under any assignment; and a payment *bonâ fide* made in respect of any policy by any insurance company, before the date on which such notice shall have been received, shall be as valid against the assignee giving such notice as if this act had not been passed."

By sect. 4, assurance companies are, in policies issued after September 30, 1867, to specify the principal place or places of business at which notices of assignment may be given.

By sect. 6, every assurance company to whom notice of the assignment of any policy shall have been duly given shall deliver an acknowledgment in writing, under the hand of the manager, secretary, treasurer, or other principal officer of the assurance company, of their receipt of such notice; and every such written acknowledgment, if signed by a person being *de jure* or *de facto* the manager, &c., of the assurance company whose acknowledgment it purports to be, shall be conclusive evidence, as against such assurance company, of their having duly received the notice to which such acknowledgment relates.

An agreement for assignment is not an assignment within this act. *Spencer v. Clarke*, 47 L. J. Ch. 692; 9 Ch. D. 137; see also *In re Williams*, 86 L. J. Ch. 36; [1917] 1 Ch. 1.

Sect. 3 regulates the priority of claims as between the company and persons interested in the policy, and does not affect the rights of those persons *inter se*. *Newman v. Newman*, 54 L. J. Ch. 598; 28 Ch. D. 674.

Where there is a condition against assignment in the policy, it is still assignable in equity as before the statute. *In re Turcan*, 58 L. J. Ch. 101; 40 Ch. D. 5.

The J. Act, 1873, s. 25 (6), contains a general provision with reference to the assignment of choses in action.

Interest.] By 14 G. 3, c. 48, ss. 1, 2, a policy on lives or other events is unlawful and void, unless the person on whose account the insurance is made has an interest, and the name of the person interested, or for whose use or benefit, or on whose account, it is made, be inserted therein. If A., having no interest in B.'s life, cause him to effect an insurance in his own name, but at A.'s expense, and for A.'s benefit, this is a fraudulent evasion, and the policy is void under sect. 1. *Wainwright v. Bland*, 1 M. & Rob. 481; *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. J. Ex. 266. See also S. C., 27 L. J. Ex. 16. Everyone is presumed to have an insurable interest in his own life, and if he insures, whether for life or a limited time, his executor is not bound to show any interest beyond this. *Wainwright v. Bland*, *supra*. So, where either husband or wife insures the life of the other. *Reed v. R. Exch. Assur. Co.*, Peake, 70; *Griffiths v. Fleming*, 78 L. J. K. B. 567; [1909] 1 K. B. 805; and see 45 & 46 V. c. 75, s. 11. But where a wife was entitled to a legacy on attaining 21, and her husband insured her life in her name, to secure the amount of the legacy,

which was then advanced to him, it was held that the policy was void, as it did not state that the husband was the person having the present interest therein, although the ultimate benefit might be for the wife. *Evans v. Bignold*, 38 L. J. Q. B. 293; L. R. 4 Q. B. 622; see also *Forgan v. Pearl Life Assurance Co.*, 51 S. J. 230. A creditor has an insurable interest in his debtor's life. *Anderson v. Edie*, Park, Ins., 8th ed., 914-15. And, in general the interest which the insurer is required to have in the life of the assured, under 14 G. 3, c. 48, s. 1, must be a pecuniary interest; and, therefore, the insurance by a father in his own name on the life of his son, without any pecuniary interest in it, is void. *Halford v. Kymer*, 10 B. & C. 724; 8 L. J. (O. S.) K. B. 311. But where B. maintained her half-sister, A., a child 10 years old, B. was held to have an insurable interest in A.'s life. *Barnes v. L. Edinburgh, &c., Insur. Co.*, [1892] 1 Q. B. 864. See further as to what is sufficient pecuniary interest, *Hebden v. West*, *infra*. If a father, being engaged in a hazardous employment, agree with his son that the father will insure his own life and the son pay the premiums, and that the father shall leave the sum insured to his son by will, *semble*, *per* Martin and Bramwell, BB., that the insurance would be the father's and valid. *Shilling v. Accidental Death Insur. Co.*, 2 H. & N. 42; 26 L. L. Ex. 266. As to the recovery back of premiums paid under a policy void under the statute, *vide* *Action for Money had and received, In Cases of Illegal Contracts*, *post*.

By sect. 3 a person who insures the life of another, or any other event, can recover from the insurer or insurers no greater sum than the amount or value of his interest in such life or event. The interest referred to is the interest at the time of making the policy, and this amount is recoverable whether the interest ceased or not before the death, or, has been satisfied *aliunde*. *Dalby v. India and L. Assur. Co.*, 15 C. B. 365; 24 L. J. C. P. 2; *Law v. L. Indisputable Policy Co.*, 1 K. & J. 223; 24 L. J. Ch. 196, is to the same effect. But, by this section, the assured can in no case recover more than this insurable interest, whether upon one policy or many; and if he has already received that amount on other policies, this is an answer to an action. *Hebden v. West*, 3 B. & S. 579; 32 L. J. Q. B. 85; see also *Wolenberg v. Royal Co-operative Collecting Socy.*, 84 L. J. Q. B. 1316.

The assignee of a life policy is not within the Act, and need not show any interest other than the original one on which the policy is founded. *Ashley v. Ashley*, 3 Sim. 149.

The insertion of a name in the policy is not conclusive as to the ownership of the money thereby insured. *In re Scottish Equitable Life, &c., Co.*, 71 L. J. Ch. 189; [1902] 1 Ch. 282; *In re Slattery*, [1917] 2 I. R. 278.

The Assurance Companies Act, 1909 (9 Ed. 7, c. 49), s. 36 (2), validates certain policies effected before the passing of the Act which otherwise would have been void. See *Tofts v. Pearl Life Assurance Co.*, 84 L. J. K. B. 286; [1915] 1 K. B. 189. See further *Goldstein v. Salvation Army Assurance Society*, 86 L. J. K. B. 793; [1917] 2 K. B. 291; and *Hatley v. Liverpool Victoria Legal Friendly Socy.*, 88 L. J. K. B. 237, as to insuring funeral expenses.

Defence.

Misrepresentation.] The assured usually subscribes a declaration answering facts inquired of by the insurers, and it is made a condition that if any be untruly answered the policy is to be void; in such case the policy is avoided though there be no intentional untruth; *Duckett v. Williams*, 2 Cr. & M. 348; 3 L. J. Ex. 141; *Macdonald v. Law, &c., Insur. Co.*, 43 L. J. Q. B. 131; L. R. 9 Q. B. 328; *Thomson v. Weems*, 9 App. Cas. 761; *Yorke v. Yorkshire Insurance Co.*, 87 L. J. K. B. 881; [1918] 1 K. B. 662; see also *Att.-Gen. v. Ray*, 43 L. J. Ch. 478; L. R. 9 Ch. 397; *Joel v. Law Union, &c., Co.*; 77 L. J. K. B. 1108; [1908] 2 K. B. 863; and though the

mis-statement he found by the jury to be immaterial: for as the basis of the contract is the truth of the representation, its materiality is not in question, and ought not to be left to the jury. *Anderson v. Fitzgerald*, 4 H. L. C. 484; *Cazenove v. British Equitable Assur. Co.*, 6 C. B. (N. S.) 437; 28 L. J. C. P. 259. See *British Equitable Assur. Co. v. Gt. W. Ry.*, 17 W. R. 43. If there be such express condition on the policy, yet material and fraudulent concealment or misrepresentation, though the inquiry and statement be oral, will also avoid it. *Wainwright v. Bland*, 1 M. & W. 32; 5 L. J. Ex. 147; 1 M. & Rob. 481. Mere representations or statements which turn out untrue, will not avoid a life policy (as in some cases they do a marine policy), unless the policy purports to be based upon their truth or there be fraud. *Wheelton v. Hardisty*, 8 E. & B. 232; 26 L. J. Q. B. 265; 8 E. & B. 285; 27 L. J. Q. B. 241. The declaration and policy are to be construed together. See *Fowkes v. Manchester, &c., Assur. Assoc.*, 3 B. & S. 917; 32 L. J. Q. B. 153; *Hemmings v. Sceptre Life Assoc.*, 74 L. J. Ch. 231; [1905] 1 Ch. 365. Where after the discovery by the insurance company of an innocent mis-statement of the assured's age, or other matter, they continue to receive the premiums, they elect to adhere to the policy. *S. C.*; *Ayrey v. British Legal, &c., Assur. Co.*, 87 L. J. K. B. 513; [1918] 1 K. B. 136. If there be an untrue statement without fraud, and the policies of a company are expressed to be "indisputable except in case of fraud," the company will, in equity, be estopped from relying on the mis-statement; and this may be specially replied to the defence. *Wood v. Duarris*, 11 Ex. 493; 25 L. J. Ex. 129; *Anstey v. British Natural Premiums, &c.*, 99 L. T. 765. But, where the policy is issued by a company, which circulates a prospectus purporting that their policies are indisputable, a reply, relying on this fact, must be supported by proof, that the prospectus had been seen, or acted upon by the insured; and, the mere proof of the public circulation of the prospectus, before the policy was effected, is not sufficient. *Wheelton v. Hardisty, supra*. The omission to state that the deceased had any occupation, in answer to questions in the proposal, any mis-statement or concealment in which was to vitiate the policy, is not such an untrue statement as to vitiate the policy. *Perrins v. Marine & General Insur. Society*, 2 E. & E. 317, 324; 29 L. J. Q. B. 17, 242. But, the omission to state that proposals for insurance were made to, and declined by, other insurance offices was held to vitiate a contract for insurance. *London Assur. v. Mansel*, 48 L. J. Ch. 331; 11 Ch. D. 363. The person whose life is the subject of insurance by another has been held to be so far an agent for the assured that his false answers will vitiate the policy. *Rawlins v. Desborough*, 2 M. & Rob. 328, 334. But this case turned on the form of the particular policy; and, the false and fraudulent statements of the person whose life is insured, and of the medical referee, will not vitiate the policy, as against an innocent person, who effected the insurance, there being no condition that the untruth of the statement, contained in the proposal, should avoid the policy. *Wheelton v. Hardisty, supra*. As to the insurance company being affected by knowledge of their agent who sent them the proposal for the insurance, see *Bawden v. L. Edinburgh & Glasgow Assur. Co.*, 61 L. J. Q. B. 792; [1892] 2 Q. B. 534; *Biggar v. Rock Life Assur. Co.*, 71 L. J. K. B. 79; [1902] 1 K. B. 516; and *Holdsworth v. Lancashire & Yorkshire Insur. Co.*, 23 T. L. R. 521. As to effect of change in the health of the proposer, between the acceptance of proposal for insurance and payment of premium, see *Canning v. Farquhar*, 55 L. J. Q. B. 225; 16 Q. B. D. 727.

Suicide, Murder, &c.] Clauses avoiding a policy if the person, whose life is insured, "commits suicide," or "dies by his own hands," are construed to include all voluntary self-destruction, though not felonious; and consequently the unconsciousness of the person's mind is not material. *Clift v. Schwabe*, 3 C. B. 437; 17 L. J. C. P. 2; *Dormay v. Borradaile*, 5 C. B. 380. Where the policy was conditioned to be valid, notwithstanding suicide, to the extent

of any *bonâ fide* interest acquired by any person, by virtue of an equitable lien or security on it, on proof of such interest, to the satisfaction of the directors of the company: proof of the policy being held by the trustees of the wife of the assured, by way of marriage settlement, was held to support the alleged lien. *Moore v. Woolsey*, 4 E. & B. 243; 24 L. J. Q. B. 40. Proof of the above facts was reasonable evidence for the directors, by which they were bound to be satisfied. S. C.; see also *Braunstein v. Accidental Death Insur. Co.*, 31 L. J. Q. B. 17; 1 B. & S. 782. The clause is, in the absence of fraud, for the benefit of the assured. *Solicitors' & General Life Assur. Soc. v. Lamb*, 1 H. & M. 716; 33 L. J. Ch. 426; *City Bank v. Sovereign Life Assur. Co.*, 50 L. T. 565. So, where the policy is mortgaged to the society, they are in the same position as if it had been mortgaged to a third party. *White v. British Empire, &c., Assur. Co.*, 38 L. J. Ch. 53; L. R. 7 Eq. 394. But the assignees of the assured under a foreign bankruptcy, are not within the condition in a policy that it should be valid, notwithstanding suicide, if any third party had acquired a *bonâ fide* interest therein by assignment, or by legal or equitable lien for a valuable consideration, or as a security for money. *Jackson v. Forster*, 1 E. & E. 463; 28 L. J. Q. B. 166; 1 E. & E. 470; 29 L. J. Q. B. 8. On the application by F. for a policy on his own life for the benefit of his creditor E., F. warranted that he would not commit suicide, whether sane or insane, within one year: the policy was granted thereon, and F. committed suicide within the year, it was held that the policy was thereby avoided even as against E. *Ellinger v. Mutual Life Insur. Co. of New York*, 74 L. J. K. B. 39; [1905] 1 K. B. 31. Where the question is whether death is due to accident or to suicide, the presumption is against suicide where the evidence pointing in each direction is equally balanced. *Harvey v. Ocean, &c., Co.*, [1905] 2 I. R. 1.

Where F., having insured his life, assigned the policy to B., and was executed for forgery, it was held that B. could not recover on the policy, F.'s death being the result of his own criminal act. *Amicable Assur. Soc. v. Bolland (Fauntleroy's Case)*, 2 Dow. & C. 1; 4 Bli. N. S. 194. On a similar principle, if B., being interested in a policy on A.'s life, murders A., neither B. nor his assignees can take any benefit under the policy. *Cleaver v. Mutual, &c., Life Assur.*, 61 L. J. Q. B. 128; [1892] 1 Q. B. 147.

Return of premiums.] See *post*, *Action for money had and received*.

INSURANCE AGAINST PERSONAL ACCIDENTS.

In a policy of insurance effected against injury caused by accident or violence, provided the same should be caused by some outward and visible means, of which satisfactory proof should be furnished to the insurers, is meant such proof as the insurers may reasonably require, and not such as they may capriciously demand. *Braunstein v. Accidental Death Insur. Co.*, 1 B. & S. 782; 31 L. J. Q. B. 17. See *Moore v. Woolsey*, *supra*, and *Trew v. Ry. Passengers' Assur. Co.*, 6 H. & N. 839; 30 L. J. Ex. 317. Where there was an exception in the policy, of death from certain specified diseases, or any other disease or cause within the system of the assured before or at the time or following such accidental injury; it was held that one of the specified diseases, brought on solely by the accident, was not within the exception. *Fitton v. Accidental Death Insur. Co.*, 17 C. B. (N. S.) 122; 34 L. J. C. P. 28; *Mardorf v. Accident Insur. Co.*, 72 L. J. K. B. 362; [1903] 1 K. B. 584. Where, however, the exception extends to secondary causes, the insurers are not liable. *Smith v. Accident Insur. Co.*, 39 L. J. Ex. 211; L. R. 5 Ex. 302. Where the policy excepted injury caused by natural disease or weakness, or exhaustion consequent on disease, and the assured while fording a stream was seized with an epileptic fit, and fell into the stream and was drowned, this was held not to be within the excep-

tion. *Winspear v. Accident Insur. Co.*, 6 Q. B. D. 42; see also *Lawrence v. Accidental Insur. Co.*, 50 L. J. Q. B. 522; 7 Q. B. D. 216. A policy against "death from the effects of injury caused by accident," includes death from a disease which was the natural consequence of an injury caused by accident. *Isitt v. Railway Passengers Assur. Co.*, 58 L. J. Q. B. 191; 22 Q. B. D. 504. In order to exclude death so arising, the policy must be plainly expressed, for an ambiguous clause must be construed rather against than in favour of the insurers. *In re Etherington and Lancashire & Yorkshire Accident Insur. Co.*, 78 L. J. K. B. 684; [1909] 1 K. B. 591; *In re Bradley and Essex & Suffolk Accident Co.*, 81 L. J. K. B. 523; [1912] 1 K. B. 415. See further *Dunham v. Clare*, 71 L. J. K. B. 683; [1902] 2 K. B. 292; *Fenton v. Thorley & Co.*, 72 L. J. K. B. 787; [1903] A. C. 443; *Brittons v. Turvey*, 74 L. J. K. B. 474; [1905] A. C. 231; *Nisbet v. Rayne*, 80 L. J. K. B. 84; [1910] 2 K. B. 689; *Trim Joint District School v. Kelly*, 83 L. J. P. C. 220; [1914] A. C. 667, decided under stat. 60 & 61 V. c. 37. In a policy of insurance against "any bodily injury caused by violent accidental external and visible means," with a proviso excepting injuries arising from "natural disease or weakness or exhaustion consequent on disease," the word "external" must be taken in contradistinction to internal causes of injury such as diseases. *Hamlyn v. Crown Accidental Insur. Co.*, 62 L. J. Q. B. 409; [1893] 1 Q. B. 750; applied in *Burridge v. Haines*, 87 L. J. K. B. 641. Death from heart failure induced by intentional physical exertion is not a death from the effects of an injury by accident. *In re Scarr v. General Accident Assur. Cor.*, 74 L. J. K. B. 237; [1905] 1 K. B. 387. Cf. *Clover, Clayton & Co. v. Hughes*, 79 L. J. K. B. 470; [1910] A. C. 242. Nor is death by sunstroke. *Sinclair v. Maritime Passengers' Assur. Co.*, 3 E. & E. 478; 30 L. J. Q. B. 77. As to a nervous shock produced by fright and excitement, see *Pugh v. L. Brighton, &c., Ry.*, 65 L. J. Q. B. 521; [1896] 2 Q. B. 248; and *Yates v. South Kirby, &c., Co.*, 79 L. J. K. B. 1035; [1910] 2 K. B. 538. Where death occurs from a risk which was either obvious to the assured, or would have been obvious to him if he had been paying reasonable attention to what he was doing, it falls within an exception in the policy, of accident caused by "exposure of the deceased to obvious risk." *Cornish v. Accident Insur. Co.*, 58 L. J. Q. B. 591; 23 Q. B. D. 453.

The insurance company is affected by the knowledge of its agent, Q., who sent to them the proposal for insurance, of special facts relating to the assured, B., whereby the risk was increased. *Bawden v. L. Edinburgh & Glasgow Assur. Co.*, 61 L. J. Q. B. 792; [1892] 2 Q. B. 534. Thus, where Q., knowing that B. was a one-eyed man, made no note thereof on the proposal on which the policy was issued, the company were held liable on the loss of B.'s remaining eye to pay compensation as for total loss of sight. S. C. But where Q. filled up the proposal form which B. signed without reading or knowing that several of the answers were false, its truthfulness being the basis of the proposal, the policy was held void, because B. must be taken to have read and approved of the answers, and that in filling in the answer, Q. was acting as B.'s agent and not that of the insurance office. *Biggar v. Rock Life Assur. Co.*, 71 L. J. K. B. 79; [1902] 1 K. B. 516.

A policy for 12 months, from Nov. 24, 1888, covers an accident on Nov. 24, 1889. *South Staffordshire Tramways Co. v. Sickness, &c., Assur. Co.*, 60 L. J. Q. B. 260; [1891] 1 Q. B. 402. As to whether injury caused to several persons by the same negligence, is one accident or more, *vide* S. C., in C. A., *Id.* Whether a term of the policy requiring notice of death within 7 days is a condition precedent depends on the construction of the whole policy. *Stoneham v. Ocean, &c., Accident Insur. Co.*, 19 Q. B. D. 237. As to the calculation of time for a claim to be made after registration under a coupon insurance policy, see *General Accident, &c., Corporation v. Robertson*, 79 L. J. P. C. 1; [1909] A. C. 404.

A policy indemnifying the assured against claims of third parties for "accidental personal injuries" caused to them by the driving of the

assured's motor car, is not void as against public policy by reason of the fact that it indemnifies the assured against the payment of compensation in respect of the death of a person whom he has accidentally killed through driving at an excessive speed. *Tinline v. White Cross Insur. Assoc.*, 37 T. L. R. 733.

FIRE INSURANCE.

The fundamental principle of fire insurance is that it is a contract of indemnity. *Castellain v. Preston*, 52 L. J. Q. B. 366; 11 Q. B. D. 380. A policy which has lapsed becomes renewed by the payment of the premium. *Kirkpatrick v. S. Australian Insur. Co.*, 11 App. Cas. 177.

Policies of fire insurance are within 14 G. 3, c. 48. A contract of fire insurance cannot be ratified after a loss has occurred. *Grover v. Mathews*, 79 L. J. K. B. 1025; [1910] 2 K. B. 401. A fire policy is now assignable by virtue of the J. Act, 1873, s. 25 (6). Where the policy requires the assured to deliver a certificate of the minister and churchwardens, as to the character of the assured, and the *bonâ fides* of the loss; *Worsley v. Wood*, 6 T. R. 710; or particulars of loss within a certain time of the fire; *Mason v. Harvey*, 8 Ex. 819; 22 L. J. Ex. 336; it is a condition precedent. See *L. Guarantee Co. v. Fearnley*, 5 App. Cas. 911. As to whom the notice of loss may be given under a similar clause, see *Marsden v. City & County Assur. Co.*, 35 L. J. C. P. 60; L. R. 1 C. P. 232. Fire policies are sometimes so framed as to be covenants to pay only an adjusted loss; in such case before adjustment no action can be maintained on the policy. *Elliott v. R. Exchange Assur. Co.*, 36 L. J. Ex. 129; L. R. 2 Ex. 237; *Viney v. Bignold*, 57 L. J. Q. B. 82; 20 Q. B. D. 172; *Caledonian Insur. Co. v. Gilmour*, [1893] A. C. 85. Policies sometimes contain a clause entitling the insurers to determine the policy on notice, refunding a proportionate part of the premium. *Sun Fire Office v. Hart*, 58 L. J. P. C. 69; 14 App. Cas. 98. A policy from August 14 to November 14 was held to include the latter day, on which a fire took place. *Isaacs v. R. Insur. Co.*, 39 L. J. Ex. 189; L. R. 5 Ex. 296. See *South Staffordshire Tramways Co. v. Sickness Assur. Co.*, *supra*.

An interim receipt for premiums or slip initialled by the insurer constitutes an agreement to insure. *Parsons v. Queen Insur. Co.*, 51 L. J. P. C. 11; 7 App. Cas. 96; *Thompson v. Adams*, 23 Q. B. D. 361. Where issued at Lloyd's, it is not subject to an implied condition that the policy should be put forward within a reasonable time. S. C.

As to the applicability of clauses incorporated in an insurance policy from original policy, see *Home Insurance Co. v. Victoria-Montreal Fire Insur. Co.*, 76 L. J. P. C. 1; [1907] A. C. 59.

On the renewal of a policy, the assured, if there is no evidence to the contrary, must be deemed to repeat the representations made by him to the insurers in the original proposal. *In re Wilson and Scottish Insurance Cor.*, 89 L. J. Ch. 329; [1920] 2 Ch. 28.

Interest.] It is necessary to show an interest in the subject insured at the time of insuring and of the fire. *Lynch v. Dalzell*, 4 Bro. P. C., 2nd ed. 431; *Saddlers' Co. v. Badcock*, 2 Atk. 554. The unpaid vendor of a house may recover the full value thereof, if it be burnt before the conveyance is executed, though after the contract of sale. *Collingridge v. R. Exchange Assur. Co.*, 3 Q. B. D. 173; 47 L. J. Q. B. 32. This interest need not be the absolute property; thus, an insolvent might insure a house, &c., to which his assignees were entitled, he being in possession and responsible to the real owners. *Marks v. Hamilton*, 7 Ex. 323; 21 L. J. Ex. 109. Warehousemen and wharfingers may insure their customers' goods in their custody, and may recover the whole value under a policy on goods "held in trust or on commission." *Waters v. Monarch Assur. Co.*, 5 E. & B. 870; 25 L. J. Q. B. 102. See also *Cochran v. Leckie's Trustee*, 8 F. 975. A carrier, who

so insures, may recover the whole value of goods lost by fire, although the owner of the goods may be disabled from recovering from the carrier by reason of the value not being declared under the Carriers Act. *L. & N. W. Ry. Co. v. Glyn*, 1 E. & E. 652; 28 L. J. Q. B. 188. See also *Ebsworth v. Alliance Marine Insur. Co.*, 42 L. J. C. P. 305; L. R. 8 C. P. 596. But it is otherwise where the further words, "for which they" (the assured) "are responsible" are added. *N. British Insur. Co. v. Moffatt*, L. R. 7 C. P. 25; 47 L. J. C. P. 1. As to the claim of the general owner to the insurance money, when received by the assured, see *Martineau v. Kitching*, 41 L. J. Q. B. 227; L. R. 7 Q. B. 436, and *Ebsworth v. Alliance Marine Insur. Co.*, *supra*. Goods delivered by A. to B., who is to return to A. an equivalent quantity of similar goods, but not necessarily the identical goods delivered to B., are to be insured as the goods of B., and not as the goods held by B. in trust; for the transaction amounts to the sale of the goods to B. *S. Australian Insur. Co. v. Randell*, L. R. 3 P. C. 101.

Premises of sufficient value were mortgaged to A., and then to B., and A. insured them in one office in a sufficient sum to cover his loan, and B. in another office to cover his loan, and they were burnt down; A. recovered enough on his policy to reinstate them, but did not do so, and the premises not reinstated were insufficient to cover B.'s security; it was held that B. was entitled to recover on his policy to the extent of his loss; *Westminster Fire Office v. Glasgow Provident Investment Society*, 10 App. Cas. 699; but not for loss of rent of the premises. S. C. As to the right of a mortgagee under s. 83 of the Fires Prevention (Metropolis) Act, 1774 (14 Geo. 3, c. 78)—a section which is of general as opposed to local application—to have insurance money spent in rebuilding the premises, see *Sinnott v. Bowden*, 81 L. J. Ch. 832; [1912] 2 Ch. 414.

As to the form of policy which a lessor is entitled to require where his lessee has covenanted to keep the premises insured, see *Upjohn v. Hitchens*, 87 L. J. K. B. 337; [1918] 2 K. B. 48.

Description of the articles insured; alteration in premises, &c.] The property intended to be insured must be described: but substantial accuracy is sufficient. See *Forbes' Claim*, 44 L. J. Ch. 761; L. R. 19 Eq. 485. Where the policy required the house or other building, in which the goods are, to be mentioned, the goods of a lodger may be called "goods in his dwelling-house." *Friedlander v. London Assur. Co.*, 1 M. & Rob. 171. The locality of the subject of insurance is material. *Pearson v. Commercial Union Assur. Co.*, 45 L. J. C. P. 761; 1 App. Cas. 498. Where the premises are described as being where "no fires are kept, or hazardous goods deposited," this means where no fires are *habitually* kept; and the casual use of fire to repair the premises does not come within the condition. *Dobson v. Sotheby, M. & M.* 90. Where the condition was against any alteration of the trade without notice, a single instance of drying bark in a kiln, used and insured as a corn kiln, will not avoid the policy. *Shaw v. Robberds*, 6 Ad. & E. 75; 6 L. J. K. B. 106. A condition against the storing of gasoline was held not to have been broken by the use on an emergency of a small quantity of gasoline in a cooking stove. *Thompson v. Equity Fire, &c., Co.*, 80 L. J. P. C. 13; [1910] A. C. 592. When no steam engine, stove, or other description of fire heat was to be introduced, without notice to the insurers, the introduction of a stove, and use of it on one occasion as an experiment, without notice, prevents the insured recovering. *Glen v. Lewis*, 8 Ex. 607; 22 L. J. Ex. 228. But, where there is no condition relating to alterations in the premises after the policy, a subsequent change, as by setting up a more hazardous trade in them, if without fraud, will not avoid the policy. *Pim v. Reid*, 6 M. & G. 1; 12 L. J. C. P. 299. Policies usually provide for notice of any such change; and where the alteration is one which makes the subject-matter insured no longer substantially correspond with the property as *particularly* described in the policy, and varies the risk, it will avoid the assurance; for the description in such cases is equivalent to a warranty. *Sillem v. Thornton*, 3 E. &

B. 868; 23 L. J. Q. B. 362. In this last case, the house was enlarged so as no longer to agree with a description of it, annexed to the policy, and referred to in it so as to form a part of it. But, such a constructive warranty or condition is restrained by an express condition, requiring notice of any alteration increasing the risk and payment of a higher premium. *Stokes v. Cox*, 1 H. & N. 533; 26 L. J. Ex. 113.

If there be a condition in the policy that no more than 20 lbs. of gunpowder be on the premises insured, the policy is avoided if the condition be broken, although the breach of the condition have not occasioned the loss. *Beacon Life Assur. Co. v. Gibb*, 1 Moo. P. C. (N. S.) 79.

As to declaring other policies, see *National Protector Fire, &c., Co. v. Nivert*, 82 L. J. P. C. 95; [1913] A. C. 507.

A warranty contained in a clause in the policy "warranted to be on the same rate, terms, and identical interest as U. Insur. Co., £800," is a condition precedent, a breach of which disentitles the assured from recovering. *Barnard v. Faber*, 62 L. J. Q. B. 159; [1893] 1 Q. B. 340.

Loss.] A fire policy is a contract of indemnity, and the assured can only recover the actual loss or damage sustained by him according to the real quantity and value of the goods at the time of the fire; *Chapman v. Pole*, 22 L. T. 306; and, in respect of the interest in the goods covered by the insurance; *Castellain v. Preston*, 52 L. J. Q. B. 375 *et seq.*; 11 Q. B. D. 397 *et seq.* Anything which reduces or diminishes the loss reduces or diminishes the amount which the indemnifier is bound to pay. *Burnand v. Rodocanachi*, 51 L. J. Q. B. 548, 552; 7 App. Cas. 333, 339; *British Dominions General Insur. Co. v. Duder*, 84 L. J. K. B. 1401; [1915] 2 K. B. 394. A valued policy is considered an open one if the loss be not total, and the damage and expenses caused by removing articles insured are also covered by the policy. 3 Kent, Com. 375, and note. By 28 & 29 V. c. 90, s. 12, "any damage occasioned by the" metropolitan "fire brigade" constituted by that act "in the due execution of their duties, shall be deemed to be damage by fire within the meaning of any policy of insurance against fire." This brigade is now under the control of the London County Council, 51 & 52 V. c. 41, s. 40 (8). See further as to loss caused by fire and water in extinguishing the fire, *Ahmedbhoy Habbibhoy v. Bombay Fire Insur. Co.*, L. R. 40 Ind. App. 10; 107 L. T. 668.

A damage sustained by atmospheric concussion, caused by an explosion of gunpowder at a distance, is not a damage insured against in a policy against loss occasioned by fire. *Everett v. London Assur. Co.*, 19 C. B. (N. S.) 126; 34 L. J. C. P. 299. See *Marsden v. City and County Assur. Co.*, 35 L. J. C. P. 60; L. R. 1 C. P. 232. Where a fire policy contained an exception of liability for loss or damage by explosion, except for such loss or damages as should arise from explosion by gas, and an inflammable vapour caught fire, exploded, and caused a further fire, it was held that gas meant only ordinary coal gas; and that the exception included not only the effects of the explosion, but also the further fire caused thereby. *Stanley v. Western Insur. Co.*, L. R. 3 Ex. 71; 37 L. J. Ex. 71; *Hooley Hill Rubber Co. v. Royal Insur. Co.*, 89 L. J. K. B. 179; [1920] 1 K. B. 257; *Curtis's & Harvey (Canada) v. North British & Mercantile Insur. Co.*, 90 L. J. P. C. 9; [1921] 1 A. C. 303. As to damage by war, bombardment, &c., and fire directly caused thereby, see *Curtis v. Mathews*, 88 L. J. K. B. 529; [1919] 1 K. B. 425. See also *Rogers v. Whittaker*, 86 L. J. K. B. 790; [1917] 1 K. B. 942.

The policy covers a loss by fire owing to the negligence of the assured himself, if there be no fraud. *Shaw v. Robberds*, 6 Ad. & E. 75; 6 L. J. K. B. 106. Wilful misrepresentations of the value of the property destroyed will, under the usual clause against fraudulent claims, defeat and vitiate the whole claim. *Britton v. R. Insur. Co.*, 4 F. & F. 905; see also *Chapman v. Pole*, *supra*. As to condition to render account of loss, see *Hiddle v. National, &c., Insur. Co. of New Zealand*, 65 L. J. P. C. 24; [1896] A. C. 372.

The managers of a workhouse effected an insurance against fire over the contents of the building, including the personal property of their servants. A fire occurred and the managers recovered the whole sum insured which was not more than covered their own loss. They were held not bound to pay over any part to a servant whose property had been destroyed. *Ferguson v. Aberdeen Parish Council*, [1916] S. C. 715.

A condition "that if, at the time of any loss happening to any property hereby insured, there be any other subsisting insurances, whether effected by the assured or any other person, covering the same property," the insurer shall not be liable to pay more than his rateable proportion of such loss, applies only where the same property is the subject-matter of insurance, and the interests are the same. *N. British & Mercantile Insur. Co. v. L. Liverpool & Globe Insur. Co.*, 5 Ch. D. 569; 46 L. J. Ch. 537. See further as to double insurance, *Australian Agricultural Co. v. Saunders*, 44 L. J. C. P. 391; L. R. 10 C. P. 668.

Where A. is insured by B., and A. can also recover the loss from C., B. may, when he has made good A.'s loss, recover in A.'s name the amount over from C. *Mason v. Sainsbury*, 3 Doug. 61; *N. British & Mercantile Insur. Co. v. L. Liverpool & Globe Insur. Co.*, 5 Ch. D. 569; 46 L. J. Ch. 537. And, so if, after B. has paid A. the amount of his loss, C., under a legal obligation, also makes it good, B. can recover the amount from A., whether A.'s right of action against C. is founded on tort (*Darrell v. Tibbitts*, 50 L. J. Q. B. 33; 5 Q. B. D. 560), or arises out of contract. *Castellain v. Preston*, 52 L. J. Q. B. 366; 11 Q. B. D. 380. And if A., instead of receiving this sum from C., released his right against him, B. may recover from A. the value of this right to which he was entitled to be subrogated. *W. of England Fire Insur. Co. v. Isaacs*, 66 L. J. Q. B. 36; [1897] 1 Q. B. 226. See also *Phœnix Assur. Co. v. Spooner*, 74 L. J. K. B. 792; [1905] 2 K. B. 753.

INSURANCE AGAINST ACCIDENTS TO CHATTELS, BURGLARY, &C.

By a policy of insurance, plate glass in the plaintiff's shop front was insured against "loss or damage originating from any cause whatsoever, except fire," &c.; a fire broke out on premises adjoining the plaintiff's, but did not approach his shop front; a mob attracted by the fire tore down the plaintiff's shop shutters, and broke the plate glass for the purpose of plunder; it was held that the proximate cause of the damage was the lawless act of the mob, and not fire. *Marsden v. City and County Assur. Co.*, 35 L. J. C. P. 60; L. R. 1 C. P. 232. A policy insuring damage to plate glass windows "caused directly by or arising from civil commotion or rioting," does not cover loss caused by certain persons organized to commit such damage. *London and Manchester Plate Glass Co. v. Heath*, 82 L. J. K. B. 1183; [1913] 3 K. B. 411. Where after a proposal by the plaintiff to the defendant company for an insurance of his goods against burglary, the defendants sealed the policy, which contained a clause that no insurance would be considered in force until the premium had been paid, after, but without notice of a loss by burglary, it was held that though no premium had been paid and the defendants retained the policy they were liable thereon. *Roberts v. Security Co.*, 66 L. J. Q. B. 119; [1897] 1 Q. B. 110. See, however, *Equitable Fire, &c., Office v. Ching Wo Hong*, 76 L. J. P. C. 31; [1907] A. C. 96. As to matters stated in proposal falling within arbitration clause, see *Stebbing v. Liverpool and London and Globe Insur. Co.*, 86 L. J. K. B. 1155; [1917] 2 K. B. 433. As to what constitutes a loss under such a policy, see *In re George and Goldsmiths', &c., Insur. Assoc.*, 68 L. J. Q. B. 365; [1899] 1 Q. B. 595. As to the effect in such a policy of a proviso excepting loss by theft by members of the assured's business staff, see *Saqui and Lawrence v. Stearns*, 80 L. J. K. B. 451; [1911] 1 K. B. 426. The burden of proof in such a case is upon the assured to prove a loss within the

policy, and not upon the insurer to prove that it came within the exception. *Hurst v. Evans*, 86 L. J. K. B. 305; [1917] 1 K. B. 352. As to loss under a banker's policy on "coin in or upon their premises taken out of their possession or control by any fraudulent means" see *Century Bank of New York v. Young*, 84 L. J. K. B. 385, and *Pawle v. Bussell*, 85 L. J. K. B. 1191.

INSURANCE OF DEBTS AND SOLVENCY.

An insurance company entered into a policy whereby they guaranteed to the assured, the plaintiff, the payment of a sum of money deposited by her in a bank in Australia, if the bank should make default in paying the same; the bank made such default and entered under a colonial statute into a scheme of arrangement with its creditors which was binding on the plaintiff, although she did not assent thereto. The company was held to remain liable to the plaintiff, but on payment was entitled to be subrogated to the plaintiff's rights under the scheme. *Dane v. Mortgage Insur. Co.*, 63 L. J. Q. B. 144; [1894] 1 Q. B. 54; *Finlay v. Mexican Investment Co.*, 66 L. J. Q. B. 151; [1897] 1 Q. B. 517. A contract of insurance of the solvency of a surety is avoided by the concealment of material facts. *Seaton v. Heath*, 68 L. J. Q. B. 631; [1899] 1 Q. B. 782; reversed in *H. L. sub. nom. Seaton v. Burnand*, 69 L. J. Q. B. 409; [1900] A. C. 135, on the ground that the facts concealed were not material to the risk.

ACTION ON CONTRACT OF AFFREIGHTMENT.

This action lies by or against a shipowner, whether the ship be general or chartered. The contract need not be under seal. In the case of a general ship, the bill of lading, or in the case of a chartered ship, the charterparty, is the proof of the contract. As the pleadings and proofs are substantially the same, whether the contract be or be not under seal, the following cases are to be taken as applicable to actions on contracts between shipper and shipowner, whatever the technical form of action may be, unless otherwise specified.

Greater weight is to be given to the words inserted in writing than to the printed form. *Glynn v. Margetsen*, 62 L. J. Q. B. 466; [1893] A. C. 351.

A charterparty, or memorandum in the nature of one, commonly contains clauses on the part of the shipowner, for seaworthiness, the reception and delivery of the cargo, and performance of the voyage, with an exception of certain perils. On the part of the charterer or freighter, the clauses are to load in a given time, and to pay freight and demurrage.

The captain or master of a ship is an agent of the owners with larger powers than an ordinary agent. As between him and third persons, he is personally liable on contracts, made in the course of his ordinary employment, in his own name, or as agent of the owner, and he is able to sue on contracts so made. So, where like contracts are made by him, whether he sign expressly as agent or not, the owner may sue or be sued on them. Hence he may sign a charterparty or bill of lading in his own name, and thereby bind his owners. 3 Kent, Com. §§ 161—164; Story on Agency, §§ 116—123. And he may sue in his own name for freight; *Shields v. Davis*, 6 Taunt. 65; unless it appear from the charterparty and bill of lading that he signed the latter as agent only. *Repetto v. Millar's Karri, &c., Forests*, 70 L. J. K. B. 561; [1901] 2 K. B. 306. The master can bind the owners by his bill of lading only when he is their servant, and not when they have, although without the knowledge of the shipper, parted with the possession and control of the ship to the charterers. *Baumwoll Manufac-*

turing Co. v. Furness, 62 L. J. Q. B. 201; [1893] A. C. 8. This rule is not altered by the owner being registered as such, and also as managing owner, under 57 & 58 V. c. 60, s. 59, S. C. The law of the country to which the ship belongs is *prima facie* that which binds the parties to a contract of affreightment; *Lloyd v. Guibert*, 35 L. J. Q. B. 74; L. R. 1 Q. B. 115; *The Gaetano & Maria*, 51 L. J. Adm. 67; 7 P. D. 137; *The August*, 60 L. J. P. 57; [1891] P. 328; but this rule will be modified where the parties show a different intention. *Chartered Mercantile Bank of India v. Netherlands India Steam Navigation Co.*, 10 Q. B. D. 521, 529, 540; 52 L. J. Q. B. 220; *The Industrie*, 63 L. J. P. 84; [1894] P. 58.

Bill of lading.] A bill of lading contains a receipt for and description of the goods received on board, the names of the shipper and consignee, the place of delivery (certain perils excepted) and the freight; and it is signed (in three parts) by the master, as agent of the shipowners. It is the contract of carriage between the shipowner and merchant; *Leduc v. Ward*, 57 L. J. Q. B. 379; 20 Q. B. D. 475; and its terms cannot be varied by oral evidence. S. C. Even where there is a charterparty and a sub-charter, the contract is with the shipowner, unless there is a demise of the ship, or the shipowner has parted with possession of the ship. *Wehner v. Dene S.S. Co.*, 74 L. J. K. B. 550; [1905] 2 K. B. 92. The shipowner must deliver all the goods described in the bill of lading, unless he can prove that they were not shipped. *Smith v. Bedouin S. Navigation Co.*, 65 L. J. P. C. 8; [1896] A. C. 70. The bill of lading may be so framed as not to be even *prima facie* evidence of the quantity shipped. This was the case in *New Chinese Antimony Co. v. Ocean S.S. Co.*, 86 L. J. K. B. 1417; [1917] 2 K. B. 664. The words "or assigns" are usually added to the name of the consignee, and it is questionable whether it be transferable by indorsement, unless the words be subjoined; see *Henderson v. Comptoir d'Escompte de Paris*, 42 L. J. P. C. 60; L. R. 5 P. C. 253; except, perhaps, in the case of special custom in certain foreign trades; see *Renteria v. Ruding*, M. & M. 511. But the omission of the words "or assigns" does not of itself give notice that the person in whose name the bill is made out is entitled to deal with the goods absolutely. *Henderson v. Comptoir d'Escompte de Paris*, *supra*. Where the terms of the charterparty and bill of lading are inconsistent, those of the former prevail as between shipowner and charterer, and the latter is only a receipt for the goods. *Rodocanachi v. Milburn*, 56 L. J. Q. B. 202; 18 Q. B. D. 67. But as between the shipowner and the indorsee of the bill of lading the latter prevails. See *Serraino v. Campbell*, 60 L. J. Q. B. 303; [1891] 1 Q. B. 283, 290, 291; *Temperley S.S. Co. v. Smyth*, 74 L. J. K. B. 876; [1905] 2 K. B. 791, 802; and *Thomas & Co. v. Portsea S.S. Co.*, 81 L. J. P. 17; [1912] A. C. 1. A clause in the charterparty giving power to the master to sign bills of lading "without prejudice to this charter" means "that it is a term in the contract between the charterers and the shipowner, that notwithstanding any engagements made by the bills of lading, that contract shall remain unaltered." *Turner v. Haji, &c., Azam*, 74 L. J. P. C. 17; [1904] A. C. 826. But where the master is to sign bills of lading without prejudice to the charterparty, and the charterers present for signature, and the master signs, bills of lading omitting the negligence clause contained in the charterparty, the charterers are liable to indemnify the shipowners in respect of damages they have had to pay to bills of lading holders for goods damaged by negligence. *Kruger v. Moel Tryvan Ship Co.*, 76 L. J. K. B. 985; [1907] A. C. 272. It is the charterer's duty to present for the master's signature bills of lading as are not inconsistent with, and are not to the prejudice of, the charterparty. S. C. See, further, *Calcutta Co. v. Weir*, 79 L. J. K. B. 401; [1910] 1 K. B. 759; *The Draupner*, 79 L. J. P. 88; [1910] A. C. 450; *Hogarth Shipping Co. v. Blythe, Green, Jourdain & Co.*, 86 L. J. K. B. 1426; [1917] 2 K. B. 534.

Although the indorsement of a bill of lading transferred the property in

the goods, at common law, it conveyed no right of action to or against the indorsee in his own name as upon the original contract. *Thompson v. Dominy*, 14 M. & W. 403; 14 L. J. Ex. 320; *Howard v. Shepherd*, 9 C. B. 297; 19 L. J. C. P. 249. And the receipt of the goods by the indorsee was only evidence for a jury of a new contract to pay freight in consideration of the delivery, on which he might be sued. *Kemp v. Clark*, 12 Q. B. 647; 17 L. J. Q. B. 305. But by the Bills of Lading Act, 1855 (18 & 19 V. c. 111), s. 1, "every consignee of goods named in a bill of lading, and every indorsee of a bill of lading to whom the property in the goods therein mentioned shall pass upon or by reason of such consignment or indorsement shall have transferred to, and vested in him all rights of suit, and be subject to the same liabilities in respect of such goods, as if the contract contained in the bill of lading had been made with himself." But by sect. 2, "nothing herein contained shall prejudice or affect any right of stoppage *in transitu*, or any right to claim freight against the original shipper or owner, or any liability of the consignee or indorsee by reason or in consequence of his being such consignee or indorsee, or of his receipt of the goods by reason or in consequence of such consignment or indorsement."

The consignee or indorsee of a bill of lading may deprive the unpaid vendor of his right to stop the goods *in transitu* by indorsing it for valuable consideration, although the goods are not paid for, provided the indorsee for value has acted *bonâ fide* and without notice. *The Marie Joseph*, L. R. 1 P. C. 219, 227; *The Argentina*, L. R. 1 Adm. 370. A past debt is sufficient consideration. *Leask v. Scott*, 46 L. J. Q. B. 329, 576; 2 Q. B. D. 376, dissenting from *Rodger v. Comptoir d'Escompte de Paris*, 38 L. J. P. C. 30; L. R. 2 P. C. 393. See, further, *Action for conversion of goods—Defence—Stoppage in transitu—how defeated, post*. The indorsee has transferred to him the same rights and liabilities in respect of the goods as if the contract in the bill of lading had been made with him. *The Helene*, B. & L. 415. Hence actions now lie on the original contract by or against the indorsee of the bill of lading, and the shipowner or master may sue him for freight, although he received the goods under circumstances which negative any intention or undertaking to pay. And the shipowner may also be liable to the indorsee by estoppel on a representation made in the bill of lading. *Compania Naviera, &c. v. Churchill*, 75 L. J. K. B. 94; [1906] 1 K. B. 237; *Martineaus v. Royal Mail Steam Packet Co.*, 17 Com. Cas. 176. It seems that a person taking a bill of lading by indorsement after a breach, by a wrongful delivery of the goods to a stranger, can maintain an action by virtue of sect. 1. *Short v. Simpson*, 35 L. J. C. P. 147; L. R. 1 C. P. 248, 252, 255. See also *Bristol, &c., Bank v. Midland Ry.*, 61 L. J. Q. B. 115; [1891] 2 Q. B. 653. The first indorsee of one part of a bill of lading, drawn in a set, "one of which being accomplished the others to stand void," gets the property in the goods, though he take no steps to enforce his rights. *Barber v. Meyerstein*, 39 L. J. C. P. 187; L. R. 4 H. L. 317. But the master is justified in delivering the goods to the consignee, to whom they are by such a bill of lading made deliverable, on production of one part of the bill, although there has been a prior indorsement for value of another part, provided the master had no notice thereof and the delivery was *bonâ fide*. *Glyn v. E. & W. India Dock Co.*, 52 L. J. Q. B. 146; 7 App. Cas. 591. See further as to bills of lading in sets, *Sanders v. Maclean*, 52 L. J. Q. B. 481; 11 Q. B. D. 327. The Act does not seem to render any bill of lading negotiable which would not have been so before the Act. See *Henderson Comptoir d'Escompte de Paris*, 42 L. J. P. C. 60; L. R. 5 P. C. 253. The shipper, A., of goods, does not, by simply indorsing the bill of lading to B., and delivering it to him by way of pledge for a loan, "pass the property in the goods" to B., so as to make B. liable to the shipowner for freight under sect. 1. *Sewell v. Burdick*, 54 L. J. Q. B. 156; 10 App. Cas. 74.

By the Sale of Goods Act, 1893 (56 & 57 V. c. 71), s. 19 (2), "Where goods are shipped, and by the bill of lading the goods are deliverable to the

order of the seller or his agent, the seller is *prima facie* deemed to reserve the right of disposal." See *Ogg v. Shuter*, 45 L. J. C. P. 44; 1 C. P. D. 47; *Mirabita v. Imperial Ottoman Bank*, 47 L. J. Ex. 418; 3 Ex. D. 164, 172.

(3.) "Where the seller of goods draws on the buyer for the price, and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him." This is in accordance with the principle laid down in *Shepherd v. Harrison*, L. R. 5 H. L. 116; 40 L. J. Q. B. 148; *Ex parte Banner*, 45 L. J. Bk. 73; 2 Ch. D. 278; *Mirabita v. Imperial Ottoman Bank*, *supra*. And the rule applies, notwithstanding a statement in the invoice that the goods are shipped on account and at the risk of the consignee. *Shepherd v. Harrison*, *supra*. The consignee may, however, although he has not accepted the bill of exchange, confer a good title on an innocent buyer. *Cahn v. Pockett's Bristol, &c., Co.*, 68 L. J. Q. B. 515; [1899] 1 Q. B. 643. See also *Moakes v. Nicholson*, 19 C. B. (N. S.) 220; 34 L. J. C. P. 273; *Gabarron v. Kreeft*, *Kreeft v. Thompson*, 44 L. J. Ex. 238; L. R. 10 Ex. 274; and *Anderson v. Morice*, 46 L. J. Q. B. 11; 1 App. Cas. 713, as to effect of shipping goods under bill of lading. As to property in goods passing when the bill of lading is posted, see *Banco de Lima v. Anglo-Peruvian Bank*, 8 Ch. D. 160.

It is a breach of contract if the master sail away, with the cargo on board, without signing bills of lading, but it does not amount to a conversion of the cargo, unless the circumstances show an intention by him to deprive the shipper of his cargo. *Jones v. Hough*, 49 L. J. Ex. 211; 5 Ex. D. 115.

Where a cargo was shipped under a charterparty which contained the clause, "the freight to be paid as follows:—One-third on signing bills of lading less 3 per cent. for interest, insurance, &c., and the remainder on unloading in cash," and the bills of lading were to be signed within 24 hours after the cargo was on board; it was held that the vessel having sunk, and the cargo being lost after the commencement of the voyage, and before the bills of lading were presented for signature, did not excuse the charterers from presenting the bills of lading, and the shipowner was entitled to recover damages equal to the advance freight. *Oriental S.S. Co. v. Tylor*, 63 L. J. Q. B. 128; [1893] 2 Q. B. 518. See also *Nolisement (Owners) v. Bunge & Born*, 86 L. J. K. B. 145; [1917] 1 K. B. 160.

The right of suing upon a contract under a bill of lading follows the legal title to the goods as against the indorser. *The Freedom*, 38 L. J. Adm. 25; L. R. 3 P. C. 594; see also *The Figlia Maggiore*, 37 L. J. Adm. 52; L. R. 2 Ad. 106. So where the consignors indorsed and delivered a bill of lading to A., who indorsed and delivered it to the plaintiff for value, this was held to be evidence of such an indorsement and delivery as to pass the property in the goods to the plaintiff within the meaning of 18 & 19 V. c. 111, s. 1; *Dracachi v. Anglo-Egyptian Navigation Co.*, 37 L. J. C. P. 71; L. R. 3 C. P. 190; and if goods are shipped by the seller to order, under circumstances which show that he intended to pass the property in the goods to the buyer, the mere fact of the seller having taken the bill of lading in his name, and its remaining unindorsed, will not prevent the property passing. *Joyce v. Swann*, 17 C. B. (N. S.) 84. See also *Mirabita v. Imperial Ottoman Bank*, 47 L. J. Ex. 418; 3 Ex. D. 164; *Karberg v. Blythe, Green, Jourdain & Co.*, 84 L. J. K. B. 1673, 1676; [1915] 2 K. B. 379, 387.

An indorsee of a bill of lading, who has indorsed it over before the arrival of the vessel and delivery of the cargo does not, under sect. 1, remain liable for the freight; *Smurthwaite v. Wilkins*, 11 C. B. (N. S.) 842; 31 L. J. C. P. 214; and where the consignee of goods, before the arrival of the ship, indorsed over the bill of lading to wharfingers thus: "deliver to W. or order, looking to them for all freight, &c., without recourse to us," and the shipowners accepted the indorsement, and delivered the goods to W.; the shipowners could not sue the consignee for freight. *Lewis v. M'Kee*,

36 L. J. Ex. 6; L. R. 2 Ex. 37. But such acceptance of the indorsement by the shipowners is not proved by showing that it was on the bill when it was presented to the captain, without proving that the captain in fact assented to it. S. C., 38 L. J. Ex. 62; L. R. 4 Ex. 58. The consignee named in the bill of lading is liable thereon, unless he has indorsed it over, even though he has sold the cargo comprised therein. *Fowler v. Knoop*, 48 L. J. Q. B. 333; 4 Q. B. D. 299.

Where goods are loaded, and the mate's receipt then given, and afterwards exchanged for the bill of lading, in the usual manner, the latter takes effect from the loading. *The Duero*, 38 L. J. Adm. 69; L. R. 2 A. & E. 393. A bill of lading remains in force until there has been a delivery of goods thereunder to a person having a right to receive them. *Barber v. Meyerstein*, 39 L. J. C. P. 187; L. R. 4 H. L. 317.

The mere employment, by the shipowner, A., of a broker at a foreign port to find a cargo for a ship, and to adjust the terms of carriage thereof, does not give him implied power to relieve the master, B., when he signs the bill of lading therefor, of the duty of seeing that the dates of shipment are correctly stated in the bill of lading, and B. is liable to A. for any damage A. may sustain by the breach of this duty. *Stumore v. Breen*, 56 L. J. Q. B. 401; 12 App. Cas. 698.

Where the bill of lading provided "average, if any, to be adjusted according to British custom," the admitted custom of average adjusters is made part of the contract, and the custom, though erroneous, is binding. *Stewart v. W. India &c., Steamship Co.*, 42 L. J. Q. B. 191; L. R. 8 Q. B. 88.

The mortgagee of a ship is bound by bills of lading given by the mortgagor before the mortgagee took possession of the ship. *Keith v. Burrows*, 46 L. J. C. P. 801; 2 App. Cas. 636.

SHIPOWNER AGAINST CHARTERER OR MERCHANT.

Although there is a charterparty by deed, yet if there is a subsequent agreement by parol, for the use of the ship, at a period before the charterparty attaches, but embodying its terms, this may be proved, and the demand recovered as on a simple contract. *White v. Parkin*, 12 East, 578. So for other matters of agreement, express or implied, *extra* the contract. *Fletcher v. Gillespie*, 3 Bing. 635; 4 L. J. (O. S.) C. P. 202.

The exception of fire in a charterparty enures for the protection of the charterer as well as the shipowner. *In re Newman & Dale S.S. Co., & British, &c., S.S. Co.*, 72 L. J. K. B. 110; [1903] 1 K. B. 262. It may be, however, that a particular exception is, on the construction of the charter, for the benefit of the shipowner only. See *Braemount S.S. Co. v. Weir*, 15 Com. Cas. 101. Where a charterparty contained the clause "in the event of war," &c., "this charterparty is to be cancelled," it was held to be determined on war breaking out without the election of either party. *Adamson v. Newcastle, &c., Insur. Assoc.*, 48 L. J. Q. B. 670; 4 Q. B. D. 462.

Compliance with warranties or conditions.] In an action for not loading, plaintiff must prove compliance with warranties or conditions. On the mere contract by the shipowner to carry goods, shipped on board his vessel, there is no implied condition that his vessel shall be seaworthy. *Schloss v. Heriot*, 14 C. B. N. S. 59; 32 L. J. C. P. 211. By undertaking that the vessel shall be seaworthy at the time of receiving the cargo, there is no warranty against "suspicion" of unfitness; therefore, where the master took antimony on board as ballast, so as to fill no more room than ballast, and the jury found it not injurious to a cargo of tea, it was held that the charterers, who were bound to load a "full cargo" of tea, were liable for refusing to put it on board, although this ballast might raise "suspicious" as to the ship's fitness for such a cargo. *Towse v. Henderson*, 4 Ex. 890; 19 L. J. Ex. 163.

The description of a ship in the charterparty may be a warranty, or condition precedent. Thus, if it be described as of the class called A 1, and it is not so, it would be an answer to an action for not loading; but such a warranty only applies to the classification at the time of the contract. *Hurst v. Osborne*, 18 C. B. 144; 25 L. J. C. P. 209; *Trench v. Newgass*, 3 C. P. D. 163; *Routh v. Macmillan*, 2 H. & C. 750; 33 L. L. Ex. 38. So, "now at sea; having sailed *three weeks ago*," is a condition; *Ollive v. Booker*, 17 L. J. Ex. 21; 1 Ex. 416; though had "or thereabouts" been added, as is wrongly stated in the marginal note in 1 Ex., the decision would probably have been otherwise. *Per Curiam* in *Behn v. Burness*, *infra*. So, "now sailed or about to sail from a pitchpine port," *Bentsen v. Taylor*, 63 L. J. Q. B. 15; [1893] 2 Q. B. 274; or "now in the port of A.," *Behn v. Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204, amounts to a warranty; and, in arriving at the true construction of the document, the court must look at the surrounding circumstances (as found by the jury) at the time the contract is made. S. C. So, a stipulation to sail, or be ready for loading, on a particular day, is a condition precedent. *Glaholm v. Hays*, 2 M. & Gr. 257; 10 L. J. C. P. 98; *Oliver v. Fielden*, 18 L. J. Ex. 353; 4 Ex. 135; *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J. Ex. 153; *Seeger v. Duthie*, 8 C. B. N. S. 45, 72; 29 L. J. C. P. 253; 30 L. J. C. P. 65. In such case readiness to sail on a particular day is not disproved by the fact that the captain, *bonâ fide*, though wrongly, thinking the ship already sufficiently loaded, refused to receive additional goods on board, and the dispute, decided ultimately against the captain, caused delay in sailing until after the day. S. C. When the charterparty is for a stipulated time, time is the essence of the contract. *Tully v. Howling*, 46 L. J. Q. B. 388; 2 Q. B. D. 182. Delay, caused by the excepted perils, when so great as to put an end in a commercial sense to the speculation, entered into between the shipowner and charterers, exonerates the charterer from loading; *Jackson v. Union Marine Insur. Co.*, L. R. 8 C. P. 572; L. R. 10 C. P. 125; see further as to the principle of frustration of the adventure by delay. *Horlock v. Beal*, 85 L. J. K. B. 602; [1916] 1 A. C. 486; *Admiral Shipping Co. v. Weidner*, *Hopkins & Co.*, 85 L. J. K. B. 409, 413; 86 L. J. K. B. 336; [1916] 1 K. B. 429, 436-7; [1917] 1 K. B. 222. The principle of frustration is applicable to a time charter. *Bank Line v. Capel*, 88 L. J. K. B. 211; [1919] A. C. 435.

A statement of tonnage is not a warranty, or condition precedent. *Barker v. Windle*, 6 E. & B. 675; 25 L. J. Q. B. 349. See *Pust v. Dowie*, 5 B. & S. 20; 32 L. J. Q. B. 179; 5 B. & S. 33; 34 L. J. Q. B. 127. To an action by shipowner, A., against shipper, B., for contributions to general average, it is no answer that the ship was not seaworthy, unless it be shown that its unseaworthiness at the commencement of the voyage caused the loss, in which case it is a good defence, in order to avoid circuity of action. *Schloss v. Heriot*, 14 C. B. N. S. 59; 32 L. J. C. P. 211. So A. cannot claim contribution in respect of jettison rendered necessary by the wrongful acts of himself or his servants. *Strang v. Scott*, 59 L. J. P. C. 1; 14 App. Cas. 601. If the ship be not fit to carry a reasonable cargo of the kind for which the ship was chartered, the charterer is not bound to load. *Stanton v. Richardson*, L. R. 7 C. P. 421; L. R. 9 C. P. 390.

The question what representation amounts to a condition precedent, or to a warranty, depends entirely on the intention of parties, as apparent on the contract itself; there is no general rule that representations in a charterparty are equivalent to warranties, or to conditions precedent. *Croockewit v. Fletcher*, 26 L. J. Ex. 153; 1 H. & N. 893, and *Bentsen v. Taylor*, 63 L. J. Q. B. 15; [1893] 2 Q. B. 274; see *MacAndrew v. Chapple*, 35 L. J. C. P. 281; L. R. 1 C. P. 643.

Demurrage.] It is usual for the merchant to undertake to load and unload within a certain number of days, called *lay days*, with liberty to delay the ship for a longer specified period on payment of a daily sum, which, as well as the delay itself, is called *demurrage*. If the charterparty contains

a fixed number of *demurrage* days, as well as *lay days*, and the ship is, by the fault of the merchant, delayed beyond them both, that is a *detention*, and is to be compensated for by damages; but, where no *demurrage* days are mentioned, all detention beyond the *lay days* is *démurrage*. *Sanguinetti v. Pacific Steam Nav. Co.*, 2 Q. B. D. 238, 251, *per* Brett, L.J.; 46 L. J. Q. B. 105; *Harris v. Jacobs*, 54 L. J. Q. B. 492; 15 Q. B. D. 247. If the charter stipulates for a *rate* of demurrage to be paid if the ship is detained beyond the agreed time, without stipulating for any particular number of extra days to be allowed by the shipowner, the vessel is not entitled to sail with an incomplete cargo immediately upon the expiry of the loading time; the charterer is entitled to keep her on demurrage for a reasonable time. *Wilson & Coventry v. Otto Thoresen Line*, 79 L. J. K. B. 1048; [1910] 2 K. B. 405. If she remains longer the demurrage rate of compensation is applicable to the whole time she may be detained for the purpose of loading or discharging, even though that period may exceed a reasonable time. *Inverkip S.S. Co. v. Bunge*, 86 L. J. K. B. 1042; [1917] 2 K. B. 193. But when a full cargo has been loaded the charterer is not entitled to detain the ship, even if the full period of the lay days has not expired. *Nolisement (Owners) v. Bunge & Born*, 86 L. J. K. B. 145; [1917] 1 K. B. 160. The days are, at the places of loading and unloading respectively, in the absence of contrary usage, to be taken as consecutive or "running" days; *Brown v. Johnson*, 10 M. & W. 331; but, by the custom of the port of London, the days in the clause of demurrage mean working days, which exclude Sundays and holidays at the custom house. *Cochran v. Retberg*, 3 Esp. 121. And, by usage, there may be other breaks in the calculation of running days. *Nielsen v. Wait*, 14 Q. B. D. 516; 16 *Id.* 67; 55 L. J. Q. B. 87. A running day is a calendar day, from midnight to midnight. *The Katy*, 64 L. J. P. 49; [1895] P. 56. For the purpose of a demurrage or despatch money (*vide infra*), clause, a day is to be taken as of its natural length of 24 hours. *Laing v. Hollway*, 47 L. J. Q. B. 512; 3 Q. B. D. 437. A fraction of a day counts as a day. *Commercial S.S. Co. v. Boulton*, 44 L. J. Q. B. 219; L. R. 10 Q. B. 346; unless, as in *Yeoman v. Rex*, 73 L. J. K. B. 904; [1904] 2 K. B. 420, this is controlled by special terms in the charterparty. But the charterer is entitled to whole days for lay days. *The Katy*, *supra*; *Houlder v. Weir*, 74 L. J. K. B. 729; [1905] 2 K. B. 267. As to the calculation of "weather-working days," see *Branchkelow S.S. Co. v. Lamport*, 66 L. J. Q. B. 382; [1897] 1 Q. B. 570. Despatch money is payable on the difference between the time allowed by the charter and that actually occupied by the loading and discharge. "(1) *Primâ facie*, the presumption is that the object and intention of these despatch clauses is that the shipowners shall pay to the charterers for all time saved to the ship, calculated in the way in which, in the converse case, demurrage would be calculated; that is, taking no account of the lay day exceptions: *Laing v. Hollway*, 47 L. J. Q. B. 512; 3 Q. B. D. 437; and *In re Royal Mail Steam Packet Co. & River Plate S.S. Co.*, 79 L. J. K. B. 673; [1910] 1 K. B. 600. (2) This *primâ facie* presumption may be displaced, and is displaced, where either (i) lay days and time saved by despatch are dealt with in the same clause and demurrage in another clause: *The Glendevon*, 62 L. J. P. 123; [1893] P. 269; (ii) lay days, time saved by despatch, and demurrage are dealt with in the same clause, but upon the construction of that clause the court is of opinion from the collocation of the words or other reason, that the days saved are referable to and used in the same sense as the lay days as described in the clause, and are not used in the same sense as days lost by demurrage: *Nelson & Sons v. Nelson Line*, 77 L. J. K. B. 97; [1907] 2 K. B. 705," *per* Bailhache, J., in *Mawson S.S. Co. v. Beyer*, 83 L. J. K. B. 290; [1914] 1 K. B. 304. The lay days, allowed for loading or discharge, begin to run when the vessel arrives at the named place of loading or discharge. When, however, the place named is a port, the lay days begin when the ship is at the freighter's disposal in the commercial port although she may not be in a position to load or discharge and although

not at the wharf or other place where the charterer may properly require her to go. If however the contract expressly entitles the charterer to order the ship to a particular wharf or dock, the wharf or dock so ordered becomes the place of loading or discharge as though it had been originally named in the contract. If the ship is prevented from going to the agreed place of loading or discharging by obstacles caused by the freighter the lay days begin as soon as the ship is ready, and could, but for those obstacles, go to that place to load or discharge. *Brereton v. Chapman*, 7 Bing. 559; *Bastifell v. Lloyd*, 1 H. & C. 388; 31 L. J. Ex. 413; *Nelson v. Dahl*, 50 L. J. Ch. 411; 6 App. Cas. 38; *Leonis S.S. Co. v. Rank*, 77 L. J. K. B. 224; [1908] 1 K. B. 499; *Armement Adolf Deppe v. Robinson*, 86 L. J. K. B. 1103; [1917] 2 K. B. 204. Where the ship was prevented from going to destination by Government orders, see *Plata (Owners) v. Ford*, 86 L. J. K. B. 1473; [1917] 2 K. B. 311. Where the vessel was to proceed to "Tyne dock to such ready quay berth as ordered by the charterers," it was held that the charterers must name a berth ready to receive the vessel, and that in default of so doing they were liable under the demurrage clause. *Harris v. Jacobs*, 54 L. J. Q. B. 492; 15 Q. B. D. 247. See also *Pyman v. Dreyfus*, 59 L. J. Q. B. 13; 24 Q. B. D. 152. And the liability continues, in the absence of default by the shipowner, till the completion of the loading. *Tyne, &c., Shipping Co. v. Leach*, 69 L. J. Q. B. 353; [1900] 2 Q. B. 12. Where, however, the charterer has, in a charterparty containing a strike clause, the choice of several named places of discharge, of which he has selected R., he is not bound to name any other place, on knowing that a strike of porters had arisen at R., which rendered discharge there within the time limited impossible. *Bulman v. Fenwick*, 63 L. J. Q. B. 123; [1894] 1 Q. B. 179. Where the ship is to unload at S., or "so near thereto as she may safely get at all times of the tide and always afloat," and the charterers are to pay demurrage for delay, and she cannot, on account of the tide, reach S. until 4 days after she had arrived at K. R., the nearest point where she could float; it was held that demurrage was payable from the arrival at K. R. *Horsley v. Price*, 52 L. J. Q. B. 603; 11 Q. B. D. 244. When the ship has reached her place of discharge, the lay days continue to run, unless the unloading was prevented by the act of the master; *Budgett v. Binnington*, 60 L. J. Q. B. 1; [1891] 1 Q. B. 35; even although a strike prevented him from carrying out the share of the work of unloading for which he was responsible. *S. C.* So, although excepted perils caused delay in unloading. *Thiis v. Byers*, 45 L. J. Q. B. 511; 1 Q. B. D. 244. The days run, although the consignee cannot take his goods away, owing to the default of the consignees of other goods in not removing their goods. *Straker v. Kidd*, 47 L. J. Q. B. 365; 3 Q. B. D. 223, and *Porteus v. Watney*, 47 L. J. Q. B. 643; 3 Q. B. D. 534. As to damages for detention, see *Jones v. Adamson*, 45 L. J. Ex. 64; 1 Ex. D. 60. The lay days allowed for loading and unloading are usually to be kept distinct. See *Marshall v. Bolckow*, 6 Q. B. D. 231; but sometimes provision is made for liberty to average the days for loading and discharging; see *Molière S.S. Co. v. Naylor*, 2 Com. Cas. 92; and *Love & Stewart v. Rowtor S.S. Co.*, 86 L. J. P. C. 1; [1916] 2 A. C. 527.

When the charterparty is silent as to the time of loading, reasonable time under the circumstances as they actually exist at the time of loading is implied, and not that which would be a reasonable time under ordinary circumstances. *Carlton S.S. Co. v. Castle Mail Packets Co.*, 67 L. J. Q. B. 795; [1898] A. C. 486. In the absence of special circumstances, it is the duty of the freighter to have his cargo in readiness for shipment, and the question of reasonable time for loading applies only to a cargo so ready; *Ardan S.S. Co. v. Weir*, 74 L. J. P. C. 143; [1905] A. C. 501. Thus, a strike in the collieries, whence the freighter was to get his cargo, is no excuse for delay. *Adams v. Royal Mail Steam Packet Co.*, 28 L. J. C. P. 33; 5 C. B. (N. S.) 492. So, where a cargo was to be loaded with "usual dispatch," this was held not to excuse a merchant, who had been prevented,

by frost, from bringing his cargo to the place of loading. *Kearon v. Pearson*, 7 H. & N. 386; 31 L. J. Ex. 1. But the risk of strikes may be thrown on the shipowner by the terms of the charterparty; see *Dobell v. Green*, 69 L. J. Q. B. 454; [1900] 1 Q. B. 526. Under the strike clause only so much time will be allowed as was actually caused by the strike if the charterer had used due diligence in loading. *Elswick S.S. Co. v. Montaldi*, 76 L. J. K. B. 672; [1907] 1 K. B. 626. An exception for "strikes, lock-outs, accidents to railway," and "other causes beyond the charterer's control" is confined to cases *ejusdem generis* with the specific exception. *In re Richardsons & Samuel*, 66 L. J. Q. B. 579; [1898] 1 Q. B. 261. *Knutsford v. Tillmanns*, 77 L. J. K. B. 977; [1908] A. C. 406; *Thorman v. Dowgate S.S. Co.*, 79 L. J. K. B. 287; [1910] 1 K. B. 410; *Jenkins v. Walford*, 87 L. J. K. B. 136. But this construction may be excluded by appropriate words. *Larsen v. Sylvester*, 77 L. J. K. B. 993; [1908] A. C. 295. With regard to unloading, where no time is expressed, a reasonable time under such circumstances as actually exist at the time and port of unloading and are beyond the control of the consignee, is implied; thus, the merchant is not responsible for delay there caused by the strike of labourers, *Hick v. Raymond*, 62 L. J. Q. B. 98; [1893] A. C. 22; or by the crowded state of the docks, *Hulthen v. Stewart*, 72 L. J. K. B. 917; [1903] A. C. 389; *Van Liewen v. Hollis Bros.*, 89 L. J. P. 86; [1920] A. C. 239; or by delay caused by the harbour authorities who by the custom of the port discharge the cargo. *The Kingsland*, 80 L. J. P. 33; [1911] P. 17. Both the shipowner and merchant are bound to use reasonable diligence, with regard to all the circumstances. *Ford v. Cotesworth*, 38 L. J. Q. B. 52; 39 L. J. Q. B. 188; L. R. 4 Q. B. 127; L. R. 5 Q. B. 544. And neither party can sue the other for delay arising from a cause over which the latter had no control. *S. C.*; *Cunningham v. Dunn*, 48 L. J. C. P. 62; 3 C. P. D. 443. As to the respective duties of the parties where the discharge is a joint act, see *Petersen v. Freebody*, 65 L. J. Q. B. 12; [1895] 2 Q. B. 294. An option given to the shipowner of landing the goods, in default of their being taken by the consignees from the ship on arrival, does not divest him of any other remedy. *The Arne*, 73 L. J. P. 34; [1904] P. 154.

The parties are bound by the custom of the port or dock, whether this be expressed in the charterparty; *Good v. Isaacs*, 61 L. J. Q. B. 649; [1892] 2 Q. B. 555; or not; *The Jaederen*, 61 L. J. P. 89; [1892] P. 351, following *Postlethwaite v. Freeland*, 49 L. J. Ex. 630; 5 App. Cas. 613; *per* Ld. Blackburn; see, however, hereon, *Hick v. Raymond*, [1893] A. C. 30, *per* Ld. Herschell, C. Thus, the question as to whether the defendant has loaded or unloaded within a reasonable time where the contract is "to be ready to load or unload in regular turns," is to be governed by the usage of the port as to the turns or order of loading or unloading. *Leidemann v. Schultz*, 14 C. B. 38; 23 L. J. C. P. 17; see *Shadforth v. Cory*, 32 L. J. Q. B. 379; *Bastifell v. Lloyd*, 31 L. J. Ex. 413; 1 H. & C. 388; *Lawson v. Burness*, 1 H. & C. 396; *Cawthorn v. Trickett*, 15 C. B. N. S. 754; 33 L. J. C. P. 182; and *Postlethwaite v. Freeland*, 49 L. J. Ex. 630; 5 App. Cas. 599, where the earlier cases are collected and reviewed. See also *Barque Quipué v. Brown*, 73 L. J. K. B. 596; [1904] 2 K. B. 264. The custom may be excluded by the terms of the contract. *Brenda S.S. Co. v. Green*, 69 L. J. Q. B. 445; [1900] 1 Q. B. 518.

When the charterparty is entered into by the shipowner with full knowledge of all the circumstances under which the cargo is to be obtained and loaded, delay in getting the cargo may be an excuse. *Jones v. Green*, 73 L. J. K. B. 601; [1904] 2 K. B. 275, following *Harris v. Dreesman*, 9 Ex. 485; 23 L. J. Ex. 210. So, where the charterparty provided that "detention by ice should not be reckoned as laying days," it was held that this must be construed with reference to the particular nature of the place of export, S., and, as there were no warehouses there, and the cargo had to be brought down to S. in boats for loading, a detention of these boats by ice was within the exception of the charterparty. *Hudson v. Ede*, 36 L. J.

Q. B. 273; 37 L. J. Q. B. 166; L. R. 2 Q. B. 566; L. R. 3 Q. B. 412. See also *Smith v. Rosario Nitrate Co.*, [1893] 2 Q. B. 323; [1894] 1 Q. B. 174. So, where time lost by strikes was not to count as part of the time allowed for discharge, a strike of labourers, who would have discharged the lighters which conveyed the cargo from the ship to the place of discharge, was held to be within the clause. *The Alne Holme*, 62 L. J. P. 51; [1893] P. 173. A "strike" includes a general concerted refusal by workmen to work in consequence of an alleged grievance; thus, where the crew refused to sail in consequence of the German submarine threat was held to be a "strike." *Williams v. Naamlooze Vennootschap Berghuys Kolenhandel*, 86 L. J. K. B. 334. The exception does not in general apply to delay caused by ice before the cargo has reached the limits of the place of loading. *Kay v. Field*, 52 L. J. Q. B. 17; 10 Q. B. D. 241; *Grant v. Cooverdale*, 53 L. J. Q. B. 462; 9 App. Cas. 470. As to detention by ice caused by breakdown of steamer, see *In re Traae and Lennard & Sons*, 73 L. J. K. B. 553; [1904] 2 K. B. 377.

The defendant, an English subject, chartered the plaintiff's ship to take on board a cargo at Odessa, a port of Russia, 45 running days being allowed for loading and unloading. When there, the defendant's agent told the master that there was no cargo for him and urged him to sail; the master refused; and continued to demand a cargo until, the running days not having expired, war was declared between England and Russia: held, that no action would lie against the defendant, as the refusal by his agent, not having been accepted by the master as a renunciation of the contract, there had been no breach of contract by the defendant, when the war put an end to it. *Avery v. Bowden*, 5 E. & B. 714; 25 L. J. Q. B. 49; 6 E. & B. 962; 26 L. J. Q. B. 3; *Reid v. Hoskins*, 5 E. & B. 729; 25 L. J. Q. B. 55; 6 E. & B. 953; 26 L. J. Q. B. 5.

Where the charter allows lay days for loading and demurrage days, and makes "the charterer's liability to cease when the ship is loaded, the captain having a lien upon the cargo for freight and demurrage," the charterer is discharged from liability incurred for demurrage during the loading; *Francesco v. Massey*, 42 L. J. Ex. 75; L. R. 8 Ex. 101; *Kish v. Cory*, 44 L. J. Q. B. 205; L. R. 10 Q. B. 553; *Sanguinetti v. Pacific Steam Navigation Co.*, 46 L. J. Q. B. 105; 2 Q. B. D. 238; and the term "demurrage" will include damages for detention, not strictly demurrage. *S. C.*, and *Harris v. Jacobs*, 54 L. J. Q. B. 492; 15 Q. B. D. 247. The clause extends to all liability under the charter arising after the ship is loaded. *French v. Gerber*, 46 L. J. C. P. 320; 1 C. P. D. 737; 2 C. P. D. 247. Where, however, the only provision as to loading is that the ship is to load "in the customary manner" and discharge her cargo in a certain number of days, paying demurrage after that time, the charterer is not released from liability in respect of delay in loading. *Lockhart v. Falk*, 44 L. J. Ex. 105; L. R. 10 Ex. 132; *Dunlop v. Balfour*, 61 L. J. Q. B. 354; [1892] 1 Q. B. 507; *Clink v. Radford*, 60 L. J. Q. B. 388; [1891] 1 Q. B. 625. The main principle to be deduced from the cases is that the cesser clause is inapplicable to the particular breach complained of if, by construing it otherwise, the shipowner would be left unprotected in respect of that particular breach, unless the cesser clause is expressed in terms that prohibit such a conclusion. *S. C.*; *Hansen v. Harrold*, 63 L. J. Q. B. 744; [1894] 1 Q. B. 612; *Jenneson, Taylor & Co. v. Secretary of State for India*, 86 L. J. K. B. 283; [1916] 2 K. B. 702.

Freight and damages.] Freight is regulated by the contract, or, if none, by usage, or a *quantum meruit*, or by the course of former dealing between the parties. As a general rule, no freight is due until the goods be carried to the destined port, without alteration of their nature by perils of the sea. *Duthie v. Hilton*, 38 L. J. C. P. 93; L. R. 4 C. P. 138; *Asfar v. Blundell*, 65 L. J. Q. B. 138; [1896] 1 Q. B. 123. Where charterparty freight is payable on unloading and right delivery of the cargo the freight is not

earned until the unloading and delivery of the whole cargo has been completed. *Brown v. Tanner*, 37 L. J. Ch. 923; L. R. 3 Ch. 597. The delivery and payment are concurrent acts. *Paynter v. James*, L. R. 2 C. P. 348; W. N. 1868, p. 141. There may, however, be a right delivery of the cargo, notwithstanding that the delivery has been otherwise than by the ship stipulated for. *Thomas v. Harrowing S.S. Co.*, 83 L. J. K. B. 1662; [1915] A. C. 58. There a lump sum freight was held payable where, the ship having been wrecked outside the port of delivery, the greater part of the cargo (pit props) was washed ashore, collected by the direction of the master, and delivered to the consignee.

Where a ship is to proceed to certain "docks or as near thereto as she may safely get," it is not sufficient for her to go to the dock gates only; *Nelson v. Dahl*, 12 Ch. D. 568; 50 L. J. Ch. 411; 6 App. Cas. 38; if she cannot enter on arrival there, by reason of the docks being full, her obligation to wait to enter depends on the question of fact whether, under all the circumstances, it is reasonable that she should so wait; if it be not reasonable, the charterer must take delivery as near to the dock as the ship can safely get. S. C. See on the construction of the words in a charter-party, "as near thereto as she may safely get," the judgment of Ld. Blackburn in S. C., *Id.* pp. 50, 51, and cases there cited. Where a ship is to go to a safe port, or so near thereto as she may safely get, and "always lie and discharge afloat," the master is not bound to discharge at a port where she could not so lie without being lightened. *The Alhambra*, 50 L. J. Adm. 36; 6 P. D. 68. See also *Horsley v. Price*, 52 L. J. Q. B. 603; 11 Q. B. D. 244. Where by the charterparty a ship was to proceed with a cargo to a port, "to discharge in a dock as ordered on arriving if sufficient water, or so near thereunto as she may safely get always afloat," it was held she was only bound to discharge in a dock named if there were sufficient water when the order was given. *Allen v. Coltart*, 52 L. J. Q. B. 686; 11 Q. B. D. 782. See also *The Curfew*, 60 L. J. P. 53; [1891] P. 131.

Where the shipowner carries the cargo to the port of destination, but from the nature of the cargo is unable to land it there, the freight becomes payable; and if the prudent course for the master to adopt is to bring the cargo home again, he is entitled to be paid back-freight as well as the expenses incurred in endeavouring to land the cargo. *Cargo ex Argos*, 42 L. J. Adm. 49; L. R. 5 P. C. 134, 155. So, freight is payable where the cargo is delivered at a port included in a charterparty, but not at the port named by the charterer, that port having become dangerous for the ship, a foreign one, by reason of war having broken out. *The Teutonia*, 41 L. J. Adm. 57; L. R. 4 P. C. 171; see also *Aktieselskabet Olivebank v. Dansk Svoovloyre Fabrik*, 88 L. J. K. B. 745; [1919] 2 K. B. 162.

The freight is sometimes made wholly or partly payable at the port of loading. If part of it be made payable on the "final sailing" of the ship from the port of loading, or "from her last port in the United Kingdom," it is not payable if the ship be wrecked in an artificial canal within the limits of the port on its way out to sea, with the clearances on board, and all ready for sailing; *Roelandts v. Harrison*, 9 Ex. 444; 23 L. J. Ex. 169; *Sailing Ship Garston Co. v. Hickie*, 15 Q. B. D. 580; and where the ship has got out of port and cast anchor some miles off, but was not in a condition to proceed on her voyage, the shipowner was held not entitled to freight payable "on sailing." *Thompson v. Gillespie*, 5 E. & B. 209; 24 L. J. Q. B. 340. But it is otherwise where the ship has once left the port in a state ready for the voyage, and it is immaterial that she has been driven back into the port by stress of weather. *Price v. Livingstone*, 53 L. J. Q. B. 118; 9 Q. B. D. 679. The term "port" in a charterparty must be understood in its popular or commercial sense. S. C.; *Sailing Ship Garston Co. v. Hickie*, *supra*; *acc. Hunter v. N. Marine Insur. Co.*, 13 App. Cas. 717; see also *Hall S.S. Co. v. Paul*, 19 Com. Cas. 384. Payments made in advance, on account of freight, cannot be recovered back, though the ship be lost. *Anon.*, 2 Show. 283; *Byrne v. Schiller*, 40 L. J. Ex. 40, 177;

L. R. 6 Ex. 20; *Id.* 319; *Allison v. Bristol Marine Insur. Co.*, 1 App. Cas. 209. But freight agreed to be paid "if required, to be advanced less 3 per cent. for interest and insurance," is not recoverable, unless demanded before the loss of the ship. *Smith v. Pyman*, 60 L. J. Q. B. 621; [1891] 1 Q. B. 742. See S. C., distinguished in *Oriental S.S. Co. v. Tylor*, 63 L. J. Q. B. 128; [1893] 2 Q. B. 518. See further as to liability to pay advance freight after partial loss of cargo. *Weir v. Girvin*, 69 L. J. Q. B. 168; [1900] 1 Q. B. 45. Where the freighter has contracted to pay a minimum freight, or the highest that the shipowner could "prove to have been paid" for ships on the same voyage, the plaintiff, who claims a higher freight, must prove by evidence that such higher freight was actually paid, or contracted to be paid, on a voyage between the two places; and proof of the highest current freight is not enough. *Gether v. Capper*, 15 C. B. 696; 24 L. J. C. P. 69.

Where the merchant agreed to find a full return cargo of various articles, each to pay a stipulated freight from the port, but he finds none, or articles not enumerated, the measure of damage is the average freight of all the articles. *Thomas v. Clarke*, 2 Stark. 450; *Capper v. Forster*, 3 Bing. N. C. 938. When the owner stipulates for a full cargo, he is entitled to full freight, as if a full cargo had been put on board, irrespective of the tonnage of the ship mentioned in the charter. *Hunter v. Fry*, 2 B. & A. 421. *Aliter*, when the amount of cargo is mentioned. *Morris v. Levison*, 45 L. J. C. P. 409; 1 C. P. D. 155. Where the charterparty stipulated for a "full and complete cargo of sugar and other lawful produce," rates were mentioned for timber and other goods, and the charterparty proceeded, "other goods, if any be shipped, to pay in proportion to the foregoing rates, except what may be shipped for broken stowage, which shall pay as customary"; a full cargo of mahogany logs was shipped; it was held that the shipper was bound to supply broken stowage to fill up the interstices. *Cole v. Meek*, 15 C. B. (N. S.) 795; 33 L. J. C. P. 183. Where the contract stipulated for a full cargo of wool, tallow, bark, hides, and other legal merchandise, fixing the freight and quantity of each, except of wool and "other merchandise," it was held that the merchant might load entirely with "other" legal merchandise, but must pay freight as if the cargo had consisted of the stipulated quantity of tallow, bark, and hides, and the residue of wool. *Cockburn v. Alexander*, 18 L. J. C. P. 74; 6 C. B. 791. In this case the court considered the words "other merchandise" as applying to goods producing the amount of freight contemplated by the contract, and that the difference was the measure of damage. *Warren v. Peabody*, 19 L. J. C. P. 43; 8 C. B. 800, was decided on the same principle. But where the charterer undertook to load "a full and complete cargo of oats or other lawful merchandise," to be delivered by the shipowner on payment of freight, as follows: "4s. 6d. sterling per 320 lbs. weight delivered for oats, and if other cargo be shipped in full and fair proportion thereto according to London Baltic printed rates," it was held that the charterer fulfilled his contract by loading a full cargo of flax, tow, and codilla, three of the articles mentioned in the Baltic printed rates, and was not liable for additional freight, as on a full cargo of oats, although this obliged the shipowner to carry 120 tons ballast to 168 tons of cargo. *Southampton Steam Colliery Co. v. Clarke*, 40 L. J. Ex. 8; L. R. 4 Ex. 73; L. R. 6 Ex. 53; following on this point, *Moorsom v. Page*, 4 Camp. 103. See *S.S. Isis Co. v. Bahr*, 68 L. J. Q. B. 930; 69 L. J. Q. B. 660; [1899] 2 Q. B. 364; [1900] A. C. 340. As to a contract to load "a cargo of ore, say about 2,800 tons," see *Miller v. Borner*, 69 L. J. Q. B. 429; [1900] 1 Q. B. 691; see also *Jardine, Matheson & Co. v. Clyde Shipping Co.*, 79 L. J. K. B. 634; [1910] 1 K. B. 627; *Millar v. "Freden" (Owners)*, 86 L. J. K. B. 1318; [1917] 2 K. B. 657.

Freight is to be calculated and paid on that amount only, which is put on board, carried throughout the whole voyage and delivered at the end to the merchant. *Gibson v. Sturge*, 10 Ex. 639; 24 L. J. Ex. 121, *per*

Alderson, B., approved in *Buckle v. Knoop*, L. R. 2 Ex. 333, 334. See *L. Transport Co. v. Trechmann*, 73 L. J. K. B. 253; [1904] 1 K. B. 635. In an action for freight against the indorsee of a bill of lading, the shipowner is not, by 18 & 19 V. c. 111, s. 3, estopped by an innocent mis-statement of quantity in the bill, if all that was shipped is actually delivered. *Blanchet v. Powell's Llantivitt Colliery Co.*, 43 L. J. Ex. 50; L. R. 9 Ex. 74. As to the freight payable where the weight or bulk of the goods when delivered differs from that when shipped, see S. CC.; *Coulthurst v. Sweet*, L. R. 1 C. P. 649; *Tully v. Terry*, 42 L. J. C. P. 240; L. R. 8 C. P. 679. Lump freight is a sum payable for the use of the ship, and is payable, though part of the cargo is lost by the excepted perils. *Robinson v. Knights*, 42 L. J. C. P. 211; L. R. 8 C. P. 465; *Merchant Shipping Co. v. Armitage*, 43 L. J. Q. B. 24; L. R. 9 Q. B. 99; it is payable also, although the cargo may have been delivered otherwise than by the ship stipulated for. *Thomas v. Harrowing S.S. Co.*, 83 L. J. K. B. 1662; [1915] A. C. 58. See also *Blanchet v. Powell's Llantivitt Colliery Co.*, *supra*. As to the construction of a clause of cesser of payment of hire of a steamship during the time she was inefficient, see *Hogarth v. Miller*, 60 L. J. P. C. 1; [1891] A. C. 48; *Vogemann v. Zanzibar S.S. Co.*, 6 Com. Cas. 253; *Smailes v. Evans & Reid*, 86 L. J. K. B. 1072; [1917] 2 K. B. 54.

Where a ship is, by the charterparty, guaranteed to carry 2,000 tons dead weight as a lump freight, with a *pro rata* deduction if the guarantee were not fulfilled, and by a memorandum on the charterparty, or otherwise, the charterer has represented the nature of the cargo, and the ship cannot carry 2,000 tons of cargo tendered, owing to its not being according to the representation, the charterer cannot claim any deduction from the freight. *Mackill v. Wright*, 14 App. Cas. 106. See also *Millar v. "Freden" (Owners)*, 87 L. J. K. B. 524; [1918] 1 K. B. 611; *Thomson v. Brocklebank*, 87 L. J. K. B. 616; [1918] 1 K. B. 655.

The charterer has no right to fill the cabins as well as the carrying part of the ship, and if permitted by the master to do so, he is liable to pay the current rate for it, and cannot insist on paying only the charter price. *Mitcheson v. Nicol*, 7 Ex. 929; 21 L. J. Ex. 323. So, on the other hand, under a voyage charter to load a full and complete cargo of wheat, the shipowner may not carry bunker coal for a subsequent voyage. *Darling v. Raeburn*, 75 L. J. K. B. 415; [1907] 1 K. B. 846.

If goods of the consignor, and carried at his risk, be delivered to the consignee, and he do not pay the freight, the consignor is liable, even though the bill of lading express that the goods are to be delivered to the consignees "paying freight for the same," this clause being inserted merely for the benefit of the shipowner. *Domett v. Beckford*, 5 B. & Ad. 521; see also *Gt. W. Ry. Co. v. Bagge*, 54 L. J. Q. B. 599; 15 Q. B. D. 625. This right to claim freight from the shipper is expressly reserved by the Bills of Lading Act, 1855 (18 & 19 V. c. 111), s. 2. The circumstances may, however, rebut the inference of freight being payable, arising merely from the goods having been carried in the plaintiff's ship under bills of lading signed by the master. *Smidt v. Tiden*, 43 L. J. Q. B. 199; L. R. 9 Q. B. 446. Though freight may not be payable in respect of goods shipped by A. in his own ship, yet if by the bills of lading he make the goods deliverable to the order of B., who has advanced him money on the security of the goods, freight becomes payable to C., to whom A. assigned the freight, to be earned by the ship. *Wequelin v. Cellier*, 42 L. J. Ch. 758; L. R. 6 H. L. 286. As to right of mortgagee, abandonee, or other transferee of the ship to freight, see *Keith v. Burrows*, 46 L. J. C. P. 801; 2 App. Cas. 636; *The Red Sea*, 65 L. J. P. 9; [1896] P. 20; *Shillito v. Biggart*, 72 L. J. K. B. 294; [1903] 1 K. B. 683.

The measure of damages for not loading any cargo is the amount of freight which would have been carried, deducting expenses and any profit earned during the time covered by the charter. *Smith v. M'Guire*, 3 H. & N. 554; 27 L. J. Ex. 465; *Morris v. Levison*, 1 C. P. D. 155, 158; 45 L. J.

C. P. 409. The shipowner cannot sue the merchant for not loading, when the loading was prevented by want of notice to him, that the ship was ready to receive the cargo. *Stanton v. Austin*, 41 L. J. C. P. 218; L. R. 7 C. P. 651.

Freight pro ratâ.] If the shipper accept part of the goods, though carried under an entire contract for freight, *Mitchell v. Darthez*, 5 L. J. C. P. 154; 2 Bing. N. C. 555; or accept the goods before the completion of the voyage, *Vlierboom v. Chapman*, 13 L. J. Ex. 384; 13 M. & W. 238; *The Soblomsten*, 36 L. J. Adm. 5; L. R. 1 Adm. 293; a new contract to pay *pro ratâ* may be inferred. But, as a general rule, unless the goods be carried to the destined port, no freight is due. S. C.; *Metcalfe v. Britannia Iron Works Co.*, 46 L. J. Q. B. 443; 1 Q. B. D. 613; 2 Q. B. D. 423; *St. Enoch Shipping Co. v. Phosphate Mining Co.*, 85 L. J. K. B. 74; [1916] 2 K. B. 624. Thus, if the master justifiably sell part at an intermediate port, he is not entitled to recover freight, *pro ratâ*, for the goods sold. *Hopper v. Burness*, 45 L. J. C. P. 377; 1 C. P. D. 137; *Hill v. Wilson*, 48 L. J. C. P. 764; 4 C. P. D. 329. *A fortiori*, if the master sell the goods unjustifiably. *Acatos v. Burns*, 47 L. J. Ex. 566; 3 Ex. D. 282. If the master be disabled from carrying the goods further, he may tranship them, and upon safe delivery at their destination he is entitled to the whole freight as on the old contract, without reference to the contract with the new ship. *Shipton v. Thornton*, 8 L. J. Q. B. 73; 9 Ad. & E. 314. The master has a reasonable time for re-shipment, and if he be prevented by default of the owner of the cargo from forwarding the cargo from an intermediate port to its destination, the whole freight is payable. *Cleary v. M'Andrew*, 2 Moo. P. C. (N. S.) 216; *The Soblomsten*, *supra*. The master, while afloat, or in a foreign port where there is no agent of the shipper, becomes, *ex necessitate*, his agent as to the goods, as well of the shipowner as to the ship and freight; and he must do what in the exercise of a sound discretion is best for both parties; and in such a case, and not otherwise, the shipper is bound by his acts, so as to be liable for freight on a contract made by the master. *Matthews v. Gibbs*, 3 E. & E. 282; 30 L. J. Q. B. 55.

Lien for freight, &c.] In addition to his remedy by action, the shipowner has a lien on the goods for freight; and where the charterer puts goods of his own on board under a bill of lading, there is a lien on the goods for the chartered freight, and this lien holds good against any one taking the bill of lading with knowledge of the terms of the charterparty. *Kern v. Deslandes*, 10 C. B. (N. S.) 205; 30 L. J. C. P. 297. The terms of the bill of lading may, however, be such as to waive the lien for the freight, in whole or part, as when it is payable at the port of lading, or by the shipper at a given time after sailing, ship lost or not lost. *Kirchner v. Venus*, 12 Moo. P. C. 361; following *How v. Kirchner*, 11 Moo. P. C. 21; *accord. Tamvaco v. Simpson*, 35 L. J. C. P. 196; L. R. 1 C. P. 363. A lien cannot be exercised on freight in the hands of the ship's agents for charterparty hire accruing, but not then due. *Wehner v. Dene S.S. Co.*, 74 L. J. K. B. 550; [1905] 2 K. B. 92. A lien on sub-freight given to a shipowner by a charterparty can only be exercised before the sub-freight has been paid to the charterer of the ship: the shipowner cannot follow it subsequently. *Tagart Beaton & Co. v. Fisher*, 72 L. J. K. B. 202; [1903] 1 K. B. 391; see, further, *Turner v. Haji, &c.*, *Azam*, 74 L. J. P. C. 17; [1904] A. C. 826. As to lien on goods under a through bill of lading at a through rate by land and sea, where some of the goods are lost during the sea transit, see *The Hibernian*, 76 L. J. P. 122; [1907] P. 277.

Where goods upon which the master of a ship has a lien are deposited in the king's warehouse in pursuance of the requisition of an Act of Parliament, the lien is not thereby waived. *Per* Ld. Kenyon, C.J., *Ward v. Felton*, 1 East, 512; *Wilson v. Kymer*, 1 M. & S. 157. So, where the

consignee refuses to take the goods, the master may, it seems, place them in a warehouse under the exclusive control of himself, or the shipowner, without losing his lien. *Mors-le-Blanch v. Wilson*, 42 L. J. C. P. 70; L. R. 8 C. P. 227. Under the provisions of many local and personal Acts, general wharves, called "sufferance wharfs," were appointed where goods might be landed and stowed, the shipowner retaining the right of lien for freight; and now, generally, by the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), Part VII., certain powers are given to shipowners to land and enter goods from foreign ports in default of the owner, and to retain the lien for freight by giving notice to the owner of the wharf, &c. See *Berresford v. Montgomerie*, 17 C. B. (N. S.) 379; 34 L. J. C. P. 41; *Wilson v. London, Italian and Adriatic S. Navigation Co.*, 35 L. J. C. P. 9; L. R. 1 C. P. 61; *Meyerstein v. Barber*, L. R. 2 C. P. 317, 330, 331; L. R. 4 H. L. 328, 330; 39 L. J. C. P. 187; *The Energie*, 44 L. J. Adm. 25; L. R. 6 P. C. 306; *Glyn v. E. & W. India Dock Co.*, 7 App. Cas. 591; *Furness, Withy & Co. v. W. N. White*, 64 L. J. Q. B. 161; [1895] A. C. 40.

A shipowner has a lien on goods shipped for unliquidated damages, known as "dead freight," by reason of the charterer failing to load a full cargo. *Kish v. Taylor*, 81 L. J. K. B. 1027; [1912] A. C. 604; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; better, L. R. 6 Q. B. 558, n.

Implied contracts on part of charterer or shipper.] Where by a charterparty a ship is to proceed to "a safe port," to be named by charterers, they are not entitled to name a port, safe by nature, but closed by the local government, so that a vessel entering it without a permit would be liable to confiscation; and having named such a port, they are liable for a breach of the contract implied on their part to name a safe port within a reasonable time. *Ogden v. Graham*, 1 B. & S. 773; 31 L. J. Q. B. 26. Dangers likely to be incurred on the voyage to a particular port may be taken into account in considering whether that port is safe to go to or not; in each case it is a question of fact and of degree. *Palace Shipping Co. v. Gans S.S. Line*, 85 L. J. K. B. 415; [1916] 1 K. B. 138. See also *In re Tonnevold & Finn Friis*, 85 L. J. K. B. 1758; [1916] 2 K. B. 551. But a mere probability that the port named may be closed before the vessel will get there is not enough to render it unsafe. *The Teutonia*, 41 L. J. Adm. 57; L. R. 4 P. C. 171. As to what is a "safe loading place," see *Smith v. Dart*, 54 L. J. Q. B. 121; 14 Q. B. D. 105. The damages recoverable for refusing to name a wharf are the freight that would have become payable on the delivery of the cargo. *Stewart v. Rogerson*, L. R. 6 C. P. 424.

There is an implied contract on the part of shippers not to put on board, without notice, packages of a dangerous or corrosive matter, the nature of which the shipowner or his agents could not be reasonably expected to know; *Brass v. Maitland*, 6 E. & B. 470; 26 L. J. Q. B. 49; or goods the nature of which is likely to involve unusual delay. *Mitchell, Cotts & Co. v. Steel*, 85 L. J. K. B. 1747; [1916] 2 K. B. 610. If such goods in fact are shipped, and the shipper does not give notice of this, then, unless the shipowner knows or ought to know their character, the shipper is liable for any damage that may be occasioned by the shipment. *Bamfield v. Goole & Sheffield Transport Co.*, 79 L. J. K. B. 1070; [1910] 2 K. B. 94. See also *Spanish Steamship Sebastian (Owners) v. Sociedad Altos Hornos de Vizcaya*, 89 L. J. K. B. 385; [1920] 1 K. B. 332. Where the shipowner has an opportunity of examining the goods, there is no warranty by their owner that they are fit to be carried. *Acatos v. Burns*, 47 L. J. Ex. 566; 3 Ex. D. 282.

Defence.] A charterer whose cargo has been damaged by the fault of the master so as to be worth less than the freight, cannot discharge himself from liability to freight by abandoning the cargo to the shipowner. *Dakin v. Oxley*, 16 C. B. (N. S.) 646; 33 L. J. C. P. 115. Nor can the assignee

of a bill of lading deduct from the freight the value of goods which, though mentioned in the bill of lading signed by the plaintiff, were not put on board. *Meyer v. Dresser*, 16 C. B. (N. S.) 646; 33 L. J. C. P. 289. The cross-claim may be set up by way of set-off or counterclaim under Rules, 1883, Order xix. r. 3. See *Mediterranean, &c., S.S. Co. v. Mackay*, 72 L. J. K. B. 147; [1903] 1 K. B. 297. Where the nature of the goods has been changed by perils of the sea, no freight is payable. *Asfar v. Blundell*, 65 L. J. Q. B. 138; [1896] 1 Q. B. 123.

Where the shipowner abandons the ship during the voyage, the owner of cargo may treat the contract of affreightment as at an end, and resume possession of his cargo without payment of freight. *The Cito*, 51 L. J. Adm. 1; 7 P. D. 5. The abandonment must be without any intention to retake possession. *Bradley v. Newsum*, 88 L. J. K. B. 35; [1919] A. C. 16.

MERCHANT AGAINST SHIPOWNER OR MASTER.

The master, as well as the owner of a general ship, is liable as a common carrier of goods. *Morse v. Slue*, 2 Lev. 69; 1 Vent. 238; *Liver Alkali Co. v. Johnson*, 43 L. J. Ex. 216; L. R. 7 Ex. 267; L. R. 9 Ex. 338; Story on Agency, § 315. His liability is limited by the same common law exceptions as in the case of land carriers, and by such further exceptions as may be expressed in the charterparty or bill of lading, or sanctioned by Act of Parliament. But he cannot rely on the exception of King's enemies if the loss has occurred during a deviation from the contract voyage, unless he can show that the loss must have occurred, even if there had been no deviation. *Morrison v. Shaw, Savill, &c., Co.*, 86 L. J. K. B. 97; [1916] 2 K. B. 783. See further, *Action against carriers, post*. The exceptions in the charterparty or bill of lading must be defined by clear and express words, which, without ambiguity, relieve the carrier from his common law obligations. *Rathbone & Co. v. D. MacIver & Co.*, 72 L. J. K. B. 703; [1903] 2 K. B. 378; *Elderslie S.S. Co. v. Borthwick*, 74 L. J. K. B. 338; [1905] A. C. 93; *Nelson Line v. Nelson (No. 2)*, 77 L. J. K. B. 82; [1908] A. C. 16. As to the liability of a shipowner for damage caused to cargo by collision, see the Maritime Conventions Act, 1911 (1 & 2 G. 5, c. 57), s. 1. There is an absolute warranty that the ship is seaworthy when the goods are shipped, but not that it shall so continue. *McFadden v. Blue Star Line*, 74 L. J. K. B. 423; [1905] 1 K. B. 697.

Where a stevedore, or special agent, is appointed by the charterer to load and stow a ship, which he puts up as a general ship, the master is exempt from liability for bad stowage, unless done under his particular orders; *Blaikie v. Stenbridge*, 6 C. B. (N. S.) 894; 28 L. J. C. P. 329; 6 C. B. (N. S.) 911; 29 L. J. C. P. 212; or unless the charterparty provides that the charterers are not in any case to be responsible for improper stowage. *Sack v. Ford*, 13 C. B. (N. S.) 90; 32 L. J. C. P. 12. But a clause in a charterparty making the shipowners responsible for the proper stowage is not an absolute warranty; it merely means that they will not be negligent in the stowage. *Union Castle Mail Co. v. Borderdale Shipping Co.*, 88 L. J. K. B. 979; [1919] 1 K. B. 612. An unexercised option, given to the charterer, of appointing a stevedore, does not dispense with the master's ordinary duty to load the ship properly. *Anglo-African Co. v. Lamzed*, 35 L. J. C. P. 145; L. R. 1 C. P. 226. See further, as to liability of shipowner to charterer for negligence of master and crew, *Omoa, &c., Coal and Iron Co. v. Huntley*, 2 C. P. D. 464. Where the plaintiff's goods have been injured by being stowed in contact with a deleterious substance, he may sue the person who so stowed them, although there is no contract between them. *Hayn v. Culliford*, 48 L. J. C. P. 372; 4 C. P. D. 182. See as to damages for delay in delivery caused by contraband of war having been carried along with the plaintiff's goods, without his consent, *Dunn v. Bucknall Bros.*, 71 L. J. K. B. 963; [1902] 2 K. B. 614. As to warranty of ship's capacity, see *Carnegie v. Conner*, 59 L. J. Q. B. 22; 24 Q. B. D.

45; *Mackill v. Wright*, 14 App. Cas. 106; *Millar v. "Freden" (Owners)*, 87 L. J. K. B. 524; [1918] 1 K. B. 611; *Thomson v. Brocklebank*, 87 L. J. K. B. 616; [1918] 1 K. B. 655.

Exception of perils.] The exception "of dangers and accidents of the sea" protects against damages to cargo by sea water passing into the ship through a hole made by rats. *Hamilton v. Pandorf*, 57 L. J. Q. B. 24; 12 App. Cas. 518. So, where, without fault in the carrying ship, she foundered from collision with another ship which was negligent. *The Xantho*, 56 L. J. Adm. 116; 12 App. Cas. 503. The exception does not, however, exonerate the shipowner from taking due care under his contract of carriage; and loss by perils, occasioned by his negligence, is not protected; thus, a loss through a collision, occasioned by the negligence of the crew, is not within the exception; *Grill v. General Iron Screw Colliery Co.*, 37 L. J. C. P. 205; L. R. 3 C. P. 476; nor is damage caused to the goods by unseaworthiness of the ship, which existed when she started on her voyage. *Steel v. State Line S. Ship Co.*, 3 App. Cas. 72. D. P.; *Gilroy v. Price*, [1893] A. C. 56. See also *S.S. Maori King (Owners of Cargo) v. Hughes*, 64 L. J. Q. B. 744; [1895] 2 Q. B. 550; *The Northumbria*, 75 L. J. P. 101; [1906] P. 292; *The Schwann*, 78 L. J. P. 112; [1909] A. C. 450; and *Ingram v. Services Maritimes*, 82 L. J. K. B. 374; 83 L. J. K. B. 382; [1913] 1 K. B. 538; [1914] 1 K. B. 541. But the warranty of seaworthiness may be limited so as not to extend to latent defects. *Cargo ex Laertes*, 57 L. J. Adm. 108; 12 P. D. 187.

An exception for "breakage, leakage, or damage" does not protect the shipowners from liability for damage accruing through the negligence of their servants; *Czech v. General Steam Navigation Co.*, 37 L. J. C. P. 3; L. R. 3 C. P. 14; *Leuw v. Dudgeon*, 37 L. J. C. P. 5, n.; L. R. 3 C. P. 17, n.; nor does an exception "for any loss of or damage to goods which can be covered by insurance"; *Price & Co. v. Union Lighterage Co.*, 73 L. J. K. B. 222; [1904] 1 K. B. 412. But such exceptions shift the onus of proof, and where the loss apparently falls within the exception the plaintiff must prove, affirmatively, the negligence of the defendant's servants. *The Helene*, B. & L. 429; 35 L. J. P. C. 63; *The Glendaroch*, 63 L. J. P. 89; [1894] P. 226, C. A. So in an action for loss of cargo, alleged to have been jettisoned and sold in consequence of the ship's stranding, the plaintiff must prove that the stranding was occasioned by the negligent navigation of the ship. *The Norway*, B. & L. 404. Where the exception is "of thieves," the shipowners must prove that the theft was committed by some one external to the ship. *Taylor v. Liverpool & Gt. W. Steam Co.*, 43 L. J. Q. B. 205; L. R. 9 Q. B. 546. An exception against loss by "pirates, robbers, or thieves of whatever kind, whether on board or not, or by land or sea," does not include thefts by stevedore's men employed in the service of the ship. *Steinman v. Angier Line*, 60 L. J. Q. B. 425; [1891] 1 Q. B. 619; see *Dunn v. Bucknall Bros.*, 71 L. J. K. B. 963; [1902] 2 K. B. 614. An exception of dangers of the seas does not include barratry. *The Chasca*, 44 L. J. Adm. 17; L. R. 4 A. & E. 446. An exception against leakage does not include injury done to other goods by such leakage. *Thrift v. Youle*, 46 L. J. C. P. 402; 2 C. P. D. 432. An exception of damage caused by navigation or management does not include damage caused by improper stowage. *Hayn v. Culliford*, 48 L. J. C. P. 372; 4 C. P. D. 182; *The Ferro*, 62 L. J. P. 48; [1893] P. 38. An exception in favour of jettison does not extend to goods improperly stowed on deck. *R. Exchange Shipping Co. v. Dixon*, 56 L. J. Q. B. 266; 12 App. Cas. 11. A condition, "no claim whatever for damage will be admitted, unless made before goods are removed," covers all damage, whether apparent or latent, which could have been discovered at the place of removal by examination with reasonable care and skill. *Moore v. Harris*, 45 L. J. P. C. 55; 1 App. Cas. 318. Cf. *Bank of Australasia v. Clan Line*, 84 L. J. K. B. 1250; [1916] 1 K. B. 39.

An exception of "any damage to any goods, which is capable of being covered by insurance," does not extend to a general average loss sustained by the goods. *Crooks v. Allan*, 49 L. J. Q. B. 201; 5 Q. B. D. 38.

An exception for perils of the seas or navigation caused by negligence, default, or error in judgment of the master, engineers or others of the crew extends to damage to cargo caused by sea water let in by a tap being opened by mistake. *Blackburn v. Liverpool, Brazil, &c., S. Nav. Co.*, 71 L. J. K. B. 177; [1902] 1 K. B. 290, so to a loss by the stranding of the ship through the negligence, not wilful, of the master, who was also part owner. *Westport Coal Co. v. McPhail*, 67 L. J. Q. B. 674; [1898] 2 Q. B. 130; and to negligence during loading. *The Carron Park*, 59 L. J. Adm. 74; 15 P. D. 203. See also *Baerselman v. Bailey*, 64 L. J. Q. B. 707; [1895] 2 Q. B. 301. As to negligence during unloading, see *The Accomac*, 59 L. J. Adm. 91; 15 P. D. 208; *The Glenochil*, 65 L. J. P. 1; [1896] P. 10; see also *The Torbryan*, 72 L. J. P. 76; [1903] P. 194, where the exception was "of all other accidents caused by negligence." An unwarranted deviation from the contemplated voyage avoids the exception. *Thorley (Joseph) v. Orchis, S.S. Co.*, 76 L. J. K. B. 595; [1907] 1 K. B. 660. But not where the deviation is necessary for the safety of the ship and crew, notwithstanding that the necessity for the deviation has been caused by unseaworthiness. *Kish v. Taylor*, 81 L. J. K. B. 1027; [1912] A. C. 604. Where the ship has put into a port of refuge for repairs, the shipowner is liable to the charterer for abandoning the voyage at that port, unless, owing to the excepted perils, it was impossible to complete the voyage either from physical causes or in a business sense, as such a course would have been unreasonable. *Assicurazioni Generali v. S.S. Bessie Morris Co.*, 61 L. J. Q. B. 754; [1892] 2 Q. B. 652.

Statutory exemptions from, or limitation of liability.] The existing provisions for limiting the liability of shipowners are comprised in the Merchant Shipping Act, 1894 (57 & 58 V. c. 60), Part VIII., which by sect. 509 applies to the whole of Her Majesty's dominions. By sect. 502 the owner of a British sea-going ship, or share therein, is not liable to make good any loss or damage that may happen, without his actual fault or privity in the following cases, viz.: (1) where any goods, merchandise, or other things whatsoever taken on board, are lost or damaged by reason of fire on board; or (2) where any gold, silver, diamonds, watches, jewels, or precious stones on board, the true nature and value of which have not at the time of shipment been declared by the owner or shipper to the owner or master in the bills of lading or otherwise in writing, are lost or damaged by reason of any robbery, embezzlement, making away with or secreting thereof. As to fire, see *The Diamond*, [1906] P. 282; 75 L. J. P. 90; *Virginia Carolina Chemical Co. v. Norfolk & North American S.S. Co.*, 81 L. J. K. B. 129; 82 L. J. K. B. 389; [1912] 1 K. B. 229; [1913] A. C. 52; 17 Com. Cas. 277; *Ingram v. Services Maritimes*, 83 L. J. K. B. 382; [1914] 1 K. B. 541. The onus is on those who plead this section. *Lennard's Carrying Co. v. Asiatic Petroleum Co.*, 84 L. J. K. B. 1281; [1915] A. C. 705. The shipowner may be liable on an implied warranty that the bullion room in which gold is carried is reasonably fit to resist thieves. *Queensland National Bank v. Peninsular & Oriental, &c., Co.*, 67 L. J. Q. B. 402; [1898] 1 Q. B. 567. By sect. 503 (1, 2) the owners of any ship, whether British or foreign, shall not, in cases which occur without their actual fault or privity, be answerable in damages in respect of loss or damage to any goods, merchandise, or other things on board, to an amount exceeding £8 for each ton of the ship's tonnage—registered tonnage of sailing ships, and, by 6 E. 7, c. 48, s. 69, that, with the addition of any engine-room space deducted, in case of steam ships. The section contains provisions for ascertaining a foreign ship's tonnage. See *Millen v. Brasch*, 10 Q. B. D. 142. The section extends to the loss of passengers' luggage. *The Stella*, 69 L. J. P. 70; [1900] P. 151, 162, n. Charterers by demise

are "owners" within the above sections. See Merchant Shipping Act, 1906 (6 Ed. 7, c. 48), s. 71; Maritime Conventions Act, 1911 (1 & 2 G. 5, c. 57), s. 9 (4). By sect. 503 (3) the owner of every sea-going ship is liable for every loss or damage arising on distinct occasions as if no other loss had arisen. The exemption from liability in respect of compulsory pilotage, formerly existing, has been abolished as from January 1, 1918, by sect. 15 of the Pilotage Act, 1913 (2 & 3 G. 5, c. 31).

Implied contracts on part of shipowner or master.] The master impliedly contracts that his vessel shall be fit for the purpose of carrying the particular cargo which he has contracted to carry, or as it is usually expressed that she must be "seaworthy" when she starts upon her voyage; *Lyon v. Mells*, 5 East, 428; *Richardson v. Stanton*, L. R. 9 C. P. 390; 45 L. J. C. P. 78; *Cohn v. Davidson*, 46 L. J. Q. B. 305; 2 Q. B. D. 455; *Steel v. State Line S. Ship Co.*, 3 App. Cas. 72; "*Maori King*" (*Cargo Owners*) v. *Hughes*, 64 L. J. Q. B. 744; [1895] 2 Q. B. 550; *Rathbone v. MacIver*, 72 L. J. K. B. 703; [1903] 2 K. B. 378; or at the commencement of each stage on the voyage, when in the case of a steamship a long voyage is divided into stages for coaling purposes; *The Vortigern*, 68 L. J. P. 49; [1899] P. 140; and it is no excuse for the breach of the contract in this case that the charterer was to provide the coal; *McIver v. Tate Steamers*, 72 L. J. K. B. 253; [1903] 1 K. B. 32. The contract is broken if the owner load the ship improperly so that she is thereby lost. *Kopitoff v. Wilson*, 45 L. J. Q. B. 436; 1 Q. B. D. 377; see also *Ingram & Royle v. Services Maritimes*, 82 L. J. K. B. 374; 83 L. J. K. B. 382; [1913] 1 K. B. 538; [1914] 1 K. B. 541. Cf. *The Thorsa*, 85 L. J. P. 226; [1916] P. 257, where the C. A. rejected the suggestion that, if two parcels are so stowed that one can injure the other during the course of the voyage, the ship is unseaworthy. Where there is no stipulation as to time, the master must sail in a reasonable time, and proceed, without deviation, to the destined port, otherwise he will be liable for any loss to the plaintiff occasioned by the delay; or, to any loss, whether by perils of the sea or otherwise, occurring during the deviation; 3 Kent, Com. 209, 210; unless the defendant can prove that the loss *must* have happened had there been no deviation. *Davis v. Garrett*, 8 L. J. (O. S.) C. P. 253; 6 Bing. 716. Deviation is justifiable to save life, but not merely to save property. *Scaramanga v. Stamp*, 48 L. J. C. P. 478; 49 L. J. C. P. 674; 4 C. P. D. 316; 5 C. P. D. 295, C. A. A well-founded fear of capture may justify a master in not leaving a port in performance of his contract; *Pole v. Cetcovich*, 9 C. B. (N. S.) 430; 30 L. J. C. P. 102; even though the ship alone would be in danger of capture. *The Teutonia*, L. R. 4 P. C. 171; *The San Roman*, L. R. 5 P. C. 301; 42 L. J. Adm. 46. A statement in a charterparty that the ship is "expected to arrive" at a port A. by a given day is a warranty that she is then in such a position that she may reasonably be expected to arrive there by that day. *Corkling v. Massey*, 42 L. J. C. P. 153; L. R. 8 C. P. 395. There is an implied contract that the goods shall be stowed under deck. *Royal Exchange Shipping Co. v. Dixon*, 56 L. J. Q. B. 266; 12 App. Cas. 11.

Upon arrival at the port, the master is bound to deliver the cargo to the consignee or order of the shipper, on production of the bill of lading, and payment of freight (and other lawful charges) for which the master has a lien on the goods, unless it appear on the bill of lading that freight has been paid, in which case it is an estoppel as against the master or owner. 3 Kent, Com. 214; *Howard v. Tucker*, 1 B. & Ad. 712. Where, by the bill of lading, the goods are to be delivered to S. M. or assigns, the master may not deliver them to S. M. without the production of one of the parts of the bill of lading. *The Stettin*, 58 L. J. Adm. 81; 14 P. D. 142. Where there is a charterparty, the provisions of which are binding only as between the shipowner and the charterer, and there is a bill of lading given by the master which gets into the hands of a *bonâ fide* assignee for value, he is entitled to have the goods delivered to him upon his fulfilling the terms

mentioned in such bill of lading, and is not ordinarily bound to refer to the charterparty. *Chappel v. Comfort*, 10 C. B. (N. S.) 802; 31 L. J. C. P. 58, *per Willes, J.*

Where the bill of lading states the cargo to have been received as against freight, and other conditions as *per* charterparty, the assignee of the bill of lading, who accepts the cargo thereunder, is liable for the demurrage provided for in the charterparty. *Porteus v. Watney*, 47 L. J. Q. B. 643; 3 Q. B. D. 534; *Wegener v. Smith*, 15 C. B. 729; 24 L. J. C. P. 25. But it is otherwise where the property in the goods did not pass to the consignee, whom the shipowner knew to be an agent only, and who repudiated liability for demurrage before the cargo was delivered to him. *S.S. County of Lancaster v. Sharp*, 59 L. J. Q. B. 22; 24 Q. B. D. 158. Where the cargo is deliverable under a similar bill of lading, the shipowner may be bound by the terms of the charterparty, as against an indorsee of the bill. *The Felix*, 37 L. J. Adm. 48; L. R. 2 A. & E. 273. Such a clause in the bill of lading incorporates those provisions only of the charterparty which are consistent with the contract in the bill of lading; *Gullischen v. Stewart*, 53 L. J. Q. B. 173; 13 Q. B. D. 317; *Gardner v. Trechmann*, 54 L. J. Q. B. 515; 15 Q. B. D. 154, and are to be performed by the consignee of the goods; *Serrano v. Campbell*, 60 L. J. Q. B. 303; [1891] 1 Q. B. 283; *Diederichsen v. Farquharson*, 67 L. J. Q. B. 103; [1898] 1 Q. B. 150; see further *Temperley S.S. Co. v. Smyth*, 74 L. J. K. B. 876; [1905] 2 K. B. 791. Thus it does not incorporate an exception in the charterparty limiting the shipowner's liability; S. C.; *Kruger v. Moell Tryvan Ship Co.*, 76 L. J. K. B. 985; [1907] A. C. 272; *The Portsmouth*, 81 L. J. P. 17; [1912] A. C. 1; *Hogarth Shipping Co. v. Blythe, Green, Jourdain & Co.*, 86 L. J. K. B. 1426; [1917] 2 K. B. 534. A bill of lading, signed only by the master, is no estoppel as between the shipowner and the person who has advanced money on the security of the bill of lading, as to the receipt and shipment of the goods specified in it; *Grant v. Norway*, 10 C. B. 665; 20 L. J. C. P. 93; and the shipowner may show that the goods were not shipped; S. C.; see also *McLean v. Fleming*; *Brown v. Powell, &c., Coal Co.*; and *Cox v. Bruce, infra*; or that the master had given other bills previously for the same goods. *Hubbersty v. Ward*, 8 Ex. 330; 22 L. J. Ex. 113.

Where the charterparty provides that the bill of lading shall be "conclusive evidence against the owners of the quantity of cargo received as stated therein," it is conclusive, except in the case of fraud. *Lishman v. Christie*, 56 L. J. Q. B. 538; 19 Q. B. D. 333. *Crossfield v. Kyle Shipping Co.*, 85 L. J. K. B. 1310; [1916] 2 K. B. 885. And by the 18 & 19 V. c. 111, s. 3, "every bill of lading, in the hands of a consignee or indorsee for valuable consideration, representing goods to have been shipped on board a vessel, shall be conclusive evidence of such shipment, as against the master or other person signing the same, notwithstanding that such goods or some part thereof may not have been so shipped, unless such holder of the bill of lading shall have had actual notice, at the time of receiving the same, that the goods had not been in fact laden on board; provided that the master or other person so signing may exonerate himself in respect of such misrepresentation by showing that it was caused without any default on his part, and wholly by the fraud of the shipper, or of the holder, or some person under whom the holder claims." This section only makes the bill of lading conclusive against the person by whom; *Jessel v. Bath*, 36 L. J. Ex. 149; L. R. 2 Ex. 267; or by whose authority; see *Brown v. Powell, &c., Coal Co.*, 44 L. J. C. P. 289; L. R. 10 C. P. 562; it was signed. In other cases evidence is admissible that the goods were not shipped; S. C.; *McLean v. Fleming*, L. R. 2 H. L. Sc. 128; see also *Meyer v. Dresser*, 16 C. B. N. S. 646; 33 L. J. C. P. 289; or are not accurately described in the bill of lading; *Cox v. Bruce*, 18 Q. B. D. 147; *New Chinese Antimony Co. v. Ocean S.S. Co.*, 86 L. J. K. B. 1417; [1917] 2 K. B. 664. The section "does not operate to make the bill of lading conclusive as to the statement of marks

upon the goods shipped where those marks do not affect or denote substance, quality, or commercial value, *Parsons v. New Zealand Shipping Co.*, 69 L. J. Q. B. 419; 70 L. J. K. B. 404; [1900] 1 K. B. 714; [1901] 1 K. B. 548, C. A. Where by mistake of the mate, a larger number of bales were represented as having been shipped than really were, and there was some evidence that this was caused by the fraud of the person putting the goods on board, who was the shipper or his vendor, the court held that there was evidence that the misrepresentation was caused "wholly by the fraud of the shipper, &c." within this section. *Valieri v. Boyland*, 35 L. J. C. P. 215; L. R. 1 C. P. 382.

When a ship is chartered, and is put up by the master as a general ship, a merchant who ships a cargo on board under bills of lading signed by the master, and in ignorance of the charterparty, is entitled to look to the owners, whose servant the master is, for the safe delivery of the cargo. *Sandeman v. Scurr*, 36 L. J. Q. B. 58; L. R. 2 Q. B. 86; *The Figlia Maggiore*, 37 L. J. Adm. 52; L. R. 2 A. & E. 106; *Hayn v. Culliford*, 48 L. J. C. P. 372; 4 C. P. D. 182; *Manchester Trust v. Furness*, 64 L. J. Q. B. 766; [1895] 2 Q. B. 539.

If the master have hypothecated or sold part of the cargo to raise money for necessary repairs to the ship, he is the agent of the shipowner only, and the shipper is entitled to sue the shipowner on the implied indemnity; *Benson v. Duncan*, 18 L. J. Ex. 169; 3 Ex. 644; and he may recover either the actual sum for which the goods were sold; *Campbell v. Thompson*, 1 Stark. 490; or the price which they would have fetched at the place of delivery; *Hallett v. Wigram*, 9 C. B. 580; 19 L. J. C. P. 281; but not unless the ship eventually arrived there. *Atkinson v. Stephens*, 7 Ex. 567; 21 L. J. Ex. 329. As to the duty of the master with respect to the cargo, where it has been damaged during the voyage, see *Notara v. Henderson*, L. R. 5 Q. B. 346; L. R. 7 Q. B. 225; 41 L. J. Q. B. 158. He must not sell the cargo, unless in a case of necessity, and without an opportunity of consulting the owners thereof. *Australasian St. Nav. Co. v. Morse*, L. R. 4 P. C. 222; *Atlantic Mutual Insur. Co. v. Huth*, 16 Ch. D. 474.

What is a sufficient delivery of the goods, depends either upon the contract or upon the custom and usage. If there be no particular custom, the master must give the consignee reasonable time and opportunity to receive them. *Bourne v. Gatcliffe*, 7 M. & Gr. 850. Mere delivery at a wharf, and there leaving them, without notifying the arrival to the consignee, is not sufficient; and the responsibility continues until actual delivery to a person appointed to receive, or something equivalent to it; or, at least, until proper notice to the consignee has been given, and the goods separated and designated for his use. 3 Kent, Com. 215; see also *Petrocochino v. Bott*, 43 L. J. C. P. 214; L. R. 9 C. P. 355. Where the goods are by the charterparty to be unloaded at S., "at the usual place of discharge, and according to the custom of the port," and there is more than one usual place of discharge, the master is bound to obey the orders of the charterer, as to which of the places the ship is to be taken to unload, although the master has previously taken her to another of those places, and thereby incurred expense. *The Felix*, 37 L. J. Adm. 48; L. R. 2 A. & E. 273. If the goods are sent for by the consignee by lighter, the captain is responsible for the safety of the goods till the lighter is fully laden; such, at least, is the custom in the port of London. *Catley v. Wintringham*, Peake, 150, and *Id.*, n.

The clause "shipped in good order and condition" affords evidence that externally, so far as meets the eye, the goods were so shipped. *The Peter der Grosse*, 1 P. D. 414; see also *Crawford v. Allan Line*, 81 L. J. P. C. 113; [1912] A. C. 130. It does not constitute a contract, but it is a representation by which the shipowner V. is estopped, as against a purchaser C., who has altered his position and acted to his prejudice on the faith of it. *Compania Naviera, &c. v. Churchill*, 75 L. J. K. B. 94; [1906] 1 K. B. 237; *Martineaus v. Royal Mail Steam Packet Co.*, 17 Com. Cas. 176.

Delivery of goods to the servants of the shipowner alongside the vessel is

equivalent to delivery on board. *British Columbia, &c., Co. v. Nettleship*, 37 L. J. C. P. 235; L. R. 3 C. P. 499.

Where goods carried have sustained a general average loss, the shipowner is bound to take the necessary steps for procuring an adjustment of the general average and securing its payment. *Crooks v. Allan*, 49 L. J. Q. B. 201; 5 Q. B. D. 38. So where loss has been caused by jettison. *Strang v. Scott*, 14 App. Cas. 601.

ACTION ON GUARANTEE.

Warranties and guarantees have acquired distinct technical meanings, and must be separately treated of. The former relate to things; the latter to persons. A guarantee is a contract to answer for the payment of a debt or performance of a duty by another person.

As to contribution between co-sureties, *vide post*, *Action for money paid: Defendant's request*.

Proof of the contract—Statute of Frauds, &c.] By the Statute of Frauds (29 C. 2, c. 3), s. 4, no action shall be brought "whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriages of another person, . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized"; and by the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 3, no such promise "shall be deemed invalid to support an action, suit, or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing, or by necessary inference from a written document." Whether a "case comes within" the above clause of the Stat. of Frauds "or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise." 1 Wms. Saund. 211, *e* (1); *Fitzgerald v. Dressler*, 7 C. B. (N. S.) 374; 29 L. J. C. P. 113; *Sutton v. Grey*, 63 L. J. Q. B. 633; [1894] 1 Q. B. 285; *Harburg India Rubber Comb Co. v. Martin*, 71 L. J. K. B. 529; [1902] 1 K. B. 778. Where the real object of the contract is not that the debt of a third person should be paid, but such payment is a mere incident therein, the contract is not within the section, and what are known as "the property cases," "the document cases," and "the *del credere* cases," fall within this rule. S. C. See *Couturier v. Hastie*, 22 L. J. Ex. 97; 8 Ex. 40.

Where an order for goods is given by A., for the use of B., and credit given to A., this is not within the statute; for it is the debt of A. and not of B.; *Birkmyr v. Darnell*, 1 Salk. 27; 1 Smith's L. C.; and, where there is no writing, whether A. or B. was made the debtor by the agreement of the parties, is a question for the jury. *Keate v. Temple*, 1 B. & P. 158; *Mountstephen v. Lakeman*, 41 L. J. Q. B. 67; 43 L. J. Q. B. 188; L. R. 7 Q. B. 196; L. R. 7 H. L. 17. If the person for whose use the goods are furnished is liable at all, or if his liability is made the foundation of a contract between the plaintiff and the defendant, and that liability fails, the defendant's promise is void if not in writing. S. C., L. R. 7 Q. B. 202, *per* Willes, J. But, until there is some person primarily liable, the section does not apply. S. C., L. R. 7 H. L. 24, *per* Ld. Selborne. The question is, Is it a promise to pay the debt of another, for which the other was, and still remains, liable after the promise is made? If it be, then the statute

requires a writing, for it is then a "collateral" and not an original promise. See notes to *Forth v. Stanton*, 1 Wms. Saund. 211 *b*. If the effect of the agreement is to extinguish or satisfy the debt of another—as if A. promise to pay the amount of B.'s debt to C., if C. will discharge B. from arrest under *ca. sa.*—then, as B.'s debt is discharged, the debt becomes the debt of A. only, and is not within the statute. *Goodman v. Chase*, 1 B. & A. 297. The statute applies to legal debts only. *In re Hoyle*, 62 L. J. Ch. 182; [1893] 1 Ch. 84, *per* Lindley and Bowen, L.JJ. Thus it does not apply to a guarantee given by H. to the firm of which he is a member, for the debt of S. to the firm. S. C.

The promise must be made to the original creditor, to be within the statute. *Eastwood v. Kenyon*, 9 L. J. Q. B. 409; 11 Ad. & E. 438; *Reader v. Kingham*, 13 C. B. (N. S.) 344; 32 L. J. C. P. 108; *Cripps v. Hartnoll*, 4 B. & S. 414; 32 L. J. Q. B. 381. A mere promise of indemnity is not within it, *e.g.*, a promise by A. to B. to put B. in funds to meet bills on which C. is liable, irrespectively of C.'s making default. *Wildes v. Dudlow*, L. R. 19 Eq. 198, and *Guild v. Conrad*, 63 L. J. Q. B. 721; [1894] 2 Q. B. 885; following *Thomas v. Cook*, 7 L. J. (O. S.) K. B. 49; 8 B. & C. 728, and *Reader v. Kingham*, *supra*; *Batson v. King*, 4 H. & N. 739; 28 L. J. Ex. 327. As where at defendant's request, and for his accommodation, plaintiff drew a bill on A., which was accepted by A., and indorsed by defendant, defendant promising at the time to indemnify plaintiff; and plaintiff was obliged to pay the bill; held, that he might sue defendant as for money paid, and that no written guarantee was necessary. S. C. In order that a promise should fall within the statute there must be some obligation, implied at least, from the person for whom the surety becomes answerable towards the promisee; S. C.C.; as the obligation of an arrested debtor towards his bail to pay the debt or surrender, in which case, a promise by a third person to hold the bail harmless was held to be within the statute; *Green v. Cresswell*, 9 L. J. Q. B. 63; 10 Ad. & E. 453; this case, however, has been doubted; see *Wildes v. Dudlow*, *Guild v. Conrad*, *Reader v. Kingham*, and *Cripps v. Hartnoll*, *supra*; and, it is settled that there is no debt or duty in a person bailed on a charge of misdemeanor towards his bail, and hence a similar promise is not in such case within the statute. S. C.

The statute applies only where the person making the promise has no interest in the transaction beyond his promise. *Sutton v. Grey*, 63 L. J. Q. B. 633; [1894] 1 Q. B. 285. Thus, an agreement between G. and a stockbroker S., that G. should share half the commission earned by S. on transactions with clients introduced by G., and also half the losses incurred on such transactions, is not within the section. S. C. But an "interest to take an agreement out of the statute" must be "some species of interest which the law recognizes," *Harburg India Rubber Comb Co. v. Martin*, 71 L. J. K. B. 529; [1902] 1 K. B. 778, 791; *Davys v. Buswell*, 82 L. J. K. B. 499; [1913] 2 K. B. 47. An agreement by a factor to sell goods on a *del credere* commission is not within the section; for, though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the factor receives the consideration. *Couturier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97. A "forbearing to press for immediate payment" implies giving a "reasonable time," and this, though indefinite, is a sufficient consideration for a guarantee by a stranger to pay the debt; *semble*, *Oldershaw v. King*, 2 H. & N. 517; 27 L. J. Ex. 120; see also *Coles v. Pack*, 39 L. J. C. P. 63; L. R. 5 C. P. 65, and *Fullerton v. Provincial Bank of Ireland*, 72 L. J. P. C. 79; [1903] A. C. 309. It is not necessary that there should have been a contract by the plaintiff to abstain from suing; forbearance to sue at the defendant's request is sufficient. *Crears v. Burnyeat*, or *Hunter*, 56 L. J. Q. B. 518; 19 Q. B. D. 341. If the consideration for guaranteeing, by the defendant, the payment of past and future debts by A., to the plaintiffs, be the future supplying by them to A. of goods, and there be no agreement binding on them to supply the goods, and no goods are in fact supplied, the guarantee fails for want of consideration. *Westhead v.*

Sproson, 6 H. & N. 728; 30 L. J. Ex. 265. A guarantee to a bank in consideration of their "lending to A. £1,000, for seven days, from this date," does not cover an account overdrawn by numerous cheques, together amounting to £1,000, as the advance of £1,000 is the consideration for the guarantee, and a condition precedent to its attaching. *Burton v. Gray*, 43 L. J. Ch. 229; L. R. 8 Ch. 932. An I O U may be shown to have been given as a guarantee, and will be good as such. See *R. v. Chambers*, 41 L. J. M. C. 15; L. R. 1 C. C. R. 341.

Although the signature only of the party to be charged is sufficient, the names of both the contracting parties must appear upon the guarantee; and therefore a guarantee on which the name of the person to whom it is given does not appear is bad; *Williams v. Lake*, 2 E. & E. 349; 29 L. J. Q. B. 1; *Williams v. Byrnes*, 1 Moo. P. C. (N. S.) 154; but it was said that if the promise were accepted in writing by any one who would furnish goods under the guarantee, it would bind. S. C., *Id.* 198. See also *Fortune v. Young*, [1918] S. C. 1. A letter of defendant to plaintiff, referring to a mortgage not complete, and stating defendant's "willingness to take any responsibility respecting it," is insufficient, there being nothing to explain the transaction referred to, as to amount, interest, or property meant, without oral evidence; and, though since 19 & 20 V. c. 97, s. 3, oral evidence may supply the consideration, it cannot also explain the promise. *Holmes v. Mitchell*, 7 C. B. (N. S.) 361; 28 L. J. C. P. 301; and see *Glover v. Halkett*, 2 H. & N. 487; 26 L. J. Ex. 416. The recital of a guarantee given by H. in H.'s will is, after his death, a sufficient memorandum to charge his estate. *In re Hoyle*, 62 L. J. Ch. 182; [1893] 1 Ch. 84.

A contract of suretyship arises under the law merchant between the drawer and the indorsee, and between the indorser and subsequent holders of a bill of exchange; but, the indorser is under no such liability to prior parties to the bill; and to constitute such liability a written memorandum is required. *Jenkins v. Coomber*, 67 L. J. Q. B. 780; [1898] 2 Q. B. 168; *Shaw v. Holland*, 82 L. J. K. B. 592; [1913] 2 K. B. 15. But the fact that the indorser's signature appears above that of the drawer who indorses as payee, does not affect the indorser's liability, at all events on a bill which has been negotiated; see *Glenie v. Tucker* (or *Smith*), 77 L. J. K. B. 193; [1908] 1 K. B. 263, and *In re Gooch*, [1921] 2 K. B. 593.

Continuing guarantee.—Revocation.] An important point often arises, whether the guarantee is a continuing guarantee—that is, whether the guarantee is confined to one transaction, and is at an end when credit has once been given to the amount guaranteed, or whether it continues in respect of credit given, or debts contracted, from time to time. The answer depends on the language of the instrument, coupled with evidence of the surrounding circumstances, in order to show what was the intention of the parties. *Heffield v. Meadows*, L. R. 4 C. P. 595; *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622; *Coles v. Pack*, 39 L. J. C. P. 63; L. R. 5 C. P. 65. Hence it follows that the decision in one case is no certain guide to the construction of the contract in another; but the tendency of the courts is now to construe guaranteees as continuing until revoked.

The following are examples of continuing guaranteees: "In consideration of the credit given by the C. Co. to my son for coal, supplied by them to him, I hereby hold myself responsible as a guarantee to them for the sum of £100, and in default of his payment of any accounts due, I bind myself, by this note, to pay to the C. Co. whatever may be owing, to an amount not exceeding the sum of £100," the son being, at the time the guarantee was given, indebted to the company for coals delivered on credit. *Wood v. Priestner*, 36 L. J. Ex. 42, 127; L. R. 2 Ex. 66, 282. So, where the defendant gave to the plaintiff, a cattle-dealer, this guarantee:—"£50. I, M., will be answerable for £50 that Y., butcher, may buy of H.," and it appeared, from the circumstances under which the guarantee was given, that the parties contemplated a continuing supply of stock to Y., in his trade

of a butcher. *Heffield v. Meadows*, L. R. 4 C. P. 595. See also *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622, and *Nottingham Hide, &c., Co. v. Bottrill*, L. R. 8 C. P. 694.

A guarantee given to secure the dealings of a single member, A., of a partnership, does not in general cover transactions of the partnership; but it will be otherwise, where it appears, from the surrounding circumstances, that the guarantee was intended to include contracts entered into by A. on behalf of his firm. *Leathley v. Spyer*, 39 L. J. C. P. 299; L. R. 5 C. P. 595; see also *Montefiore v. Lloyd*, 15 C. B. (N. S.) 203; 33 L. J. C. P. 49. By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 18: "A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in respect of the transactions of which, the guaranty or obligation was given." This section appears to be identical in effect with the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 4; which was held to be only declaratory of the existing law. *Backhouse v. Hall*, 6 B. & S. 507; 34 L. J. Q. B. 141.

The power of a guarantor to withdraw from liability under a guarantee depends on whether the consideration is entire or "fragmentary, supplied from time to time, and therefore divisible." In the latter case, where it is given to secure the balance of a running account at a banker's or for goods supplied, he may, unless the guarantee provide otherwise, give notice to stop further money or goods being advanced on the guarantee. *Lloyds v. Harper*, 50 L. J. Ch. 145, 146; 16 Ch. D. 319, 320, *per* Lush, L.J. Thus a guarantee by writing, under hand only, for 12 months for the payment of all bills the plaintiff might discount for D., to the extent of £600, was held revocable by a notice given during the 12 months, although some discount had been made and repaid before notice. *Offord v. Davies*, 12 C. B. (N. S.) 748; 31 L. J. C. P. 319. And the same principle applied in equity, although the guarantee is under seal. *In re Crace*, 71 L. J. Ch. 358; [1902] 1 Ch. 733, 738. See further as to withdrawal from a guarantee. *Burgess v. Eve*, 41 L. J. Ch. 515; L. R. 13 Eq. 450; *Phillips v. Foxall*, 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; and *Egbert v. Northern Crown Bank*, 87 L. J. P. C. 186; [1918] A. C. 903. But a guarantee, the consideration for which is given once for all, cannot be determined by the guarantor, and does not cease on his death. *Lloyds v. Harper*, 50 L. J. Ch. 140; 16 Ch. D. 290; *In re Crace, supra*, in the absence of a special provision to that effect. S. C. The death alone of the guarantor does not revoke an engagement to guarantee the balance of a running account until notice. *Bradbury v. Morgan*, 1 H. & C. 249; 31 L. J. Ex. 462. Whether in the absence of express provision, it is revoked as to subsequent advances by notice of the guarantor's death alone, is not yet settled; in *Coulthart v. Clementson*, 49 L. J. Q. B. 204; 5 Q. B. D. 42, and *In re Whelan*, (1897) 1 Ir. R. 575, it was held to be so revoked; *secus*, *In re Silvester*, [1895] 64 L. J. Ch. 390; 1 Ch. 573, 577; and *In re Crace*, 71 L. J. Ch. 358; [1902] 1 Ch. 733, 739, *per* Joyce, J. A guarantee is not, however, revoked as against the survivor of two joint and several co-sureties. *Beckett v. Addyman*, 51 L. J. Q. B. 597; 9 Q. B. D. 783. See also *Harriss v. Fawcett*, 42 L. J. Ch. 502; L. R. 8 Ch. 866. See further Rowlatt's Law of Principal and Surety, [1899] pp. 73 *et seq.*

M., by a guarantee given to a bank, guaranteed payment on demand or on the sooner determination of the guarantee, of all moneys up to a certain amount due or to be due to the bank by B. The guarantee was to be determinable (a) by the bank closing the account, or (b) by M. giving the bank three months' notice. In the absence of these steps it was held that M. had no immediate right to compel B. to relieve him from his liability. *Morrison v. Barking Chemicals Co.*, 88 L. J. Ch. 314; [1919] 2 Ch. 325.

Default of principal debtor.] The plaintiff must prove the default of the principal debtor, against which he has been guaranteed by the surety.

Admissions made by the principal debtor, or a judgment or award obtained against him by the plaintiff, are not evidence against the surety. *Ex pte. Young*, 50 L. J. Ch. 824; 17 Ch. D. 668.

Damages.] A guarantee for payment by the acceptor of a bill of exchange includes interest. *Ackerman v. Ehrensperger*, 16 L. J. Ex. 3; 16 M. & W. 99. "We guarantee that £400 shall be duly paid, in the proportion of £200 each," signed by two persons, does not make them jointly liable to £400, but is a separate contract as to £200 by each. *Fell v. Goslin*, 7 Ex. 185; 21 L. J. Ex. 145. An agreement to be answerable for all the costs of, and incidental to, an action to be brought by the plaintiff, entitles him to recover the costs of his own solicitor, though not actually paid at the time of suing on the guarantee. *Spark v. Heslop*, 1 E. & E. 563; 28 L. J. Q. B. 197. The defendant promised to pay the plaintiffs "£300 to secure an advance now or hereafter on a banking account with A." They advanced more than £300 to A., who paid his creditors 16s. in the £ only; it was held that the defendant's promise was only to repay an advance of £300, and that he was therefore entitled to the benefit of the dividend thereon. *Gee v. Pack*, 33 L. J. Q. B. 49; following *Bardwell v. Lydall*, 7 Bing. 489; *Thornton v. M'Kewan*, 1 H. & M. 525; 32 L. J. Ch. 69; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Seckham*, 42 L. J. Ch. 127; L. R. 7 Ch. 680. The surety may, however, waive his right to the share of the composition by the terms of the contract of suretyship; *Ex pte. National Provincial Bank of England*, 17 Ch. D. 98; *Ellis v. Emmanuel*, 1 Ex. D. 157; as where the guarantee is given for a limited amount, and is less than the debt, the amount of which is then ascertained. S. C. Where a guarantee given to A. appears to have been so given to him as trustee for B., A. can recover thereon the same damages B. could have recovered if it had been given to B. *Lloyds v. Harper*, 50 L. J. Ch. 140; 16 Ch. D. 290.

Defence.

The want of a written memorandum must be pleaded specially. Rules, 1883, O. xix. r. 20.

The mere omission on the part of the principal creditor to enforce his rights against the principal debtor does not discharge the surety. *Mansfield Union v. Wright*, 9 Q. B. D. 683.

Concealment.] The surety may sometimes rely on the concealment of material particulars by the principal at the time the contract was made, as a fraud. *Lee v. Jones*, 14 C. B. (N. S.) 386; 17 C. B. (N. S.) 482; 34 L. J. C. P. 131. So, in the case of concealment during the pendency of a continuing guarantee. *Phillips v. Foxall*, 41 L. J. Q. B. 293; L. R. 7 Q. B. 666; *Sanderson v. Aston*, 42 L. J. Ex. 64; L. R. 8 Ex. 73. See *Durham, Mayor of, v. Fowler*, 58 L. J. Q. B. 246; 22 Q. B. D. 394. The duty of the principal must always ultimately be measured by the jury, but the judge will have to point out what their duty is in this respect. A direction that a concealment must be "wilful and intentional, with a view to the advantage they (the principals) were thereby to receive," is wrong. *Railton v. Mathews*, 10 Cl. & F. 934. See further *Davies v. L. & Provincial Marine Insur. Co.*, 47 L. J. Ch. 511; 8 Ch. D. 469, and *Seaton v. Heath*, 68 L. J. Q. B. 631; [1899] 1 Q. B. 782. Where a bond has been given by A. to B. for the fidelity of B.'s servant, the innocent non-disclosure by B. of the servant's previous dishonesty vitiates the contract and releases A. *London General Omnibus Co. v. Holloway*, 81 L. J. K. B. 603; [1912] 2 K. B. 72. On the other hand, the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the required obligation; *Owen v. Homan*, 4 H. L. C. 997; for a surety is only entitled to disclosure of any arrangement that may exist between the debtor

and creditor that may make his position different from what he would reasonably expect; and hence, if a person undertake to be responsible for a cash credit given to one of the banker's customers, the banker is not bound voluntarily to communicate that the intention is to apply the credit to an old debt due from the customer to the banker. *Hamilton v. Watson*, 12 Cl. & F. 109, per Ld. Campbell; *N. British Insur. Co. v. Lloyd*, 10 Ex. 523; 24 L. J. Ex. 14; or that the bank has suspicions regarding their customer; *Bank of Scotland v. Morrison*, [1911] S. C. 593; and *National Provincial Bank of England v. Glanusk*, 82 L. J. K. B. 1033; [1913] 3 K. B. 335. See also *Royal Bank of Scotland v. Greenshields*, [1914] S. C. 259. So where the guarantee was a continuing one, given to a bank to secure advances "not exceeding in the whole £1,000," it was held no defence to an action to recover £1,000 on the guarantee that the bank had made advances together exceeding £1,000. *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622.

Alteration of position of parties.—Giving time, &c.] Any alteration by a binding agreement in the relative position of the creditor and principal debtor whereby the latter is released or the remedy against him is suspended, or the risk of the surety varied, without the surety's assent, will be a discharge of the guarantee. *Polak v. Everett*, 46 L. J. Q. B. 218; 1 Q. B. D. 669; *Lewis v. Jones*, 4 B. & C. 506, and 515, n.; *Cragoe v. Jones*, 42 L. J. Ex. 68; L. R. 8 Ex. 81; *Bolton v. Buckenham*, 60 L. J. Q. B. 261; [1891] 1 Q. B. 278. The rule applies where two or more are indebted as principals, and it is afterwards agreed between them that as between themselves one shall be surety only, and the creditor has notice of this. *Rouse v. Bradford Banking Co.*, 63 L. J. Ch. 337; [1894] A. C. 586. So any material alteration in the terms of an agreement between the creditor and principal debtor will discharge the surety, provided the agreement forms the basis of the contract of suretyship; *N. W. Ry. Co. v. Whinray*, 10 Ex. 77; 23 L. J. Ex. 261; but not otherwise; *Sanderson v. Aston*, 42 L. J. Ex. 64; L. R. 8 Ex. 73. See further *Holme v. Brunskill*, 3 Q. B. D. 495. And in order to discharge the surety by such material alteration, e.g., by giving time to the principal debtor, A., there must be a binding enforceable contract with A. *Clarke v. Birley*, 58 L. J. Ch. 616; 41 Ch. D. 422. Such contract with a third party has no effect. S. C.; *Lyon v. Holt*, 5 M. & W. 250; *Fraser v. Jordan*, 26 L. J. Q. B. 288; 8 E. & B. 303. "Mere laches of the obligee, or a mere passive acquiescence by the obligee, in acts which are contrary to the conditions of the bond, is not sufficient of itself to relieve the sureties." *Durham, Mayor of, v. Fowler*, 58 L. J. Q. B. 246, 257; 22 Q. B. D. 394, 417; *Hull, Mayor, &c., of, v. Harding*, 62 L. J. Q. B. 55; [1892] 2 Q. B. 494. Nor is it sufficient that the surety's position has been altered by the conduct of the creditor, where that conduct has been caused by the fraudulent act or omission of the principal debtor against which the surety by his contract of suretyship had guaranteed the creditor. S. C. The rule that the giving of time to the principal debtor without the surety's consent discharges the surety, does not apply after judgment has been obtained against them both jointly as co-defendants. *In re Debtor*, 82 L. J. K. B. 907; [1913] 3 K. B. 11.

The contract of suretyship is sometimes severable, so that it is only discharged as to part by an alteration in the position of the creditor and the principal debtor. *Harrison v. Seymour*, 35 L. J. C. P. 264; L. R. 1 C. P. 518; *Skillett v. Fletcher*, 35 L. J. C. P. 154; 36 L. J. C. P. 206; L. R. 1 C. P. 217; L. R. 2 C. P. 469; *Croydon Commercial Gas Co. v. Dickinson*, 45 L. J. C. P. 869; 46 L. J. C. P. 157; 2 C. P. D. 46.

If the rights against the surety be expressly reserved, the latter is not discharged; *Kearsley v. Cole*, 16 L. J. Ex. 115; 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 779; 24 L. J. Q. B. 130; *Bateson v. Gosling*, 41 L. J. C. P. 53; L. R. 7 C. P. 9; and if the contract of suretyship contain a special clause allowing the creditor to compound with the principal debtor, the surety

is not discharged by such compounding. *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J. Ex. 133; *Perry v. National Provincial Bank of England*, 79 L. J. Ch. 509; [1910] 1 Ch. 464. The reservation of rights against the surety prevents the latter from being discharged, because the principal debtor cannot then complain that the surety, when he has been obliged to pay the debt, immediately claims to be indemnified by the principal debtor, and that this claim makes the discharge of the latter illusory. *Kearsley v. Cole*, 16 L. J. Ex. 115; 16 M. & W. 128; *Nevill's Case*, 40 L. J. Ch. 1; L. R. 6 Ch. 43, 47; *Muir v. Crawford*, L. R. 2 H. L. Sc. 456, 458. Where the principal debtor is absolutely discharged, as by a novation of debt, the surety is discharged notwithstanding a clause in the contract of suretyship, reserving rights against him. *Commercial Bk. of Tasmania v. Jones*, 62 L. J. P. C. 104; [1893] A. C. 313; see also *Bradford Old Bank v. Sutcliffe*, 88 L. J. K. B. 85, 96; [1918] 2 K. B. 833, 850.

Where the liabilities of the principal debtor have been changed by statute during the pendency of the guarantee, the surety is discharged; *Pybus v. Gibb*, 6 E. & B. 902; 26 L. J. Q. B. 41; unless the terms of the guarantee show that it is intended the suretyship should continue. *Oswald v. Berwick (Mayor)*, 5 H. L. C. 856; 25 L. J. Q. B. 383. See *Skillett v. Fletcher*, 35 L. J. C. P. 154; 36 L. J. C. P. 206; L. R. 1 C. P. 217; L. R. 2 C. P. 469.

As a surety on payment of the debt is entitled to all the securities of the creditor, whether he is aware of their existence or not, even though they were given after the contract of suretyship, if the creditor who has had, or ought to have had, them in his full possession or power, lose them or permit them to get into the possession of the debtor, or do not make them effectual by giving proper notice, the surety to the extent of such security will be discharged; a surety, moreover, will be released if the creditor, by reason of what he has done, cannot, on payment by the surety, give him the securities in exactly the same condition as that in which they formerly stood in his hands. See notes to *Rees v. Barrington*, 2 White & Tudor, L. C.; *Wulff v. Jay*, 41 L. J. Q. B. 322; L. R. 7 Q. B. 756. Thus, where the plaintiff held a bill of sale of the debtor's furniture as security for a debt to him for which the defendant was surety, but neglected to register it, and although he had notice of the debtor's insolvency did not seize the furniture under it; and the goods in consequence passed to the debtor's trustee in bankruptcy; it was held that the defendant was discharged to the extent of the value of the goods. S. C. See also *Watts v. Shuttleworth*, 5 H. & N. 235; 29 L. J. Ex. 229; *Mutual Loan Assoc. v. Sudlow*, 5 C. B. (N. S.) 449; 28 L. J. C. P. 108; and *Lawrence v. Walmesley*, 12 C. B. (N. S.) 799; 31 L. J. C. P. 143. These rules as to the right of the surety apply as between the acceptor and indorser of a bill where securities had been deposited to secure its payment, and it has been paid at maturity by the indorser. *Duncan v. N. & S. Wales Bank*, 50 L. J. Ch. 355; 6 App. Cas. 1. In *Pojak v. Everett*, 46 L. J. Q. B. 218; 1 Q. B. D. 669, the distinction is explained between intentional acts which discharge the claim against the surety altogether, and negligent acts which discharge it only to the extent to which the surety has been thereby prejudiced. See also *Carter v. White*, 25 Ch. D. 666. The right of a surety to the benefit of a collateral security is not in abeyance till he pays the debt. *Dixon v. Steel*, 70 L. J. Ch. 794; [1901] 2 Ch. 602. The principal creditor is not entitled to the benefit of security given by the principal debtor to the surety. *In re Walker*, 61 L. J. Ch. 234; [1892] 1 Ch. 621.

In the case of two sureties, A. and B., contracting severally, the creditor does not by releasing A. thereby break his contract and so release B., unless B. can show that he had a right to contribution which has been taken away or injuriously affected. *Ward v. National Bank of New Zealand*, 52 L. J. P. C. 65; 8 App. Cas. 755.

The release of the principal debtor by discharge in bankruptcy or by arrangement or composition under the Bankruptcy Acts does not release a

surety, whether he assents or not. See *Ex pte. Jacobs*, 44 L. J. Bk. 34; L. R. 10 Ch. 211; *Ellis v. Wilmot*, 44 L. J. Ex. 10; L. R. 10 Ex. 10. This principle applies to the insurance of the debt of a company which afterwards, under a colonial statute, enters into a scheme of arrangement with its creditors. *Dane v. Mortgage Insur. Co.*, 63 L. J. Q. B. 144, 147; [1894] 1 Q. B. 54, 63, 64. A creditor who holds security for his debt does not discharge a surety for the debt by surrendering his security to the trustee in the bankruptcy of the principal debtor, in order to entitle himself to prove for the whole debt. *Rainbow v. Juggins*, 49 L. J. Q. B. 353, 718; 5 Q. B. D. 138, 422. The adjudication in bankruptcy under the Bankruptcy Act, 1890, s. 3 (15) [now s. 16 (16) of the Bankruptcy Act, 1914], of a debtor who has compounded with his creditors, discharges the liability of a surety who has secured the composition and avoids the security. *Walton v. Cook*, 58 L. J. Ch. 180; 40 Ch. D. 325.

ACTION ON WARRANTY.

A warranty is either express or implied. "Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given." *Readhead v. Midland Ry. Co.*, 38 L. J. Q. B. 169; L. R. 4 Q. B. 392; *Francis v. Cockrell*, 39 L. J. Q. B. 113, 117; L. R. 5 Q. B. 184, 193. See *The Moorcock*, 58 L. J. P. 73; 13 P. D. 64, *per Bowen, L.J.*; *The Bearn*, 75 L. J. P. 9; [1906] P. 48; *Bede S.S. Co. v. R. Wear Commrs.*, 76 L. J. K. B. 434; [1907] 1 K. B. 310; *Hamlyn v. Wood*, 60 L. J. Q. B. 734; [1891] 2 Q. B. 488; and *Easton v. Hitchcock*, 81 L. J. K. B. 395; [1912] 1 K. B. 535. A warranty may arise from an innocent mis-statement. *Low v. Bouverie*, 60 L. J. Ch. 594; [1891] 3 Ch. 82. It is a question of intention whether a representation amounts to a warranty. *Wallis v. Pratt*, 80 L. J. K. B. 1058; [1911] A. C. 394; *Heilbut, Symons v. Buckleton*, 82 L. J. K. B. 245; [1913] A. C. 30; *Harrison v. Knowles*, 87 L. J. K. B. 680; [1918] 1 K. B. 608.

Where plans and a specification of a certain work to be done for A. are prepared as the basis of tenders, A. does not warrant that the work can be done under such plans and specification. *Thorn v. Mayor of London*, 45 L. J. Ex. 487; 1 App. Cas. 126. So, where the architect takes out the quantities, A. does not warrant their correctness. *Scrivener v. Pask*, L. R. 1 C. P. 715.

The most frequent cases in which an action is brought on a warranty, are on the occasion of the sale of goods, including horses, and of a representation of authority to enter into a contract on behalf of another person.

ACTION ON WARRANTY ON SALE OF CHATTELS.

Sect. 62 of the Sale of Goods Act, 1893, 56 & 57 V. c. 71: "In this Act unless the context or subject-matter otherwise requires": *Warranty* "means an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

Sect. 11 (1.) (a.): "Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or may elect to treat the breach of such condition as a breach of warranty, and not as a ground for treating the contract as repudiated."

Warranty of title.] Sect. 12. "In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

- "(1.) An implied condition on the part of the seller that in the case of a sale he has the right to sell the goods, and that in the case of an agreement to sell he will have a right to sell the goods at the time when the property is to pass :
- "(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods :
- "(3.) An implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

At common law there was no warranty of title on the sale by a pawn-broker of an unredeemed pledge at an auction of such pledges; *Morley v. Attenborough*, 18 L. J. Ex. 148; 3 Ex. 500; nor on a sale under an execution, nor on a sale by the purchaser on that occasion to another purchaser privy to the first sale. *Chapman v. Speller*, 19 L. J. Q. B. 239; 14 Q. B. 621. So, where the defendant had bought at a public auction a boiler set in brickwork which had been seized as a distress for poor rate; the plaintiffs bought it of the defendant, with notice of the circumstances under which it had been originally sold, and were to remove the boiler at their own expense, but were prevented so doing by the mortgagees of the premises: it was held (Willes, J., *diss.*) that the seller had not warranted his title to the boiler, or that the plaintiffs would be permitted to remove it, 36 L. J. C. P. 328; *Bagueley v. Hawley*, L. R. 2 C. P. 625. Where without the knowledge of buyer or seller, goods are so labelled that they cannot in their then condition be resold without infringing the trade-mark of a third party, sub-ss. 1 and 2, *supra*, do not entitle the buyer to reject the goods. *Niblett v. Confectioners' Materials Co.*, 37 T. L. R. 103.

Warranty of quality.] Sect. 14. "Subject to the provisions of this Act and of any statute in that behalf, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, except as follows:—

- "(1.) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he be the manufacturer or not), there is an implied condition that the goods shall be reasonably fit for such purpose, provided that in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied condition as to its fitness for any particular purpose :
- "(2.) Where goods are bought by description from a seller who deals in goods of that description (whether he be the manufacturer or not), there is an implied condition that the goods shall be of merchantable quality; provided that if the buyer has examined the goods, there shall be no implied condition as regards defects which such examination ought to have revealed :
- "(3.) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- "(4.) An express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith."

Evidence of what took place prior to the written contract of sale is admissible to prove that the buyer made known to the seller the particular purpose for which the goods were required, so as to bring the case within sub-sect. 1. *Gillespie v. Cheney*, 65 L. J. Q. B. 552; [1896] 2 Q. B. 59. The particular purpose may be known to the seller L. by the recognized description by which P. purchased the article. *Preist v. Last*, 72 L. J. K. B. 657; [1903] 2 K. B. 148. Whether P. thereby showed that he relied on L.'s skill or judgment is a question of fact under all the circumstances. S. C. The condition of

reasonable fitness applies, although the defect was latent and undiscoverable at the time of sale, as in the case of milk sold for consumption. *Frost v. Aylesbury Dairy Co.*, 74 L. J. K. B. 386; [1905] 1 K. B. 608. Bottles containing mineral water supplied by a mineral water manufacturer to a retailer are "supplied under a contract of sale" (although the bottles are only hired), and there is an implied condition that they, as well as their contents, are reasonably fit for the purpose for which they were required by the retailer, e.g., for handling safely. *Gedding v. Marsh*, 89 L. J. K. B. 526; [1920] 1 K. B. 668. Sect. 14 (2) applies whether the goods are sold under a patent or trade name or not. *Bristol Tramways &c., Co. v. Fiat Motors*, 79 L. J. K. B. 1107; [1910] 2 K. B. 831. It was held to apply where a beer-house keeper H. gives a customer W. the particular kind of beer in which H. deals and for which W. asks. *Wren v. Holt*, 72 L. J. K. B. 340; [1903] 1 K. B. 610. The expression "merchantable quality" in the sub-section means goods saleable at the time the delivery is made and not goods which can only be made saleable by the expenditure of labour upon them. *Jackson v. Rotex Motor Co.*, 80 L. J. K. B. 38; [1910] 2 K. B. 937. The proviso at the end of the sub-section "if the buyer has examined the goods" appears to be satisfied if the buyer sees the outside of the receptacles in which the goods are packed and has an opportunity of fully examining the contents if he so desires. *Thornett and Fehr v. Beers*, 88 L. J. K. B. 684; [1919] 1 K. B. 486.

Sects. 13, 15, define the effect of a sale of goods by description or sample.

By the Merchandise Marks Act, 1887 (50 & 51 V. c. 28), s. 17, "On the sale, or in the contract for the sale of any goods to which a trade mark, or mark, or trade description has been applied, the vendor shall be deemed to warrant that the mark is a genuine trade mark and not forged or falsely applied, or that the trade description is not a false trade description within the meaning of this Act" (see sect. 3, modified by sect. 18; see also 54 & 55 V. c. 15, s. 1), "unless the contrary is expressed in some writing signed by or on behalf of the vendor and delivered at the time of the sale or contract to and accepted by the vendee." This section will apply although the trade description is not physically attached to the goods. See *Budd v. Lucas*, 60 L. J. M. C. 95; [1891] 1 Q. B. 408. By the Fertilizers and Feeding Stuffs Act, 1906, 6 E. 7, c. 27, s. 1, invoices required to be given by that section imply a warranty.

As to the obligation arising from a contract to supply power, see *Bentley Bros. v. Metcalfe*, 75 L. J. K. B. 891; [1906] 2 K. B. 548.

Remedy where there is a warranty.] Sect. 53. (1.) "Where there is a breach of warranty by the seller, or where the buyer elects, or is compelled, to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may (a) set up against the seller the breach of warranty in diminution or extinction of the price; or (b) maintain an action against the seller for damages for the breach of warranty." (4.) "The fact that the buyer has set up the breach of warranty in diminution or extinction of the price does not prevent him from maintaining an action for the same breach of warranty if he has suffered further damage." See *Bostock v. Nicholson*, 73 L. J. K. B. 524; [1904] 1 K. B. 725; *Wallis v. Pratt*, 80 L. J. K. B. 1058; [1911] A. C. 394.

In some special cases, however, the buyer may rescind the contract, and recover the money paid under a claim for money had and received: as, where by the contract the purchaser has the power of returning the article, if not approved; *Towers v. Barrett*, 1 T. R. 133; or, where the contract is rescinded with assent of the defendant; *per Buller, J., Id.*; and the article is returned within a reasonable time; *Compton's Case*, cited by Buller, J., in 1 T. R. 136; *Adam v. Richards*, 2 H. Bl. 573; *Street v. Blay*, 2 B. & Ad. 456; and, in the same state as sold, and without using the thing sold after the discovery of the breach; *Harmor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53; *Curtis v. Hannay*, 3 Esp. 82.

But on the purchase of a specific chattel, it is only where there is a condition in the contract authorizing the return, or the vendor has received back the horse or other article, and has thereby rescinded the contract, or has been guilty of a fraud which avoids the contract altogether, that the purchaser may thus recover back the price. *Street v. Blay*, 2 B. & Ad. 462, and the cases there cited; *Gompertz v. Denton*, 1 Cr. & M. 207. See also *Houldsworth v. City of Glasgow Bank*, 5 App. Cas. 338.

If the purchaser sue upon the warranty, he need not return the article sold. *Fielder v. Starkin*, 1 H. Bl. 17; *Pateshall v. Tranter*, 3 Ad. & E. 103.

Proof of the sale and warranty.] Where there is no written contract, and the warranty is (as it often is) mentioned in the receipt for the purchase-money, the sale and warranty may be proved by the production of the receipt without an agreement stamp. *Skrine v. Elmore*, 2 Camp. 407. A sale for the price of £10 and upwards is within the Sale of Goods Act, 1893, s. 4; but as the breach of warranty is not usually discovered till after delivery and acceptance of the goods sold, the statute is then complied with, and the contract may be proved by oral evidence.

The plaintiff must in general prove an express warranty; a high price is not tantamount to an implied warranty. *Stuart v. Wilkins*, 1 Doug. 20; *Parkinson v. Lee*, 2 East, 322. The word "warranty" is not essential; but there may be a mere misrepresentation or opinion of the seller without any intention on either side to give or require a warranty, and this will be a question for the jury. Generally, however, a representation made at the sale is part of the contract, and equivalent to a warranty. *Wood v. Smith*, 5 M. & Ry. 124; *Salmon v. Ward infra*; *Schawel v. Reade*, [1913] 2 I. R. 64. But not if the contract be reduced to writing. *Pickering v. Dowson*, 4 Taunt. 779. But where the evidence of the contract of sale consists of a series of letters which are ambiguous in their terms on the question of warranty, oral evidence of all the surrounding facts and circumstances of the sale is admissible, for the purpose of showing that a warranty was not contemplated between the parties. *Stucley v. Baily*, 1 H. & C. 405; 31 L. J. Ex. 483. A mere invoice describing articles sold does not amount to a warranty of quality. *Rook v. Hopley*, 3 Ex. D. 209. On the sale of pictures, with a bill of parcels having the artist's name attached, it is for the jury to find whether the seller has guaranteed that they are really the works of the artist, or merely intimated his opinion as to the authorship. *Power v. Barham*, 4 Ad. & E. 473; see also *Hyslop v. Shirlaw*, 7 F. 875. A., a corn-dealer, sold to B., another corn-dealer, some barley as "seed barley," just before bought by sample from a third person. B. knew that A. had so bought it by sample as "seed barley," and that he had not seen it in bulk: held, that this was not evidence of a warranty, but was a mere expression of A.'s belief. *Carter v. Crick*, 4 H. & N. 412; 28 L. J. Ex. 238. See further as to representation or warranty relating to a specific thing, *Heilbut, Symons v. Buckleton*, 82 L. J. K. B. 245; [1913] A. C. 30; and *Harrison v. Knowles*, 87 L. J. K. B. 680; [1918] 1 K. B. 608.

Where the plaintiff wrote to the defendant, "You will remember that you warranted a horse as a five year old," &c., to which the defendant answered, "The horse is as I represented it," it was ruled that this was evidence of a warranty at the time of sale. *Salmon v. Ward*, 2 C. & P. 211. Where the seller said, "The horse is sound to the best of my knowledge, but I will not warrant it," and the seller knew it to be unsound, he was held answerable on this qualified warranty, viz., that "it was sound to the best of his knowledge." *Wood v. Smith, supra*. But *quære*, for this seems to be rather a case of fraud than of qualified warranty. Where the warranty was, "To be sold, a black gelding, five years old; has been constantly driven in the plough. Warranted," this was held to be only a warranty of soundness. *Richardson v. Brown*, 1 Bing. 344. So, "Received of B. £10 for a grey four-year-old colt, warranted sound," is not a warranty of age. *Budd v. Fairmaner*, 8 Bing. 48. Where there is a manifest defect, a general warranty of

soundness will not be deemed to extend to it. *Margetson v. Wright*, 7 Bing. 603. A splint has been held not to be such a manifest defect; S. C., 8 Bing. 454; nor convexity of the cornea of the eye; *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J. Q. B. 9. When a horse is sold with a warranty by private sale at a repository for the sale of horses, where the terms of the sales are painted upon a board fixed up in a conspicuous situation, a purchaser must be taken to be cognizant of these terms, though nothing is said respecting them at the time of sale; and if one of the terms be that the warranty of soundness should remain in force until noon next day, unless in the meantime notice of unsoundness should be given by the purchaser, it must be complied with, though the unsoundness be of such a nature as may not be discovered within that time. *Bywater v. Richardson*, 1 Ad. & E. 508; 3 L. J. K. B. 164. So, where the condition was that a horse not answering the warranty must be returned before a given time after the sale. *Hinchcliffe v. Barwick*, 49 L. J. Ex. 495; 5 Ex. D. 177. So, where a horse was "warranted sound for one month," it was held that the complaint of unsoundness must be made within one month of the sale. *Chapman v. Gwyther*, 35 L. J. Q. B. 142; L. R. 1 Q. B. 463. The buyer has, however, that time within which to return the horse, though the purchaser had notice of the breach of warranty before he removed the horse, and the horse through an accident became depreciated in value. *Head v. Tattersall*, 41 L. J. Ex. 4; L. R. 7 Ex. 7; *Cranston v. Mallow*, [1912] S. C. 112. And where, before the time stipulated for return has elapsed, the horse is too injured to be returned, the buyer may recover for breach of warranty without returning it. *Chapman v. Withers*, 57 L. J. Q. B. 457; 20 Q. B. D. 824. So, if the horse die before the time has elapsed. See *Elphick v. Barnes*, 49 L. J. C. P. 698; 5 C. P. D. 321.

Warranty by agent.] A servant employed to sell a horse has been held to have an implied authority to warrant; *Alexander v. Gibson*, 2 Camp. 555 (the case of a sale at a fair); and, even where the servant of a horse-dealer has express directions not to warrant, but does warrant, the master is bound unless he has notified to the world that the general authority is limited. *Per Bayley, J.*, in *Pickering v. Busk*, 15 East, 45; *Helyear v. Hawke*, 5 Esp. 72; *Howard v. Sheward*, 36 L. J. C. P. 42; L. R. 2 C. P. 148. But the doctrine has, according to some authorities, been confined to the case of sales by servants of horse-dealers, who may be supposed to possess a general authority; *Scotland, Bank of, v. Watson*, 1 Dow, 45; *Fenn v. Harrison*, 3 T. R. 760, *per Ashhurst, J.*; *Anon.*, cited 15 East, 407; and it has been decided that the servant of an owner, not a horse-dealer, entrusted on one particular occasion to sell and deliver a horse, is not by law authorized to bind his master by a warranty; and the buyer taking a warranty from such an agent takes it at the risk of being able to prove that he had the principal's authority. *Brady v. Todd*, 9 C. B. (N. S.) 592; 30 L. J. C. P. 223. *Quære*, Whether, in the case of a foreman alleged to be a general agent, or such a special agent as a person entrusted with the sale of a horse at a fair or other public mart, the authority would be implied; S. C.; *semble*, *per Ashhurst, J.*, in *Fenn v. Harrison*, *supra*, that in the latter case it would not. What is said at the time of the sale is evidence, and may amount to a warranty; *Brady v. Todd*, *supra*. If the seller repudiates the warranty made by his agent there is no sale; S. C. Where the horse had been already sold, and the vendor's servant on delivering him to the purchaser, made certain statements, and signed a receipt for the price containing a warranty, it was held that the vendor was not bound by such statements, nor by the receipt, no express authority to warrant being shown. *Woodin v. Burford*, 2 Cr. & M. 391. Where the plaintiff wrote to the defendant, referring to the warranty and alleging a breach of it, and the defendant in reply denied that there had been any breach, it was held that the jury were justified in finding a warranty on this evidence. *Miller v. Lawton*, 15 C. B. (N. S.) 834.

Breach of warranty.] If the breach be denied, the plaintiff must give positive proof of unsoundness, &c., at the time of the sale; a suspicion that a horse was unsound is not sufficient. *Eaves v. Dixon*, 2 Taunt. 343. The term "sound," in the case of a horse, implies the absence of disease, or the seeds of a disease, which impairs the natural usefulness of the animal. *Kiddell v. Burnard*, 9 M. & W. 668; 11 L. J. Ex. 268. An infirmity, as a temporary lameness, which renders a horse less fit for present use, though not of a permanent nature, and though removed after action brought, is an unsoundness. *Per* Ld. Ellenborough, *Elton v. Brogden*, 4 Camp. 281; 1 Stark. 127. A cough, though not permanent, is therefore an unsoundness. *Coates v. Stephens*, 2 M. & Rob. 157; *Shillitoe v. Claridge*, 2 Chitty, 425. But see *Garment v. Barrs*, 2 Esp. 673, where Eyre, C.J., held that a horse labouring under a temporary injury or hurt is not an unsound horse. Roaring is not, it is said, necessarily an unsoundness, unless symptomatic of disease; *Bassett v. Collis*, 2 Camp. 523; but, if it is of such a nature as to incommode the horse when pressed to his speed, is an unsoundness; *Onslow v. Eames*, 2 Stark. 81. Mere badness of shape (such as may produce cutting or curbs) is not unsoundness; *Dickinson v. Follett*, 1 M. & Rob. 299; *Brown v. Elkington*, 10 L. J. Ex. 336; 8 M. & W. 132; but, any defect in the structure of a horse, congenital as well as arising from subsequent disease or accident, which diminishes his natural usefulness and renders him less than reasonably fit for present use, is unsoundness; and convexity in the cornea of the eye, making the horse short-sighted, and so inducing a habit of shying, is such a defect. *Holliday v. Morgan*, 1 E. & E. 1; 28 L. J. Q. B. 9; see also *Schawel v. Reade*, [1913] 2 I. R. 64. A nerved horse is unsound. *Best v. Osborne, Ry. & M.* 290. Crib-biting is not unsoundness, but vice. *Scholfield v. Robb*, 2 M. & Rob. 210. Whether thrushes, splints, or quidding be unsoundness, is a disputed question; *Bassett v. Collis*, 2 Camp. 524, n.; but a splint which produces lameness is an unsoundness, even before the lameness is produced. *Margetson v. Wright*, 8 Bing. 454. So, a bone spavin. *Watson v. Denton*, 7 C. & P. 85. A chest-foundered horse is unsound. *Atterbury v. Fairmanner*, 8 B. Moore, 32. Proof that a horse is a good drawer will not satisfy a warranty that he is "a good drawer, and pulls quietly in harness." *Coltherd v. Puncheon*, 2 D. & Ry. 10.

It need not be averred, nor if averred, proved, that the defendant knew of the unsoundness. *Williamson v. Allison*, 2 East, 446.

By the Fertilizers and Feeding Stuffs Act, 1906, 6 E. 7, c. 27 (replacing 56 & 57 V. c. 56), s. 3 (5), in an action for breach of the warranty implied by an invoice under sect. 1, the certificate of the analyst to whom a sample has under sect. 3 been submitted for analysis shall, provided that the sample has been treated as thereby prescribed, "be sufficient evidence of the facts therein stated, unless the defendant requires that the analyst be called as a witness."

Damages.] By sect. 53. "(2.) The measure of damages for breach of warranty is the estimated loss directly and naturally resulting, in the ordinary course of events, from the breach of warranty. (3.) In the case of breach of warranty of quality such loss is *primâ facie* the difference between the value of the goods at the time of delivery to the buyer and the value they would have had if they had answered to the warranty."

If a horse has been returned, the plaintiff will be entitled to recover the whole price; if kept, the difference between the real value and the price; or the plaintiff may sell the horse for what he can get, and recover the residue of the price paid, in damages. *Caswell v. Coare*, 1 Taunt. 566. If the horse be not tendered to the vendor, the vendee can recover no damages for the expense of his keep. S. C. But, if the vendee have tendered the horse, he may recover for the keep, for such time as would be required to sell him to the best advantage. *M'Kenzie v. Hancock, Ry. & M.* 436. So, where after notice to the vendor that the horse might be taken away, it was resold,

the vendor is liable for the keep for a reasonable time, which is a question for a jury. *Chesterman v. Lamb*, 2 Ad. & E. 129. Where the vendor rescinded the contract, it was held that he was liable for the keep of the horse from the time of the contract. *King v. Price*, 2 Chitty, 416. Where defendant warranted a horse to plaintiff, who resold him with a warranty to C., and the horse proving unsound, C. sued the plaintiff, and he gave notice to the defendant of the action, and offered him the option of defending it, but receiving no answer, he defended the action and failed; it was held that defendant was liable, in an action on the warranty, for the costs of the action brought by C. against the plaintiff. *Lewis v. Peake*, 7 Taunt. 153; and see *Rolph v. Crouch*, L. R. 3 Ex. 44. Where B. sold coal to H. as of a particular description, knowing that H. bought it to resell under the same description, and the coal delivered did not answer the description, but this could only be ascertained on use by the sub-vendee, C.; C. sued H. for breach of warranty, and thereupon H. gave B. notice of the action, but B. insisted that the coal was according to contract. In an action, *H. v. B.*, B. paid the damages recovered in the action *C. v. H.* into court; it was held that H. could also recover the costs of that action, as it had been reasonably defended by H. *Hammond v. Bussey*, 57 L. J. Q. B. 58; 20 Q. B. D. 79; *Agius v. Gt. W. Colliery Co.*, 68 L. J. Q. B. 312; [1899] 1 Q. B. 413. See also *The Millwall*, 74 L. J. P. 82; [1905] P. 155. In *Wallis v. Pratt*, 80 L. J. K. B. 1058; [1911] A. C. 394, the appellants bought from the respondents seed which was described as "common English sainfoin." It was subsequently discovered to be "giant sainfoin" which is different and of inferior quality. The appellants resold part of the seed and paid their purchasers the difference between the value of the seed sold and that of common English sainfoin. In the sold note the respondents declined to give any "warranty express or implied as to growth, description, or any other matters." The appellants were held entitled to the remedies applicable to a breach of warranty and to recover from the respondents the damages which the appellants had been obliged to pay to their purchasers. In *Cox v. Walker*, 6 Ad. & E. 523, *u.*, the plaintiff had bought a horse of the defendant for £100, and had been offered £140 for it, but the horse proving unsound, plaintiff had been obliged to give up the bargain and to sell it for £49 7s. *Ld. Denman, C.J.*, directed the jury that the plaintiff was entitled to recover the difference between the price at which he had sold and the actual value of the horse, if it had been sound at the time of such sale; and he left to the jury as a measure of such value, the price offered for the horse while in the plaintiff's hands. This ruling was questioned, but the case stood over, after argument, for several terms, and was then compromised. The liability of plaintiff for the breach of warranty, given on a resale by him, may be alleged and proved as special damage, though the plaintiff had not actually paid the sub-vendee his demand. *Randall v. Raper*, E. B. & E. 84; 27 L. J. Q. B. 266. See also *Josling v. Irvine*, 6 H. & N. 512; 30 L. J. Ex. 78. Where the defendants broke a warranty in not sending hemp that was merchantable, the measure of damages was held to be the difference between what the hemp was worth when it arrived, and what the same hemp would have realized if it had been shipped in a proper state. *Jones v. Just*, 37 L. J. Q. B. 89; L. R. 3 Q. B. 197. Where the defendant sold a diseased cow to a farmer, warranting that she was free from disease, he was held liable for the value of other cows of the plaintiff which died of the disease, caught from her, if he knew, at the time of the sale, that the plaintiff was a farmer, and might place the cow with others; *Smith v. Green*, 45 L. J. C. P. 28; 1 C. P. D. 92; for the defendant is liable for such damages as are the natural consequence of the breach of warranty. S. C.; *Randall v. Newson*, 46 L. J. Q. B. 259; 2 Q. B. D. 102. Where A. employed B. to discharge a ship, supplying him with all necessary gearing, which was however defective, whereby B.'s servant C. was injured in doing the work; C. sued B. under the Employers' Liability Act, 1880, and B. settled the action by paying C. £125, which was a proper

settlement. It was held that B. could recover this £125 from A., as the liability to pay it was the natural consequence of the breach of warranty, and might have been within the contemplation of A. and B. when they made it. *Mowbray v. Merryweather*, 65 L. J. Q. B. 50; [1895] 2 Q. B. 640. Where N. sold B. sulphuric acid, warranted free from arsenic, and it was not free; and B. in ignorance of that fact used the acid in making glucose which he sold to a brewer H. for brewing beer; the beer was thereby rendered poisonous and H. suffered loss for which B. was liable, and the goodwill of B.'s business was damaged, Bruce, J., held that B. could not recover from N. either of these heads of damage, but that he might recover the price of the acid lost, and also the value of other goods spoilt by being mixed with the acid, as the manufacture of glucose was an ordinary use of the acid. *Bostock v. Nicholson*, 73 L. J. K. B. 524; [1904] 1 K. B. 725. The liability of B. to H. was the full selling value of the beer which had to be destroyed as poisonous. *Holden v. Bostock & Co.*, 50 W. R. 323. Under a contract for the sale of 3,000 pieces of a specified quality the sellers delivered 1,625 pieces of inferior quality. The buyers accepted and paid for these but refused to take further deliveries. Being sued by the sellers for non-acceptance of the balance, the buyers counter-claimed damages for breach of warranty of quality in relation to the 1,625 pieces. The buyers had sold and been paid for 691 of the 1,625 pieces on re-sale at a price higher than the market price per piece of the 1,625 pieces as delivered. It was held that this sub-sale should not be taken into account in measuring the damages payable by the sellers to the buyers. *Slater v. Hoyle & Smith*, 89 L. J. K. B. 401; [1920] 2 K. B. 11.

It is a question of fact in each case what steps a plaintiff in an action for breach of contract ought to have taken towards mitigating the damages, and not a question of law. *Payzu v. Saunders*, 89 L. J. K. B. 17; [1920] 2 K. B. 581.

In an action for breach of contract on the sale of foods or drugs, the plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 63), s. 28, recover, as damages, any penalty in which he may have been convicted under the Act in respect of these goods, and the costs paid and incurred by him, if he prove that he innocently sold the goods as he purchased them from the defendant; but the defendant may in answer prove that the conviction was wrong and the costs excessive.

ACTION ON WARRANTY OF AUTHORITY.

Where A. contracts on behalf of B. as his agent, but without authority from B., A. is in general not liable as *principal*; *Jenkins v. Hutchinson*, 13 Q. B. 744; 18 L. J. Q. B. 274; *Lewis v. Nicholson*, 18 Q. B. 503; 21 L. J. Q. B. 311; unless he was such in fact; *Carr v. Jackson*, 7 Ex. 382; 21 L. J. Ex. 137; or, unless B. has no existence. *Kelner v. Baxter*, L. R. 2 C. P. 174; 36 L. J. C. P. 94. It is, however, now settled that A., by contracting with C. on behalf of B., impliedly warrants that he has authority from B. to enter into the contract; and if he have not such authority he is liable for a breach of the warranty; *Collen v. Wright*, 27 L. J. Q. B. 215; 8 E. & B. 647, and *Ex pte. Panmure*, 53 L. J. Ch. 57; 24 Ch. D. 367; and is bound, as far as damages will do it, to place C. in the same position as if he had the authority. S. C.; *Meek v. Wendt*, 21 Q. B. D. 126; *affd.*, (1889) W. N. 14; *Haigh v. Suart*, (1890) W. N. 213. See as to extent of this warranty in the case of a sub-agent signing a contract, S. C. See on the general principle the judgments in *Dixon or Dickson v. Reuter's Telegram Co.*, 47 L. J. C. P. 1; 3 C. P. D. 1; *Yonge v. Toynbee*, 79 L. J. K. B. 208; [1910] 1 K. B. 215; *Simmons v. Liberal Opinion*, 80 L. J. K. B. 617; [1911] 1 K. B. 966. Thus, if A., *bonâ fide*, but falsely, represent to the plaintiff that he is authorized by B. to order goods, and the plaintiff fail in the action against B. for want of such authority, he may recover the value and the costs of the former action in

an action against A. *Randell v. Trimen*, 18 C. B. 786; 25 L. J. C. P. 307. So, where the defendant's testator, as agent for G., had let land without authority, he was held liable for breach of warranty that he had authority; and in the damages were included the costs of an unsuccessful chancery suit against G. *Collen v. Wright*, 8 E. & B. 647; 27 L. J. Q. B. 215. In a similar action it was held that the proper measure of damages was the value of the term agreed for, and the costs of an abortive chancery suit, but not damages and costs the plaintiff had been compelled to pay to a third person, for the breach of an agreement for a sub-lease of the premises. *Spedding v. Nevell*, 38 L. J. C. P. 133; L. R. 4 C. P. 212. See also *Simons v. Patchett*, 7 E. & B. 568; 26 L. J. Q. B. 195; *Hughes v. Græme*, 33 L. J. Q. B. 335. F. agreed to sell the plaintiff an estate, representing that he had authority from his co-owners so to do; and on the co-owners repudiating the contract, the plaintiff sued them for breach thereof, and continued his action after they had all sworn in answer to the interrogatories that F. had no authority from them to contract, and was nonsuit; it was held, that in an action against F. for breach of warranty of authority, the plaintiff could recover the costs of the action against the others, down to the time when the answers to the interrogatories had been received and considered, and the difference between the contract price and the market price of the estate, of which latter the price for which the estate was subsequently sold was *prima facie* evidence. *Godwin v. Francis*, 39 L. J. C. P. 121; L. R. 5 C. P. 295. Where, however, the plaintiff must anyhow have failed in his previous action by reason of the contract on which he sued being oral only, the costs of that action are not recoverable from the agent. *Pow v. Davis*, 30 L. J. Q. B. 257; see also *Irving v. Burns*, [1915] S. C. 260. A. being instructed by B. to apply for shares in A.'s name, in a company C., by mistake applied for shares in a company D., which were accordingly allotted to B., and repudiated by him; the company D. had a large number of shares unallotted and the shares were worthless in the market: A. was held liable to the company D. for the full amount of the shares for which he had applied. *Ex pte. Panmure*, 53 L. J. Ch. 57; 24 Ch. D. 367.

Where A., a banker, on the faith of a statement made to him by B. and C., the directors of a company, that they had appointed D. manager of the company, and had authorized him to draw on the company's account with A., made advances on cheques so drawn by D.; B. and C. had no power to confer this authority on D., but acted *bonâ fide*; it was held, that B. & C. were liable to A. for the advances so made by him, on the ground that they had warranted to A. that D. had authority to bind the company. *Cherry v. Colonial Bank of Australasia*, L. R. 3 P. C. 24. So, where the plaintiff lent money to a building society, which had no power to borrow money, the directors signing the deposit note were held liable to an action on their implied warranty of authority, for the amount of the loan, it not appearing that the company was insolvent. *Richardson v. Williamson*, 40 L. J. Q. B. 145; L. R. 6 Q. B. 276; see also *Chapleo v. Brunswick Building Soc.*, 50 L. J. Q. B. 372; 6 Q. B. D. 696. So, the directors of a railway company were held liable for issuing a debenture exceeding the borrowing powers of the company. *Weeks v. Propert*, 42 L. J. C. P. 129; L. R. 8 C. P. 427; *Firbank's Executors v. Humphreys*, 56 L. J. Q. B. 57; 18 Q. B. D. 54. So, where the directors of a company, incorporated under a private Act of Parliament, which gave them no power to issue bills, accepted a bill for and on behalf of the company, they were held liable to a *bonâ fide* holder for value. *W. London Commercial Bank v. Kitson*, 53 L. J. Q. B. 345; 13 Q. B. D. 260. The plaintiff must however in these cases have relied on the existence of the authority of the agent A., and he cannot do so if A. had disclaimed any present authority. *Halbot v. Lens*, 70 L. J. Ch. 125; [1901] 1 Ch. 344. Where a stockbroker S. innocently transferred stock at the Bank of England under a forged power of attorney purporting to have been given by the stockholder O. to S. and S.'s partner L., it was held that S. must indemnify the Bank against its liability to

O.; *Starkey v. Bank of England*, 72 L. J. Ch. 402; [1903] A. C. 114; but that L. was not liable for merely applying for the form of the power of attorney. S. C., [1901] 1 Ch. 652. So where a stockbroker C., has procured the transfer of stock out of M.'s name by innocently putting the transfer forward in the usual way and identifying to the Bank as M., a person, J., who then forges M.'s signature, C. must indemnify the Bank. *Bank of England v. Cutler*, 77 L. J. K. B. 889; [1908] 2 K. B. 208. See also *Sheffield Cor. v. Barclay*, 74 L. J. K. B. 747; [1905] A. C. 392, and *A.-G. v. Odell*, 75 L. J. Ch. 425; [1906] 2 Ch. 47.

The principle of the above cases does not apply where the misrepresentation is not one of fact, but an erroneous representation of law. *Beattie v. Ebury, Ltd.*, 41 L. J. Ch. 804; L. R. 7 Ch. 777; affirm. on other grounds, 44 L. J. Ch. 20; L. R. 7 H. L. 102. See also *McCollin v. Gilpin*, 5 Q. B. D. 390; 6 *Id.* 516. Nor does it apply where an agent S. employed by his principal R. to enter into a contract for R. with I., untruly tells R. that he has so done: the damages to which S. is liable are those only which R. has in fact sustained in consequence of the misrepresentation, and do not include profits which he might have made if the representation had been true. *Salvesen v. Rederi Aktiebolaget, &c.*, 74 L. J. P. C. 96; [1905] A. C. 302. Public servants making contracts on behalf of the Crown do not warrant their authority. *Dunn v. Macdonald*, 66 L. J. Q. B. 420; [1897] 1 Q. B. 555; *Hales v. Regem*, 34 T. L. R. 589; see also *Hoster v. Derby (Earl)*, 87 L. J. K. B. 1009; [1918] 2 K. B. 671.

As to the effect of the signature of a charterparty by a ship-broker in the form "by telegraphic authority of the charterer as agent," see *Lilly v. Smales*, [1892] 1 Q. B. 456.

ACTION ON PROMISE OF MARRIAGE.

This action is competent at the instance of either a man or a woman. *Harrison v. Cage*, 5 Mod. 411. As an infant may enforce an advantageous contract, although not bound thereby, an infant may sue a person of full age for breach of promise of marriage. *Holt v. Ward*, Str. 937; *Warwick v. Bruce*, 2 M. & S. 209. A married man may be sued on a promise of marriage to the plaintiff, although he was married when he promised, provided the plaintiff was ignorant of the fact; and the plaintiff's remaining unmarried on the faith of such promise is a sufficient consideration, and the inability of the defendant to marry the plaintiff is a sufficient breach. *Milward v. Littlewood*, 20 L. J. Ex. 2; 5 Ex. 775; *Wild v. Harris*, 18 L. J. C. P. 297; 7 C. B. 999. But a promise by a married man to a woman who at the time of the promise knew that the promisor had a wife living is void as against public policy, and no action will lie for breach of such a promise after the death of the wife. *Spiers v. Hunt*, 77 L. J. K. B. 321; [1908] 1 K. B. 720; *Wilson v. Carnley*, 77 L. J. K. B. 594; [1908] 1 K. B. 729. So, too, a promise by a man to marry a woman if she obtains a divorce from her husband, and a divorce is in fact obtained by the concealment of material facts. *Prevost v. Wood*, 21 T. L. R. 684. This action falls within the general rule *actio personalis moritur cum persona*, and cannot be maintained by an executor or administrator; *Chamberlain v. Williamson*, 2 M. & S. 408; unless, perhaps, where a strictly pecuniary loss has accrued to the deceased, and the personal estate been damaged accordingly; in such case special damage must be stated on the record, for it will not be intended; *per Cur.*, *Id.* 416. So the action will not lie against an executor without special damage. *Finlay v. Chirney*, 57 L. J. Q. B. 247; 20 Q. B. D. 494. This must be damage to the property, not the person of the promisee, and be within the contemplation of both parties at the time of the promise; such damage is alone recoverable, and not special damage. S. C.

Formerly the parties to this action were not competent as witnesses; but by 32 & 33 V. c. 68, s. 2, "the parties to any action for breach of promise of marriage shall be competent to give evidence in such action; provided always, that no plaintiff in any action for breach of promise of marriage shall recover a verdict unless his or her testimony shall be corroborated by some other material evidence in support of such promise." Evidence of a third person that the plaintiff said to the defendant that he had promised to marry her, and that the defendant did not deny it, is sufficient to satisfy this section. *Bessela v. Stern*, 2 C. P. D. 265. The mere fact, however, that the defendant did not reply to letters written to him by the plaintiff, in which she stated he had promised to marry her, is not sufficient. *Wiedemann v. Walpole*, 60 L. J. Q. B. 762; [1891] 2 Q. B. 534; or where the defendant did not reply to the letter written to him by the plaintiff's parent. *Spooner v. Godfrey*, Times, Oct. 16, 1908. In the last-cited case it was also held that the giving of a ring is not necessarily evidence of a promise of marriage. In *Hansen v. Dixon*, 96 L. T. 32, a letter written by the defendant to the plaintiff, in which he said, "If I were well, would you marry me, little girl? Do tell me all now," was held to be corroboration of the plaintiff's testimony.

Proof of the contract.] To maintain this action, the plaintiff must prove, under a traverse, the contract and promise of the defendant as stated. The promises must be mutual, the reciprocity constituting the consideration. *Harrison v. Cage*, *supra*; 1 Rol. Ah. 22, pl. 20. At first, it was held that mutual promises to marry came within the Stat. of Frauds, s. 4; Com. Dig. Action on the Case upon Assumpsit (F. 3); but in Bull. N. P. 280 *e*, a contrary doctrine is laid down, and it is now settled that the promises need not be in writing. *Cork v. Baker*, 1 Str. 34; *Harrison v. Cage*, 1 Ld. Raym. 387, note at end of case. If written evidence of the contract be produced, no stamp is required. *Orford v. Cole*, 2 Stark. 351. A promise, on the part of a woman, may be presumed from such circumstances of acquiescence, or tokens of approval, as usually attend the acceptance of an offer of marriage; her presence when the offer was made, and the consent of parents asked, without her making any objection; her subsequent reception of the suitor's visits, and concurrence in the arrangements for the wedding; her demeanour as one consenting and approving, &c. Express consent in words is not necessary. *Daniel v. Bowles*, 2 C. & P. 553; *Hutton v. Mansell*, 3 Salk. 16. But to prove a promise by a man more would be necessary; neither the usages of society nor considerations of delicacy interfering to restrain an explicit declaration on his part. A promise to marry generally is, in law, a promise to marry within a reasonable time; and although an admission of a special promise to marry at a particular time should be proved in evidence, it may be left to a jury to infer from the circumstances a more general promise. *Potter v. Deboos*, 1 Stark. 82; *Phillips v. Crutchley*, 1 Moore & P. 239. But a promise to marry after a certain event will not support a claim on a general promise if the qualification be properly pleaded in the defence. *Atchinson v. Baker*, Peake, Add. Ca. 103.

Breach.] To prove the breach of the promise, if denied, evidence must be given, either that the defendant has married another person, so that performance is no longer possible; or that a tender has been made by the plaintiff, followed by a refusal on the part of the defendant. For this purpose it is sufficient that the father of a female plaintiff demanded performance of the defendant. *Gough v. Farr*, 2 C. & P. 631. Where the defendant has promised to marry the plaintiff on the death of his father, the marriage of the defendant to another woman, during his father's lifetime, gives the plaintiff an immediate right of action. *Frost v. Knight*, 41 L. J. Ex. 78; L. R. 7 Ex. 111. See *Synge v. Synge*, 63 L. J. Q. B. 202; [1894] 1 Q. B. 466.

Damages.] The affluent circumstances of the defendant are evidence on the question of damages; and not merely the loss of an establishment in life, but the injury to the plaintiff's feelings, may be considered by the jury; and in this respect the measure of damages is different from that which is adopted in the case of other contracts. *Smith v. Woodfine*, 1 C. B. (N. S.) 660; *Berry v. Da Costa*, 35 L. J. C. P. 191; L. R. 1 C. P. 331. It is no misdirection to tell the jury that, in estimating the damages, they may take into consideration the altered social position of the plaintiff, in relation to her home and family, by the defendant's having seduced and deserted her. S. C. It seems doubtful whether evidence of such seduction can be given in aggravation of damages unless it be specially pleaded. See *Millington v. Loring*, 50 L. J. Q. B. 214; 6 Q. B. D. 190. In *Quirk v. Thomas*, 85 L. J. K. B. 519; [1916] 1 K. B. 516, pecuniary loss suffered by the woman in giving up an employment or business in contemplation of marriage was held not recoverable as special damage.

Evidence of character.] Where the defendant, by his defence, sets up a general charge of immodesty, the plaintiff may, in the first instance, give general evidence of good character for modesty and propriety of demeanour, though this could not be done in the case of a specific charge of immoral acts. *Jones v. James*, 18 L. T. 243.

Return of engagement ring.] Where, on an engagement to marry, an engagement ring is given by the man to the woman, there is an implied condition that, if she breaks off the engagement, the ring should be returned. *Jacobs v. Davis*, 86 L. J. K. B. 1497; [1917] 2 K. B. 532.

Costs.] As to the plaintiff's right to costs, *vide ante*, *Practice at Nisi Prius: Order as to Costs*. The county court has no jurisdiction to entertain an action for breach of promise of marriage; 51 & 52 V. c. 43, s. 56; except by agreement.

Defence.

If, *after* entering into a contract of marriage, either party discover gross immorality or depraved conduct in the other, it may be pleaded in bar of the action; thus, brutal and violent conduct in the man, accompanied with threats of ill-usage to the woman, goes to the ground of the action; *Leeds v. Cook*, 4 Esp. 258; and if a man has made a promise of marriage to one whom he supposes to be a modest person, and he *afterwards* discovers her to be a loose and immodest woman, and he on such account refuses to fulfil his promise, he is justified in so doing. *Irving v. Greenwood*, 1 C. & P. 350. To entitle the defendant to a verdict on the ground of the bad character of the plaintiff, it is not sufficient to show that charges (as of pecuniary dishonesty or perjury, &c.) were made against the plaintiff, which plaintiff promised, but failed, to explain: the defendant must show that the charges are well founded. *Baddeley v. Mortlock*, Holt, N. P. 151. To show the general bad character of the plaintiff, where such evidence is relevant, evidence of general reputation is admissible. *Foulkes v. Sellway*, 3 Esp. 236. Material misrepresentation of the real circumstances of the family and previous life of the plaintiff may be a good defence to the action; as, where the plaintiff's father and brother told the defendant that she would have property from her father (who was insolvent), and denied that she had ever been (as in fact she had been) a barmaid. *Wharton v. Lewis*, 1 C. & P. 529. The plaintiff was, in this case, living with the relations who misrepresented her, and was probably presumed to be privy to their statements. Letters written by the plaintiff's father, with her knowledge, are evidence against her, though she would not be answerable for particular expressions in them; but a false representation, made orally by the father to a third person in the absence of the plaintiff and without her privity, and

by such person communicated to the defendant, is not admissible. *Foote v. Hayne*, 1 C. & P. 546.

A pre-contract on the part of the plaintiff to marry another person, which the plaintiff concealed from the defendant at the time of his promise, is no defence to the action, without fraud. *Beechey v. Brown*, E. B. & E. 796; 29 L. J. Q. B. 105. Bodily infirmity supervening and rendering it dangerous to the defendant's life to marry was held to be no defence in *Hall v. Wright*, E. B. & E. 746, 765; 27 L. J. Q. B. 345; 29 L. J. Q. B. 43. But see that case considered in *Jefferson v. Paskell*, 85 L. J. K. B. 398; [1916] 1 K. B. 57, where it was said that mental or bodily infirmity of the plaintiff supervening or becoming known to the defendant after the date of the promise may in certain cases afford a defence. The fact that the defendant honestly and on reasonable grounds believed the plaintiff to be unfit for marriage on the day fixed for the marriage, or within a reasonable time thereafter, is not a defence if in fact the plaintiff was not unfit. *Jefferson v. Paskell*, *supra*. Insanity in the plaintiff, existing unknown to the defendant previously to his promise, was held no defence. *Baker v. Cartwright*, 10 C. B. (N. S.) 124; 30 L. J. C. P. 364. But see *Jefferson v. Paskell*, *supra*.

An exoneration by the plaintiff of the defendant from his promise may be implied from the conduct and demeanour of the parties; the total cessation of intercourse and correspondence for two or three years is evidence for the jury on a defence of exoneration, although on the last occasion they were seen together the plaintiff refused to give up the defendant's letters, saying it would be like giving him up altogether. *Davis v. Bomford*, 6 H. & N. 245; 30 L. J. Ex. 139.

Infancy is a defence to the action, and the contract of marriage is within the Infants' Relief Act, 1874 (37 & 38 V. c. 62), cited *sub tit.*, *Defences—Infancy*, *post*, and cannot, therefore, be ratified after full age; *Coxhead v. Mullis*, 47 L. J. C. P. 761; 3 C. P. D. 439; and evidence of mere ratification does not amount to a fresh promise. S. C. Where, however, the parties continue to associate together after the defendant has attained full age, as they did before, it can rarely happen that there is not *some* evidence for the jury of a fresh promise. Thus, fixing the wedding day was held to be such evidence. *Ditcham v. Worrall*, 49 L. J. C. P. 688; 5 C. P. D. 410. The question for the jury is whether what was said or done was intended by the party to be a new promise, or merely a ratification of the old promise. *Northcote v. Doughty*, 4 C. P. D. 385; *accord. Holmes v. Brierley*, (1888) W. N. 158; 36 W. R. 795.

ACTION ON AN AWARD.

In this action the plaintiff must prove the submission and award, and the performance by himself of any conditions precedent put in issue by the pleadings. Where the submission is by a judge's order, which has been made an order of court, it is sufficiently proved by production of the office copy of the latter order. *Still v. Halford*, 4 Camp. 17; *Selby v. Harris*, 1 Ld. Raym. 745. But not when the submission is by deed or written agreement; for the rule or order of court gives it no binding effect, and is, or may be, obtained *ex parte*. *Berney v. Read*, 7 Q. B. 79. In that case the rule or order was evidently not obtained by the party *against* whom it was offered. It is necessary to prove the submission of all parties to arbitration, for without such proof it does not appear that the arbitrator had competent authority to decide the question between the parties. *Ferrer v. Owen*, 7 B. & C. 427; 6 L. J. (O. S.) K. B. 28; *Brazier v. Jones*, 8 B. & C. 124. If the time for making the award has been enlarged, and

the award made within the enlarged time, the plaintiff must show (if it be put in issue) that the enlargement was duly made according to the terms of the submission, or by the consent of the parties, or under the powers granted by the Arbitration Act, 1889 (52 & 53 V. c. 49), s. 9. If the enlargement were irregularly made, such irregularity is waived by the appearance of the parties having knowledge of it, without objection, before the arbitrator after the enlargement; *In re Hick*, 8 Taunt. 694; *Tyerman v. Smith*, 6 E. & B. 719; 25 L. J. Q. B. 359; so if the time had not been enlarged at all; *Lawrence v. Hodgson*, 1 Y. & J. 16. Such appearance of the parties may be evidence of a new oral submission, for an award to be made within a reasonable time. *Bennett v. Watson*, 5 H. & N. 831; 29 L. J. Ex. 357. But though the parties appear and take part in the reference, if they protest at the time, the objection is not waived. *Ringland v. Lowndes*, 17 C. B. (N. S.) 514; 33 L. J. C. P. 337. So the objection is not waived if it go to the jurisdiction of the arbitrator over the subject-matter. *Davies v. Price*, 34 L. J. Q. B. 8. And if the award be not made within the time limited by the submission, and one of the parties, not knowing the fact, take up the award, his so doing will not be a waiver of the conditions as to time stated in the submission. *Darnley (Earl) v. L. C. & Dover Ry. Co.*, L. R. 2 H. L. 43; 36 L. J. Ch. 404. The plaintiff need not prove that the defendant had notice of the award, for he is bound to take notice of the award as well as the plaintiff. 2 Wms. Saund. 62 (4). Where the award states a "request" to the defendant to pay, this is equivalent to an order to pay. *Smith v. Hartley*, 10 C. B. 800; 20 L. J. C. P. 169. So where, after issue joined, a cause was referred, and although there was no power to direct a verdict to be entered, the arbitrator ordered that there should be a verdict for the plaintiff for a certain sum: this was held good as an award of that sum to the plaintiff, on which an action for the amount could be maintained; *Everest v. Ritchie*, 7 H. & N. 698; 31 L. J. Ex. 350; and where an award directs payment to an arbitrator, or to a stranger, for the use of the plaintiff, the plaintiff may sue on it for the money. *Wood v. Adcock*, 7 Ex. 468; 21 L. J. Ex. 204. An award to be made by two arbitrators must be signed by them in the presence of each other, and at the same time and place, and it is no award unless so signed. *Wade v. Dowling*, 4 E. & B. 44; 23 L. J. Q. B. 302; *Peterson v. Ayre*, 15 C. B. 724; 23 L. J. C. P. 129.

If the award be by an umpire, or by the arbitrators and an umpire, the appointment of the latter must be proved. *Still v. Halford*, 4 Camp. 19. In the absence of any clause to the contrary, the arbitrators may make a valid appointment of an umpire after the time for making the award has expired, if it be within the time limited for the umpirage. *Harding v. Watts*, 15 East, 556; *Holdsworth v. Wilson*, 4 B. & S. 1; 32 L. J. Q. B. 289. When the arbitrators have agreed on an umpire they need not sign the appointment at the same time, or together. *In re Hopper*, L. R. 2 Q. B. 367; 36 L. J. Q. B. 97.

In practice there is usually a witness to the execution of an award who, if the execution is disputed, is generally called; but unless the submission require it, attestation is unnecessary; and in general, therefore, an award may be proved like any other deed or writing, viz., by proof of the arbitrator's handwriting.

Under the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein (sect. 1), is irrevocable, and (sect. 2) is to be deemed to include the provisions set forth in sched. 1.

If the validity of the award is doubtful, and gives rise to serious question, the court will not grant leave to enforce it summarily, but will leave the successful party to bring an action to enforce it. *In re Boks and Peter, Rushton & Co.*, 88 L. J. K. B. 351; [1919] 1 K. B. 491.

When the business of a company incorporated under the Companies Act, 1862, and being voluntarily wound up, is transferred to another company, and the amount to be paid by the company to a dissenting shareholder for

the purchase of his interest (sect. 161) (sect. 192 of Companies Act, 1908) has been settled by arbitration (sect. 162) (sect. 192), he may maintain an action against the company on the award so made. *De Rosaz v. Anglo-Italian Bank*, L. R. 4 Q. B. 462; 38 L. J. Q. B. 161.

Defence.

A denial of the making of the award will now be taken to put in issue its making in point of fact only, and not its validity in law. See Rules, 1883, O. xix. rr. 15, 20. *Adcock v. Wood*, 6 Ex. 814; 20 L. J. Ex. 435. Nor could the defendant under such a defence show that it was set aside. See *Roper v. Levy*, 7 Ex. 55; 21 L. J. Ex. 28.

Where an award ordered a sum to be paid by instalments, a defence of an oral agreement to pay a less sum at earlier dates than so ordered, and payment thereunder, is good, by way of accord and satisfaction after breach, by non-payment of the first instalment; and is proved, although the payment was made and accepted after the substituted day, if the plaintiff received the payment and made no objection on the ground of its being too late. *Smith v. Trowsdale*, 3 E. & B. 83; 23 L. J. Q. B. 107.

Corruption or misconduct of the arbitrators is not matter of defence; at least, where application might have been successfully made to the court to set the award aside. 1 Wms. Saund. 327 a (3); *Wills v. Maccarmick*, 2 Wils. 148; *Braddick v. Thompson*, 8 East, 344; *Brazier v. Bryant*, 3 Bing. 167; *Grazebrook v. Davis*, 5 B. & C. 534; *Whitmore v. Smith*, 7 H. & N. 509; 31 L. J. Ex. 107. The omission to give one of the parties an opportunity of being heard is misconduct of the arbitrators, and falls within this rule. *Thorburn v. Barnes*, 36 L. J. C. P. 184; L. R. 2 C. P. 384. Nor can the award be impeached on the ground that the decision of the arbitrator has proceeded on a mistake. *Johnson v. Durant*, 1 L. J. K. B. 47; 2 B. & Ad. 925. Or is wrong in point of law if a specific question of law has been submitted to him. *In re King & Duveen*, 82 L. J. K. B. 733; [1913] 2 K. B. 32. Cf. *In re Parsons & Braham Fishing, &c., Socy.*, 118 L. T. 600. Or there is error on the face of the award if the error is not material to the decision. *Buerger v. Barnett*, 35 T. L. R. 260. But the defendant may show that it is not conformable to the submission, where the defence is properly pleaded.

Although an award is not final if it do not award costs in some way, where they are in the discretion of the arbitrator, yet if the submission can be made an order of court, the amount need not be specified, as the taxing-master has jurisdiction over them; and the costs need not have been taxed before action brought. *Holdsworth v. Barsham*, 4 B. & S. 1; 32 L. J. Q. B. 299. Cf. *In re Stanley & Nuneaton Corpn.*, 59 S. J. 104.

As to calling the arbitrator as a witness to show that he has exceeded his jurisdiction in making his award, which was good on the face of it, see *Bucclleuch (Duke) v. Metropolitan Board of Works*, 41 L. J. Ex. 137; L. R. 5 H. L. 418; *O'Rourke v. Commissioner for Railways*, 59 L. J. P. C. 72; 15 App. Cas. 371; and *Recher v. North British & Mercantile Insurance Co.*, 84 L. J. K. B. 1813; [1915] 3 K. B. 277.

It may be observed that, where the amount of compensation to be paid for land compulsorily taken has been fixed by an award under the Lands Clauses Act, 1845, an action for the amount cannot be maintained until a conveyance of the land has been executed. *E. London Union v. Metropolitan Ry. Co.*, 38 L. J. Ex. 225; L. R. 4 Ex. 309.

ACTION ON A SOLICITOR'S BILL.

In an action upon a solicitor's bill the plaintiff must prove, when denied, (1) his retainer as solicitor by the defendant, which may be done by showing either an express retainer, or that the defendant attended at his office, and gave directions, or in other ways recognised his employment; (2) that the business was done, which may be proved by a clerk, or other agent, who can speak to the existence of the cause, or the business in respect of which the charges are made, and can prove the main items.

Retainer.] Proof of a judge's order, referring the bill to be taxed, and of the defendant's undertaking to pay the taxed costs, and of the master's *allocatur*, will be sufficient proof both of the retainer and of the business having been done. *Lee v. Jones*, 2 Camp. 496. In an action against an ordinary corporation, the plaintiff must show a retainer under seal. *Arnold v. Poole (Mayor)*, 4 M. & Gr. 860; *Sutton v. Spectacle Makers' Co.*, 10 L. T. 411. But in the case of commercial companies incorporated by Act of Parliament, such as railway companies, there is usually a power to retain solicitors and other like officers without a retainer under seal. So such power is conferred on companies incorporated under the Companies Acts, 1862, 1867, by sect. 37 of the latter Act. And where, by an Act of Parliament, the directors of a railway company had power to appoint and displace officers, this was held to extend to an attorney, who therefore need not be appointed under the common seal of the company. *R. v. Cumberland (Justices)*, 5 D. & L. 43, n.; 17 L. J. Q. B. 102. And where the retainer, by a common law corporation, is by resolution only, such retainer is sufficient to warrant payment by the corporation, though it may not be sufficient to found an action against them. *R. v. Lichfield*, 16 L. J. Q. B. 333; 10 Q. B. 534. The managing partner of a firm has an implied authority to retain a solicitor to defend an action brought for the price of goods delivered to the firm in its ordinary course of business. *Tomlinson v. Broadsmith*, 65 L. J. Q. B. 308; [1896] 1 Q. B. 386. The liquidator of a company is not personally liable to the solicitor employed by him, in a voluntary liquidation, for the costs thereof; *In re Trueman's Estate*, 41 L. J. Ch. 585; L. R. 14 Eq. 278; nor in a compulsory liquidation; *Ex pte. Watkin*, 45 L. J. Ch. 115; 1 Ch. D. 130. When several actions against several defendants are consolidated, and are to abide the event of one, the same solicitor having been retained by each of the defendants, he is entitled to hold all the defendants liable to the costs of the action tried, as on a joint retainer, *Anderson v. Boynton*, 19 L. J. Q. B. 42; 13 Q. B. 308. A solicitor who has obtained judgment for a client has no authority, without special instructions, to engage in interpleader proceedings. *James v. Ricknell*, 57 L. J. Q. B. 113; 20 Q. B. D. 164. He has implied authority to issue execution on a judgment; *Sandford v. Porter*, [1912] 2 Ir. R. 551; and, after issue of the writ, to compromise and settle the action. *Welsh v. Roe*, 87 L. J. K. B. 520. He has no implied authority to employ another solicitor to bring an action. *In re Beckett*, 87 L. J. Ch. 457; [1918] 2 Ch. 72. Although a lessee or mortgagor is usually to pay the expenses of the lease or mortgage, yet he is not *directly* liable for them to the solicitor of the lessor or mortgagee, who prepared the instruments; *Rigley v. Daykin*, 2 Y. & J. 83; but slight evidence is sufficient to show direct liability, as that the solicitor received instructions from the lessee, and was desired by him to send the bill of costs to him; *Smith v. Clegg*, 27 L. J. Ex. 300; *Webb v. Rhodes*, 3 Bing. N. C. 732. Under the Mortgagee's Legal Costs Act, 1895 (58 & 59 V. c. 25), a solicitor can charge profit costs of a mortgage from a client to himself, or in respect of proceedings relating to the mortgage. See *In re Norris*, 71 L. J. Ch. 187; [1902] 1 Ch. 741. As to the liability of the husband for the costs of preparing a marriage settlement, see *Helps v. Clayton*, 17 C. B. (N. S.) 553; 34 L. J. C. P. 1; it must, however, be

observed that in this case the *dicta* was made *obiter*, as the action was brought against the husband and wife, upon the retainer of the wife, given *dum sola*, and that under the Married Women's Property Act, 1882, s. 14, a husband is now liable for his wife's ante-nuptial debts to the extent only thereby defined, and under sect. 13 the wife remains liable in respect of her separate property. As to the liability of the husband, on the retainer of his wife, living apart from him, see *Wilson v. Ford*, 37 L. J. Ex. 60; L. R. 3 Ex. 63. As to the continuance of such retainer, see *In re Wingfield and Blew*, 73 L. J. Ch. 797; [1904] 2 Ch. 665.

On all questions as to the retainer of a solicitor, where there is a conflict as to the authority between the solicitor and the client, without further evidence, weight must be given to the affidavit against, rather than to the affidavit of, the solicitor. *In re Paine*, 28 T. L. R. 201.

Admittance, Certificate, &c.] The Solicitors Act, 1843 (6 & 7 V. c. 73), s. 2, prohibits any person from acting in any way as solicitor unless duly admitted, enrolled, and qualified. By sect. 31 no solicitor shall prosecute or defend suits in his own or another's name whilst in prison, nor sue for fees, rewards, or disbursements, in respect of any business done by him whilst such prisoner.

The Solicitors Act, 1874 (37 & 38 V. c. 68), s. 12: "No costs, fee, reward or disbursement on account of, or in relation to, any act or proceeding done or taken by any person who acts as an attorney or solicitor, without being duly qualified so to act, shall be recoverable in any action, suit, or matter by any person or persons whomsoever." A person is duly qualified for the purposes of this section if he have a stamped certificate in force, or be appointed solicitor to some public department. An uncertificated solicitor cannot retain money deposited with him by his client with a direction to pay his costs thereout. *Browne v. Barber*, 82 L. J. K. B. 1006; [1913] 2 K. B. 553.

By the Stamp Act, 1891, s. 43 (1), "Every person who in any part of the United Kingdom (a) directly or indirectly acts or practises as a solicitor," &c., in any court, "without having in force at the time a duly stamped certificate; or (b) on applying for his certificate does not truly specify the facts and circumstances upon which the amount of duty chargeable upon the certificate depends": . . . "shall be incapable of maintaining any action or suit for the recovery of any fee, reward, or disbursement on account of or in relation to any act or proceeding done or taken by him in any such capacity."

Where a solicitor with a London address held a country certificate only, the judge ordered the case to stand over. *Richards v. Bostock*, 31 T. L. R. 70.

The 37 & 38 V. c. 68, s. 12, applies even where a client has taken out an order of course for taxation of the bill with the usual submission to pay what was found to be due. *In re Sweeting*, 67 L. J. Ch. 159; [1898] 1 Ch. 268.

Signed bill—Special agreement.] By sect. 37 of 6 & 7 V. c. 73, no solicitor, nor any executor, administrator, or assignee of any solicitor, shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such solicitor, until the expiration of one [calendar] month after such solicitor, or executor, administrator, or assignee of such solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to, or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, &c., which bill shall either be *subscribed* by the solicitor or by any of the partners, with his own name or with the name or style of the partnership, or of the executor, administrator, or assignee of such solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill. Provided that it shall not be necessary in the first instance for such solicitor, &c., to prove the contents of the bill delivered, sent, or left; but it shall be sufficient to prove that a bill,

subscribed or enclosed as aforesaid, was delivered, sent, or left; but nevertheless, it shall be competent for the other party to show that the bill so delivered, &c., was not such a bill as constituted a *bonâ fide* compliance with this Act. 38 & 39 V. c. 79, empowers a judge, in certain cases therein specified, to allow the action to be commenced, although the month shall not have expired.

The case of bills for business in the House of Lords and Commons respectively is provided for by 12 & 13 V. c. 78, and 10 & 11 V. c. 69, extended by 42 & 43 V. c. 17.

The 6 & 7 V. c. 73 repeals 2 G. 2, c. 23, on which many cases were decided, and the present Act is expressed in language, in general sufficiently different, to make most of them inapplicable to it. Those decisions only are here retained which, from the similarity of the language used, are not manifestly useless.

One distinction between this Act and the former seems to be that the power of taxing bills now extends to bills for *any business* done by a solicitor. It is no longer confined to proceedings taken in a court, and the only qualification is one evidently implied, though not expressed, viz., that it should be done *as solicitor*. In all such cases a bill must be delivered, sent, or left in the manner required by sect. 37. See *Smith v. Dimes*, 4 Ex. 32, 40; 19 L. J. Ex. 60. In some cases (as *In re Gedye*, 2 D. & L. 915, and *In re Simons*, 3 D. & L. 156), it had been held that agency business was virtually excepted out of the 6 & 7 V. c. 73. But in *Billing v. Coppock*, 1 Ex. 14; 16 L. J. Ex. 265, where an attorney employed another attorney to defend an indictment, the bill delivered by the latter to the former was held taxable; and it seems to follow that the delivery of the bill is obligatory. *Smith v. Dimes*, 4 Ex. 32; 19 L. J. Ex. 60.

A solicitor's bill cannot be recovered on an account stated without proof of the delivery of the bill, though the amount has been admitted. *Eicke v. Nokes*, 1 M. & Rob. 359; *Brooks v. Bockett*, 16 L. J. Q. B. 178; 9 Q. B. 847. But the solicitor may recover on a promissory note given for the amount. *Jeffreys v. Evans*, 14 M. & W. 210. And if a solicitor S. has a claim against his client W. for costs, and W. has a cross-claim against S., and they orally agree upon the amounts of their respective claims, and state an account showing a balance due to S., S. may recover it without proving delivery of a detailed bill. *Turner v. Willis*, 74 L. J. K. B. 365; [1905] 1 K. B. 468. As to setting off a solicitor's bills, see sub-tit. *Defences in Actions on Simple Contracts—Set-off, post*.

An agreement entered into by a client with his attorney to pay him at a certain special rate for business to be done was not binding, or, at all events, not conclusive upon the client. *Drax v. Scroope*, 2 B. & Ad. 581; 9 L. J. (O. S.) K. B. 291. Such an agreement was void, at least to the extent that the attorney could not recover on it a larger sum than the master would allow on taxation; and, therefore, a bill in which a gross sum is charged by the attorney as *per agreement*, without giving specific items so as to enable the master to tax them, was not a compliance with the 6 & 7 V. c. 73, s. 37. *Philby v. Hazle*, 8 C. B. (N. S.) 647; 29 L. J. C. P. 370. But, in the absence of a defence pleaded of no signed bill delivered, a solicitor might prove and recover a specified sum agreed to be paid. *Scarath v. Rutland*, L. R. 1 C. P. 642. A solicitor employed as clerk to a public board at a fixed salary can recover his salary, although part of the work be done as a solicitor without having delivered a bill of such part. *Bush v. Martin*, 2 H. & C. 311; 33 L. J. Ex. 17. So an agreement between a solicitor and his client that the former shall be paid a fixed yearly salary, to be clear of all expenses of his office, and to include all emoluments, he paying to his client any surplus that may arise of receipts over payments, and undertaking to do no work for any other client, is legal. *Galloway v. London, Cor. of*, L. R. 4 Eq. 90; 36 L. J. Ch. 978.

Now by the Solicitors Act, 1870 (33 & 34 V. c. 28), s. 4, a solicitor "may make an agreement in writing with his client respecting the amount,

and manner of payment," for his fees or disbursements, &c., either by a gross sum, or commission, or salary, but where the agreement is in respect of business transacted in court the amount payable thereunder shall not be received by the solicitor until the agreement has been approved by a taxing officer. An agreement by a client that his solicitor should receive the proceeds of the sale of certain furniture "to cover" the charges of defending the client on a criminal charge was held not to be an agreement within sect. 4. *In re Jackson*, 84 L. J. K. B. 548; [1915] 1 K. B. 371. A client is not now bound by an oral agreement to pay the solicitor a lump sum in satisfaction of past costs. *In re Russell*, 54 L. J. Ch. 948; 30 Ch. D. 114. A receipt containing the terms of an agreement assented to by the solicitor, signed by the client only, is sufficient. *Ex pte. Baylis*, 63 L. J. Q. B. 187; [1894] 1 Q. B. 462; *In re Jones*, 64 L. J. Ch. 832; [1895] 2 Ch. 719. See also *Bake v. French (No. 2)*, 76 L. J. Ch. 605; [1907] 2 Ch. 215. The client may set up an agreement as to costs, although not in writing. *Clare v. Joseph*, 76 L. J. K. B. 724; [1907] 2 K. B. 369. It may be an agreement by the solicitor to charge no costs. *Gundry v. Sainsbury*, 79 L. J. K. B. 713; [1910] 1 K. B. 645. Cf. *McLean v. Carlisle*, 61 S. J. 399. By sect. 8 no action shall be brought to enforce an agreement made under sect. 4, but the same may be enforced by the court on motion. This section applies only to an action to recover the agreed remuneration, and does not prohibit an action for refusing to allow the work to be done. *Rees v. Williams*, 44 L. J. Ex. 116; L. R. 10 Ex. 200. An agreement under this Act obviates (see sect. 15) the objection of no signed bill having been delivered, when an action is brought to enforce a solicitor's charges.

Under the Solicitors' Remuneration Act, 1881 (44 & 45 V. c. 44), s. 2, general orders are made as to "the remuneration of solicitors in respect of business connected with sales, purchases, leases, mortgages, settlements, and other matters of conveyancing, and in respect of other business not being business in any action or transacted in any court, or in the chambers of any judge or master, and not being otherwise contentious business." See *Stanford v. Roberts*, 53 L. J. Ch. 338; 26 Ch. D. 155; *Humphreys v. Jones*, 55 L. J. Ch. 1; 31 Ch. D. 30. But by sect. 8 (1), in respect of such business, it shall be competent for a solicitor and client, before or after or in the course of such business, to make an agreement for the remuneration of the solicitor to such amount, and in such manner, as they shall think fit, by a gross sum, or by commission or percentage, or by salary or otherwise. (2) "The agreement shall be in writing, signed by the person to be bound thereby, or by his agent in that behalf." (3) The agreement may be made on the terms that the remuneration shall or shall not "include all or any disbursements made by the solicitor in respect of searches, plans, travelling, stamps, fees, or other matters." (4) "The agreement may be sued and recovered on or impeached and set aside in like manner and on the like grounds as an agreement not relating to the remuneration of a solicitor." The agreement must be signed by the party seeking to repudiate it. *Ex pte. Perrett*, 62 L. J. Ch. 473; [1893] 2 Ch. 284. As to what is a sufficient agreement, *vide* S. C., and *In re Baylis*, 65 L. J. Ch. 612; [1896] 2 Ch. 107. Where an action is brought on such an agreement, the defence of no signed bill will not be available. By sect. 9, "the Attorneys and Solicitors Act, 1870, shall not apply to any business to which this Act relates." A solicitor cannot evade his obligation to deliver a bill of costs by taking a bill of exchange from the client for an agreed amount. *Ray v. Newton*, 82 L. J. K. B. 125; [1913] 1 K. B. 249.

Delivery of the bill, how, and to whom.] Where the non-delivery of a signed bill is pleaded, plaintiff must prove that the bill was not only delivered, but left with the defendant for examination. *Brooks v. Mason*, 1 H. Bl. 290. Showing and explaining the bill without a regular delivery is not sufficient. *Crowder v. Shue*, 1 Camp. 437. It has been held not sufficient to prove that the bill was delivered at a particular place not shown

to be the defendant's abode, and that the defendant afterwards delivered it to the attorney's clerk; *Eicke v. Nokes*, M. & M. 303; unless it appears that the defendant had it in his possession a month before action; *per Alderson, B., Eggington v. Cumberledge*, 1 Ex. 271; 16 L. J. Ex. 283; in which case a delivery of a bill by a local attorney to the general attorney of a company, who submitted it to the provisional committee, one of whom present was the defendant, a month before action, was held sufficient. *Phipps v. Daubney*, 16 Q. B. 514; 20 L. J. Q. B. 273. A delivery at the office of a public company, or to a person representing it, would be sufficient; but a delivery to one provisional committee-man at his private place of business is not sufficient alone, as against a co-committee-man; *Edwards v. Lawless*, 6 C. B. 329; 17 L. J. C. P. 293. See also *Blandy v. De Burgh*, 6 C. B. 623; 18 L. J. C. P. 2. If, however, two be shown to be joint contractors, the delivery to one is good as against the other. *Mant v. Smith*, 4 H. & N. 324; 28 L. J. Ex. 234.

The delivery of the bill to the attorney of the party has been held good, where that attorney had obtained the order for delivery of the bill; *Vincent v. Slaymaker*, 12 East, 372; or where the party himself afterwards attended the taxation. *Warren v. Cunningham*, Gow, 71. A delivery to one of the retaining persons, who has been authorized to act for the others, is a delivery to all. *Finchett v. How*, 2 Camp. 277. Where an attorney had been retained jointly by several persons to defend several suits against each, in the subject-matter of which they had a common interest, it was held that the delivery of a bill to one was sufficient to enable the plaintiff to maintain a joint action against all. *Oxenham v. Lemon*, 2 D. & Ry. 461. Some of the above decisions were under the repealed statute, but they seem to be still applicable, as the wording of the two is very similar; for by the 2 G. 2, c. 23, s. 23, the bill is to be "delivered to the party to be charged therewith, or left for him at his dwelling-house or last place of abode."

Delivery of the bill, how proved.] As to proof of delivery of bill by indorsement made on a copy by a deceased clerk in the ordinary course of his business, see *Champneys v. Peck*, 1 Stark. 404. As to evidence of sending bill by post, see *Skilbeck v. Garbett*, 14 L. J. Q. B. 338; 7 Q. B. 846.

Delivery of the bill at what time.] The bill must be proved to have been delivered one calendar month before the commencement of the action; 6 & 7 V. c. 73, ss. 37 and 48. The month must be a *clear* calendar month, *i.e.*, it must have been reckoned exclusively of the days on which the bill is delivered and action brought. *Brown v. Black*, 81 L. J. K. B. 458; [1912] 1 K. B. 316. Where a bill is sent by post the posting must take place at such time that in the ordinary course of post the bill should have reached its destination one clear calendar month before the date on which the action is commenced. S. C. In calculating the calendar month, the days of the calendar furnish the only guide to follow; *e.g.*, if the bill be delivered on the 28th day of one month, the action may be commenced on the 29th day of the following month, without regard to the length of the month. See *Freeman v. Read*, 4 B. & S. 174; 32 L. J. M. C. 226.

The commencement of the action is determined by the date of the issuing of the writ of summons (Rules, 1883, O. ii. r. 1); and as this date appears on the statement of claim (see Rules, 1883, Forms, App. C.), the plaintiff need now give no further evidence of when he began the action, in order to show that it is not premature.

Proof and form of the bill.] The bill may be proved by a copy or duplicate original, without any notice to produce the bill delivered. *Anderson v. May*, 2 B. & P. 237; *Colling v. Treweek*, 6 B. & C. 394; 5 L. J. (O. S.) K. B. 132. But, it is not now necessary in the first instance for the plaintiff to prove the contents; it is enough to prove that a bill of fees, &c., subscribed

or inclosed in a signed letter, was duly delivered, and the defendant may show that it was not a *bonâ fide* compliance with the Act. See 6 & 7 V. c. 73, s. 37. The Act does not prescribe any form of making out the bill, as 2 G. 2, c. 23, s. 23, did. See *Reynolds v. Caswell*, 4 Taunt. 193, on the old Act. And this has not been sufficiently attended to in cases decided since the last Act, in which the courts have been influenced too much by the strict requirements of the old one. Thus, it was held that the bill must still show in what court the business had been done; *Engleheart v. Moore*, 15 L. J. Ex. 312; 15 M. & W. 548; *Martindale v. Falkner*, 15 L. J. C. P. 91; 2 C. B. 706; but, it is sufficient if the court appear by reasonable inference; S. C.; *Sargent v. Gannon*, 18 L. J. C. P. 220; 7 C. B. 742. It was, however, decided that, the authority to tax, and the scale in all the superior courts of law being the same, it was *primâ facie* enough if it appeared to be business done in any of those courts, and that the defendant ought to have applied for a better bill, if it were *bonâ fide* necessary; *Cozens v. Graham*, 12 C. B. 398; 21 L. J. C. P. 206; *Cook v. Gillard*, 1 E. & B. 26; 22 L. J. Q. B. 90. Now the scale in all the divisions of the Supreme Court is the same. If the cause be sufficiently described to be understood, the technical title need not appear. *Anderson v. Boynton*, 19 L. J. Q. B. 42; 13 Q. B. 308. The bill must show, either by the heading or by the accompanying letter or envelope, the party charged. *Taylor v. Hodgson*, 3 D. & L. 115; *Lucas v. Roberts*, 11 Ex. 41; 24 L. J. Ex. 227; *Gridley v. Austen*, 18 L. J. Q. B. 337; 16 Q. B. 504; *Champ v. Stokes*, 6 H. & N. 683; 30 L. J. Ex. 242. A mistake in the date of the items, which does not mislead, will not vitiate the bill. *Williams v. Barber*, 4 Taunt. 806. So a mistake in the name of the parties to the cause at the head of the bill, if not of a nature to mislead, or if the right name appears indorsed. *Sargent v. Gannon*, 18 L. J. C. P. 220; 7 C. B. 742. If part of the business were done in a court, named in the bill, and part in an unnamed one, it has been considered that the plaintiff cannot recover any part. *Ivimey v. Marks*, 17 L. J. Ex. 165; 16 M. & W. 843; *Dimes v. Wright*, 19 L. J. C. P. 137; 8 C. B. 831. But this is the rule only where there is not enough in the bill to show on what scale the costs should be taxed; and where a part of the business appeared to have been done in an unnamed superior court of law, but the bulk of it in a named court of law at Westminster, this was held enough. *Keene v. Ward*, 19 L. J. Q. B. 46; 13 Q. B. 515. The reasoning of the Q. B., in S. C., and *Cook v. Gillard*, 22 L. J. Q. B. 90; 1 E. & B. 26, seems to impugn the doctrine of *Ivimey v. Marks*, and *Dimes v. Wright*, *supra*, that a bill insufficient for part is bad altogether; which is, however, supported in *Pigot v. Cadman*, 1 H. & N. 837; 26 L. J. Ex. 134. On the other hand, *Cook v. Gillard*, *supra*, and *Keene v. Ward*, *supra*, are adhered to, and the cases in the Exchequer dissented from, in *Haigh v. Ousey*, 7 E. & B. 578; 26 L. J. Q. B. 217. And the Q. B. point out that the C. P. had expressly decided in *Waller v. Lacy*, 1 M. & Gr. 54, that an attorney may recover for such of the items of his bill as are sufficiently described, although, as to others, the bill is insufficient. Where the solicitor A. who did the work assigned his business and debts to B., it was held that a bill signed by B. was sufficient to entitle him to sue. *Penley v. Anstruther*, 52 L. J. Ch. 367; *Ingle v. McCutchan*, 53 L. J. Q. B. 311; 12 Q. B. D. 518. The bill of costs delivered by a solicitor to his client, the successful party in an action, should contain not only the solicitor and client items, but also the party and party items, even though these latter items have already been taxed and paid by the opposite party. *In re Osborn*, 83 L. J. K. B. 70; [1913] 3 K. B. 862.

Interest.] The General Order, cl. 7, made under the Solicitors' Remuneration Act, 1881, 44 & 45 V. c. 44, provides that "a solicitor may accept from his client, and a client may give to his solicitor, security for the amount to become due to the solicitor for business to be transacted by him, and for interest on such amount, but so that interest is not to commence

till the amount due is ascertained, either by agreement or taxation. A solicitor may charge interest at 4 per cent. per annum on his disbursements and costs, whether by scale or otherwise, from the expiration of one month from demand from the client. And in cases where the same are payable by an infant, or out of a fund not presently available, such demand may be made on the parent or guardian, or the trustee or other person liable." See *In re Marsden's Estate*, 58 L. J. Ch. 260; 40 Ch. D. 475.

The solicitor is, under this order, entitled, after the taxation of his bill, to recover interest on the taxed amount, from one month from the date of the delivery of the bill, although he made no claim for interest until the taxed amount was paid. *Blair v. Cordner*, 56 L. J. Q. B. 642; 19 Q. B. D. 516.

Defence.

Non-delivery of bill.] The defence of non-delivery of a bill must be specially pleaded. *Lane v. Glenny*, 7 Ad. & E. 83; 6 L. J. K. B. 218; see Rules, 1883, O. xix. r. 15. Proof that the bill was delivered to a servant of the defendant at his house is *prima facie* evidence of delivery to the defendant. *M'Gregor v. Keily*, 3 Ex. 794; 18 L. J. Ex. 391. In the absence of the defence, the solicitor may prove and recover a specific sum agreed to be paid. *Scarth v. Rutland*, L. R. 1 C. P. 642.

Champertous agreement.] If the original retainer has been varied by a subsequent champertous agreement under which the litigation is conducted, the solicitor cannot recover. *Wild v. Simpson*, 88 L. J. K. B. 1085; [1919] 2 K. B. 544.

Disputed charges.] Where a bill has been delivered containing taxable items (and almost all items are so now), it was held, under the old Act, that the defendant could not object to the reasonableness of the charges at the trial. *Williams v. Frith*, 1 Doug. 198; *Anderson v. May*, 2 B. & P. 237; *Lee v. Wilson*, 2 Chitty, 65. The reason seems to have been that the defendant might have had them taxed by more competent persons than a jury, and must therefore be taken to have acquiesced in them conclusively. But by the present Act (6 & 7 V. c. 63, s. 37) it is only after a verdict or writ of inquiry, or the expiration of one year from the delivery of the bill, that the reference to taxation at the request of the party chargeable is not grantable of course; and in point of practice a verdict is almost always taken subject, as to the amount, to taxation by the proper officer. See *Lumsden v. Shipcote Land Co.*, 75 L. J. K. B. 665; [1906] 2 K. B. 433, and *Lumley v. Brooks*, 58 L. J. Ch. 494; 41 Ch. D. 323. And even where a testator had retained the bill for 12 months before his death, it was held that this was *prima facie* evidence only that the charges were reasonable, and certain items objected to by the executor were referred to the taxing master for his report as to whether they were fair and proper to be allowed, and to what amount. *In re Park*, 58 L. J. Ch. 547; 41 Ch. D. 326; *Jones v. Whitehouse*, 87 L. J. K. B. 840; [1918] 2 K. B. 61. It seems, however, that the plaintiff, is not entitled as of right to have the amount so ascertained. *Ex pte. Ditton*, 13 Ch. D. 318.

The delivery of a former bill is conclusive against an increase of charge on any of the same items contained in a subsequent bill for the same business, and strong presumptive evidence against any additional items; but errors or real omissions are to be allowed for. *Loveridge v. Botham*, 1 B. & P. 49. See *Lumsden v. Shipcote Land Co.*, *supra*. Where the bill had been taxed previously to the signed bill being delivered, the master's *allocatur* was not conclusive against the plaintiff on a plea of *nonquam indebitatus*, but only strong evidence that no more is due; *Beck v. Cleaver*, 9 Dowl. 111; there the difference of amount depended on when the retainer of the plaintiff was revoked. It is a good defence that the plaintiff undertook the cause

gratis; and the declaration of his clerk to that effect, when he attended to tax costs, is evidence for the defendant. *Ashford v. Price*, 3 Stark. 185. 33 & 34 V. c. 28, ss. 4, 11, does not require that an agreement with the client "to charge him nothing if he lost the action, and to take nothing for costs out of any money that might be awarded to him in such action," should be in writing. *Jennings v. Johnson*, L. R. 8 C. P. 425. If a solicitor undertake to charge a client only costs out of pocket, "in case the damages or costs should not be recoverable," and the client recovers, but the defendant becomes insolvent, the solicitor is not limited to costs out of pocket. *In re Stretton*, 15 L. J. Ex. 16; 14 M. & W. 806; *McLean v. Carlisle*, 61 S. J. 399. The plaintiff is *prima facie* entitled to be paid for professional services; but, where the defendant proves facts which are evidence of gratuitous services, the jury ought not to be told "to find for the plaintiff unless the defendant has established his defence," but should be asked whether, taking all the evidence together, the plaintiff has proved his title to payment; for the onus of proof lies on him, and if the matter is made *doubtful* in their minds by the evidence, they ought to find for the defendant. *Hingeston v. Kelly*, 18 L. J. Ex. 360.

[*Negligence or misconduct of plaintiff.*] The plaintiff's negligence in the conduct of the business cannot be set up as a *defence*, if it has not been such as to deprive the defendant of all benefit; *Templer v. M'Lachlan*, 2 B. & P. N. R. 136; but where such has been the case, as where the defendant's appeal against the removal of a pauper wholly failed from the plaintiff going to the wrong sessions and wrongly signing the notices himself, the plaintiff cannot recover; *Huntley v. Bulwer*, 6 Bing. N. C. 111; and if a solicitor conducting a suit commits an act of negligence by which all the previous steps become useless in the result, he can recover for no part of his business. *Bracey v. Carter*, 12 Ad. & E. 373. So where an indictment for perjury failed for misnomer of the commissioner before whom it was committed, and the jury found gross negligence, the plaintiff cannot recover; *Lewis v. Samuel*, 8 Q. B. 685; 15 L. J. Q. B. 218; even though the client was only to pay costs out of pocket, which was all the plaintiff sought to recover. S. C. A solicitor cannot recover costs of suit in an inferior court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. See *Robinson v. Emanuel*, 43 L. J. C. P. 244; L. R. 9 C. P. 415, 416. If a solicitor sue in a court which is without adequate powers to examine material witnesses out of the jurisdiction, and the suit fail accordingly, he cannot recover his costs of the suit; but he may recover the costs of letters before suit demanding the debt. *Cox v. Leach*, 1 C. B. (N. S.) 617; 26 L. J. C. P. 125. Where a solicitor commences an action on two foreign bills, without having first ascertained whether they had been specially indorsed to his client, which the solicitor knew was necessary by the foreign law, and the action is discontinued for want of such indorsement, he can recover no costs. *Long v. Orsi*, 18 C. B. 610; 26 L. J. C. P. 127. If a solicitor, through inadvertence or inexperience, do useless work, he cannot recover anything for it. *Hill v. Featherstonhaugh*, 7 Bing. 569. And entire items for useless work may be expunged. *Shaw v. Arden*, 9 Bing. 287. But if there be other causes conducing to the loss of the benefit besides the plaintiff's negligence, the negligence is no defence. *Dax v. Ward*, 1 Stark. 409. It was no defence to an action for business done in defending a suit, that the plaintiff was instructed to put in a plea for delay, which he neglected to do. *Johnson v. Alston*, 1 Camp. 176. Nor that the plaintiff refused to go on with a suit in Chancery, if the defendant did not supply him with money; *Rowson v. Earle*, M. & M. 538; for though a solicitor cannot suddenly and without notice abandon a cause, yet if he give reasonable notice, he is at liberty to discontinue the conduct of it, on the refusal by the client to supply him with money; and he may recover for the work done. *Vansandau v. Browne*, 9 Bing. 402. Where a solicitor prepares for a client a document which turns out to be illegal, but with regard to the legality of which there was reasonable doubt, he is

entitled to recover for preparing it. *Potts v. Sparrow*, 6 C. & P. 749. The illegality must at all events be pleaded; S. C., 1 Bing. N. C. 594; unless it makes the work done wholly useless; *semb. Tabram v. Warren*, 1 Tyr. & Gr. 153; *Roberts v. Barber*, Chitty, Preced. 3rd ed. 320. So the misinterpretation of a rule or order (such as a standing order of the House of Lords, by a solicitor acting as a parliamentary agent), the construction of which is doubtful, is not such culpable negligence as to disentitle the plaintiff to recover for his work, although in consequence of the mistake the bill is withdrawn. *Bulmer v. Gilman*, 4 M. & Gr. 108; see also *In re Sadd*. 34 Beav. 653; 34 L. J. Ch. 562. It is a good defence that the plaintiff paid no attention to the defendant's case, but resided at a distance from the place where his business was carried on, and that in fact it was transacted there by another person employed by plaintiff; *Taylor v. Glassbrook*, 3 Stark. 75; *Hopkinson v. Smith*, 1 Bing. 13; and this was ruled without reference to the success or miscarriage of the business done.

The plaintiff's negligence may now in any case be set up as a counter-claim *pro tanto* under Rules, 1883, O. xix. r. 3.

Want of certificate, admission, &c.] The defendant may put the plaintiff to prove, under a special defence, that the plaintiff had a certificate, or was duly admitted. *Hill v. Sydney*, 7 Ad. & E. 956; 7 L. J. K. B. 37. By the 23 and 24 V. c. 127, s. 22, the Law List, purporting to be published by the authority of the Commissioners of Inland Revenue, and to contain the names of solicitors who have obtained stamped certificates for the current year (from 16 November or any later day to 15th November in the next year), on or before the 1st of January in the same year, shall, until the contrary be made to appear, be evidence in all courts, &c., that the persons named in it as such solicitors are so certificated; and the absence of the name of any person from the List shall be *prima facie* evidence that he is not so qualified to practise as a solicitor under a certificate for the current year; but in the latter case an extract from the Roll of Attorneys under the hand of the registrar for the time being (or of the secretary of the Law Society, while that society acts as registrar) shall be evidence of the facts appearing in the extract. See J. Act, 1875, s. 14.

Agency business.] Where one solicitor does business for another, the solicitor who does the business universally gives credit to the solicitor who employs him, and not to the client for whose benefit it is done. If the solicitor in such case intends not to be personally responsible, it is his duty to give express notice that the business is to be done on the credit of the client. *Scrace v. Whittington*, 2 B. & C. 11; 1 L. J. (O. S.) K. B. 221. But such notice, though it may protect the solicitor from liability, will not necessarily make the client liable. See *Robbins v. Fennell*, 11 Q. B. 248, 256; 17 L. J. Q. B. 77; *Robbins v. Heath*, 11 Q. B. 257, n.; and *Peatfield v. Barlow*, 38 L. J. Ch. 310; L. R. 8 Eq. 61. The usual agency terms are that the agent should be repaid his disbursements, and receive half the profit charges, *i.e.*, charges involving no expenditure, whether they are paid by the client or not; he is not entitled to interest for delay in payment. *Ward v. Lawson*, 59 L. J. Ch. 323; 43 Ch. D. 353. London solicitors who were instructed to act as agents for a country solicitor in an appeal briefed counsel in the usual way. The country solicitor then revoked his authority to the London agents to pay the fees on the briefs, but nevertheless the agents paid them, recouping themselves out of moneys of the country solicitor in their hands. The country solicitor sought to recover the moneys so retained, but it was held that, in the circumstances, he had no power to revoke his authority. *Rhodes v. Fielder, Jones & Harrison*, 89 L. J. K. B. 15.

Non-completion of work—Statute of Limitations.] The contract of a solicitor to conduct a common law action is entire, and can only be determined on reasonable notice that he will not proceed without payment or advances

from the client; the solicitor cannot therefore sue for his costs till the action is ended, *Underwood v. Lewis*, 64 L. J. Q. B. 60; [1894] 2 Q. B. 306; or the client dead, *Whitehead v. Lord*, 7 Ex. 691; 28 L. J. Ex. 239. The Statute of Limitations (six years) does not therefore run as to any items of the bill until the happening of one of those events. S. C.; *Harris v. Osbourn*, 2 Cr. & M. 629; *Harriss v. Quine*, 38 L. J. Q. B. 331; L. R. 4 Q. B. 653. In cases, however, other than a common law action, as a suit for administration or proceedings in bankruptcy which may extend over a considerable time, and in which breaks may occur, at the conclusion of separate and distinct parts of the transaction, the solicitor may sue for the costs of each such part. *In re Hall and Barker*, 47 L. J. Ch. 621; 9 Ch. D. 538. As to an arbitration, see *In re Romer and Haslam*, 62 L. J. Q. B. 610; [1893] 2 Q. B. 286. And the principle as to the contract being entire does not extend to miscellaneous work done by a solicitor. *Beck v. Pierce*, 58 L. J. Q. B. 516; 23 Q. B. D. 316. The statute runs in each case from the completion of the work in respect of which the cause of action arises and not from a month after the delivery of the bill of costs. *Coburn v. Colledge*, 66 L. J. Q. B. 462; [1897] 1 Q. B. 702. As to solicitor obtaining from executrix of deceased client acknowledgment of indebtedness in respect of costs without disclosing that debt was to large extent statute-barred, see *Lloyd v. Cooté & Ball*, 84 L. J. K. B. 567; [1915] 1 K. B. 242.

On payment of solicitor's bill, he is bound to deliver to his client H. not only original deeds, &c., belonging to H., but also the drafts and copies for which H. has paid. *Ex pte. Horsfall*, 7 B. & C. 528. See *Gibbon v. Pease*, 74 L. J. K. B. 502; [1905] 1 K. B. 810.

ACTION AGAINST SOLICITOR FOR NEGLIGENCE.

What amounts to actionable negligence.] An error of judgment on a point of law, open to reasonable doubt, is not sufficient; *Kemp v. Burt*, 4 B. & Ad. 424; 2 L. J. K. B. 69; there must be gross ignorance or gross negligence in the performance of his professional duties. *Purves v. Landell*, 12 Cl. & F. 91. The solicitor is bound to bring a fair amount of skill, care, and knowledge to the performance of his duty, and this will be a question of fact for the jury under the direction of the judge, who will explain the nature of the duty, and the degree of negligence which makes him responsible. *Hunter v. Caldwell*, 10 Q. B. 69, 83; 16 L. J. Q. B. 274. See *Blyth v. Fladgate*, 60 L. J. Ch. 66; [1891] 1 Ch. 337.

The omission to take the proper steps for renewing a writ, issued to save the Statute of Limitations, is evidence of actionable negligence. *Hunter v. Caldwell*, *supra*. Where a mortgage was prepared under the defendant's advice, and the solvency of the mortgagor was questionable to the knowledge of the attorney, it was held his duty to search at the Insolvent Debtors' Court; and if the language of the defendant show that he considered his search expedient, this is evidence of his suspicions; *Cooper v. Stephenson*, 21 L. J. Q. B. 292; but the court declined to say whether or not searches of this kind are necessarily, and in all cases, essential. See also *Langdon v. Godfrey*, 4 F. & F. 445. It may not be part of the duty of a solicitor to know the legal operation of conveyances, but it is his duty to take care not to draw wrong conclusions from deeds before him, but to lay them before counsel, or draw the conclusions at his own peril; and therefore, where a solicitor acted on the advice of counsel to whom he had mis-stated the legal effects of certain deeds which did not accompany the case, this was held evidence for the jury of negligence for which he was responsible. *Ireson v. Pearman*, 3 B. & C. 799; 3 L. J. (O. S.) K. B. 119. As to a solicitor's liability for investing his client's money by way of mortgage on an insufficient security, see *Dooby v. Watson*, 57 L. J. Ch. 865; 39 Ch. D. 178.

A solicitor instructed to take or to defend legal proceedings is liable for failure by reason of his own culpable neglect; as where he was retained to proceed on a statute against an apprentice, and he proceeded under a wrong section of the statute as against a servant; *Hart v. Frame*, 6 Cl. & F. 193; or where in negotiations with a public authority in respect of a claim for negligence he overlooks the provisions of sect. 1 of the Public Authorities Protection Act, 1893, so that the claim becomes barred; *Fletcher v. Jubb, Booth & Helliwell*, 89 L. J. K. B. 236; [1920] 1 K. B. 275; or where the solicitor and his witnesses were absent when a cause was called on; and the counsel had a brief and was present, and was obliged to withdraw the record; *Hawkins v. Harwood*, 4 Ex. 503; 19 L. J. Ex. 33; or where he sued in an inferior court, which, as he ought to have known, had no jurisdiction in the matter, and was restrained by prohibition. See *Robinson v. Emanuel*, L. R. 9 C. P. 415, 416; 43 L. J. C. P. 244.

The cases on this subject establish, in general, that a solicitor is liable for the consequence of ignorance or non-observance of the rules of practice of the court in which he sues; for the want of care in the preparation of the cause for trial; or of attendance thereon with his witnesses; and for the mismanagement of so much of the conduct of a cause as is usually allotted to solicitors. But he is not answerable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or such as are usually intrusted to counsel. His liability must, however, depend upon the nature and description of the mistake or want of skill which has been shown, and he cannot shift from himself such responsibility by consulting counsel where the law would presume him to have the knowledge himself. *Godefroy v. Dalton*, 6 Bing. 467-9. See *Lee v. Walker*, L. R. 7 C. P. 121; 41 L. J. C. P. 91.

A solicitor will be liable to an action, at least for nominal damages, for compromising an action against the express directions of his client, though the compromise be really for the benefit of the client; *Butler v. Knight*, 36 L. J. Ex. 66; L. R. 2 Ex. 109; and, under such circumstances, it is no defence that the solicitor acted under the advice of counsel retained to conduct the cause. *Fray v. Voules*, 1 E. & E. 839; 28 L. J. Q. B. 232. A solicitor retained in an action has no implied authority after judgment in favour of his client to agree on his behalf to postpone execution. *Lovegrove v. White*, 40 L. J. C. P. 253; L. R. 6 C. P. 440. As to the implied authority of a solicitor to compromise an action, *vide ante*, p. 67.

By the Partnership Act, 1890 (53 & 54 V. c. 39), s. 10, "Where, by any wrongful act or omission of any partner acting in the ordinary course of the business of the firm, or with the authority of his co-partners, loss or injury is caused to any person not being a partner in the firm, or any penalty is incurred, the firm is liable therefor to the same extent as the partner so acting or omitting to act."

Sect. 11: "In the following cases; namely—(a.) Where one partner acting within the scope of his apparent authority receives the money or property of a third person and misapplies it; and (b.) Where a firm in the course of its business receives money or property of a third person, and the money or property so received is misapplied by one or more of the partners while it is in the custody of the firm; the firm is liable to make good the loss."

Sect. 12: "Every partner is liable jointly with his co-partners and also severally for everything for which the firm while he is a partner therein becomes liable under either of the two last preceding sections."

Where the money of a client comes into the hands of a partner in a firm of solicitors in the ordinary course of their business as solicitors, the firm are liable to make good any loss occasioned by the partner's defalcation or for breach of trust. *St. Aubyn v. Smart*, L. R. 3 Ch. 646; *Dundonald (Earl) v. Masterman*, 58 L. J. Ch. 350; L. R. 7 Eq. 504; *Blyth v. Fladgate*, 60 L. J. Ch. 66; [1891] 1 Ch. 337. So in the case of negotiable share warrants or bonds of the client. *Rhodes v. Moules*, 64 L. J. Ch. 122;

[1895] 1 Ch. 236. A sum of money received to be invested on a *specific* mortgage falls within this rule; *Harman v. Johnson*, 2 E. & B. 61; 22 L. J. Q. B. 297; but not a sum left to be invested on mortgage generally, for this is the business of a scrivener, and does not fall within the province of a solicitor merely as such. S. C.; *Plumer v. Gregory*, 43 L. J. Ch. 616; L. R. 18 Eq. 621. A firm of solicitors are not liable for money received by a partner *quâ* trustee; *Dundonald (Earl) v. Masterman*, *supra*; or otherwise than in a professional capacity. *Cleather v. Twisden*, 54 L. J. Ch. 408; 28 Ch. D. 340. See, however, *Blyth v. Fladgate*, *supra*.

Sect. 13: "If a partner, being a trustee, improperly employs trust-property in the business or on the account of the partnership, no other partner is liable for the trust-property to the persons beneficially interested therein: Provided as follows:—(1.) This section shall not affect any liability incurred by any partner by reason of his having notice of a breach of trust; and (2.) Nothing in this section shall prevent trust money from being followed and recovered from the firm if still in its possession or under its control."

Where B. has a contract with A., who then takes P. into partnership with notice to B., B. may elect whether he will rest with his contract with A. or accept the joint liability of A. & P.; in the former case P. is not liable for the fraud of A. committed against B. in respect of the contract and within the scope of the partnership. *British Homes Assur. Cor. v. Paterson*, 71 L. J. Ch. 872; [1902] 2 Ch. 404. As to the liability of an outgoing partner, see *Scarf v. Jardine*, 51 L. J. Q. B. 612; 7 App. Cas. 345.

A solicitor, when making a special agreement under the Attorneys and Solicitors Act, 1870, with reference to his fees, cannot stipulate that he shall not be liable for negligence, as such condition is by sect. 7 wholly void.

Damages.] This action is maintainable, though the damages be only nominal; *Godefroy v. Jay*, 7 Bing. 413, adopting the rule in *Marzetti v. Williams*, 1 B. & Ad. 415; *Fray v. Voules*, 28 L. J. Q. B. 232; 1 E. & E. 839; and where the plaintiff shows that the solicitor has been guilty of negligence, as by letting judgment go by default in an action which he was retained to defend for the plaintiff, it is for the defendant (the solicitor) to show that the plaintiff had no defence in that action, and not for the plaintiff to begin by showing he had a good defence, and so had been damaged by the judgment by default. *Godefroy v. Jay*, 7 Bing. 413. See also *Whiteman v. Hawkins*, 4 C. P. D. 13. As to damages where the solicitor has compromised the action contrary to his client's instructions, *Butler v. Knight*, 36 L. J. Ex. 66; L. R. 2 Ex. 109; and where he has improperly sold his client's land under a power of sale, *Cockburn v. Edwards*, 51 L. J. Ch. 46; 16 Ch. D. 393.

Defence.

Statute of Limitations.] As the action can be maintained without showing special damage, it follows that the Statute of Limitations runs from the breach of duty complained of; *Howell v. Young*, 5 B. & C. 259; 4 L. J. (O. S.) K. B. 160; and not from the first discovery of the default; S. C., *Short v. M'Carthy*, 3 B. & A. 626; nor from the occurrence of the consequential damage; S. CC.; *Smith v. Fox*, 6 Hare, 386; 17 L. J. Ch. 170; nor is the remedy kept alive by the defendant's admission of his responsibility within six years. *Short v. M'Carthy*, *supra*. The statute runs, although the defendant concealed the negligence until within six years before action, unless he were guilty of fraud. *Armstrong v. Milburn*, 54 L. T. 723. Under the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8 (1), the defence now extends to cases where the solicitor was a trustee, "except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use."

ACTION BY SURGEONS OR OTHER MEDICAL PRACTITIONERS.

The Apothecaries Act (55 G. 3, c. 194), s. 20, prohibits any person from acting or practising as an apothecary without having obtained a certificate from the Court of Examiners of the Apothecaries' Company. See *Davies v. Makuna*, 29 Ch. D. 596. By sect. 21 no apothecary shall be allowed to recover any charges claimed by him in a court of law, unless he shall prove at the trial that he has obtained such certificate.

The Medical Act, 1858 (21 & 22 V. c. 90, amended by 22 V. c. 21, 23 V. c. 7, and 49 & 50 V. c. 48, s. 2), provides for the formation of a general "medical register" of all persons qualified to practise in medicine, surgery, and midwifery; and (sect. 31) a person so registered is entitled to practise medicine or surgery, or both according to his qualifications, in any part of the King's dominions, and to demand and recover in any court of law, with "full costs of suit," reasonable charges for professional aid, advice, and visits, and the cost of any medicines or other medical or surgical appliances rendered or supplied to patients. Sect. 32: "No person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied, unless he shall prove upon the trial that he is registered under this Act."

By sect. 27 the registrar of the general council, formed under the Act, shall yearly cause to be printed and published, under the direction of the council, a register of the names and residences of all persons entitled to be registered under it and appearing in it on January 1 in each year, with their medical titles, diplomas, and qualifications, &c.; and a copy of this "medical register" for the time being *purporting* to be so printed and published shall be evidence in all courts, and before all justices and others, that the persons therein specified are registered according to the Act; and the absence of the name of any person from such a copy shall be evidence, until the contrary appear, that he is not registered. Provided that in the case of a name not in the copy of the register, a certified copy under the hand of the registrar of the general council, or of any branch council, of the entry of the name on the general or local register, shall be evidence of registration. As to the form of register, see *Pedgrift v. Chevallier*, 8 C. B. (N. S.) 240; 29 L. J. M. C. 225.

By sect. 55, the Act does not extend to prejudice or affect the lawful occupation, trade, or business of chemists and druggists, and dentists, so far as the same extends to selling, compounding, or dispensing medicines. But if a chemist prescribe he must show registration, as sect. 55 exempts chemists only so far as selling, compounding, and dispensing medicine. See *Apothecaries' Co. v. Greenough*, 1 Q. B. 799; 11 L. J. Q. B. 156.

The Medical Act, 1886 (49 & 50 V. c. 48), s. 28, repeals sect. 31, *supra*, and by sect. 6, provides that a medical practitioner registered on or after June 1st, 1887, is entitled to practise medicine, surgery, and midwifery, and to recover in due course of law in respect of such practice any expenses, charges in respect of medicaments, or any fees to which he may be entitled. But, by sect. 24, the Act does not increase or diminish the privileges in respect of his practice, of any person registered before June 1st, 1887, and he is entitled to practise in pursuance of the qualification then possessed by him in medicine, surgery, or midwifery, or any of them, according as he was then entitled, but not further or otherwise.

The language of the Medical Act, 1858, s. 32, resembles that of the Apothecaries Act, 55 G. 3, c. 194, s. 21, under which Act many of the following cases were decided. Proof of qualification is a condition precedent to recovery, but the want of qualification must now be specially pleaded. See *Rules*, 1883, O. xix. rr. 15, 20. The provisions above as to proof of registration are probably only cumulative, and plaintiff may prove it by production of a "local register," or, *semb.*, by an examined copy, or by a copy certified

as in the case of public books under 14 & 15 V. c. 99, s. 14. The qualification of an apothecary may be proved by certificate under 14 & 15 V. c. 99, s. 8. The identity of the plaintiff and the person named in the register will be presumed. *Simpson v. Dismore*, 9 M. & W. 47; 11 L. J. Ex. 137. The register only shows registration down to the preceding January, but the plaintiff's continuance on the register will probably be presumed, in conformity with the ordinary presumption of things remaining *in statu quo*. To entitle the plaintiff to recover for services and medicines supplied, he must have had the necessary qualification, and be registered in respect thereof, at the time the services were rendered and the medicines supplied. *Leman v. Houseley*, 44 L. J. Q. B. 22; L. R. 10 Q. B. 66. But see *Turner v. Reynall*, 14 C. B. (N. S.) 328; 32 L. J. C. P. 164, where it was held to be sufficient if he was duly registered at the time of trial. The plaintiff, although duly qualified and registered, cannot recover for medical services rendered exclusively by his assistant who was neither qualified nor registered. *Howarth v. Brearley*, 56 L. J. Q. B. 543; 19 Q. B. D. 303.

Sect. 31 only enables persons registered to practise medicine or surgery "according to their qualifications"; hence, where the plaintiff's qualification is to practise surgery only, he cannot recover for attendance in a medical case, for he is not within the section, and is prohibited from recovering by the Apothecaries Act, s. 21. *Allison v. Haydon*, 4 Bing. 619; *Leman v. Fletcher*, 42 L. J. Q. B. 214; L. R. 8 Q. B. 319. He might, however, recover for medicine administered as ancillary to a surgical case; *vide* S. C. See also on this section, *per* Bramwell, B., *Ellis v. Kelly*, 6 H. & N. 226; better, 30 L. J. M. C. 35, 37. But a medical man registered on or after June 1st, 1887, may practise in either branch. See 49 & 50 V. c. 48, s. 6. Sect. 32 of 21 & 22 V. c. 90, is not confined in its operation to actions against the patients themselves, but extends to a case where a third person has guaranteed payment for medical attendance, &c., or is primarily liable for it, as supplied on his credit. So, a medical practitioner, engaged by another to attend his patients in his absence, cannot recover the price of his services without proof of registration; *De la Rosa v. Prieto*, 16 C. B. (N. S.) 578; 33 L. J. C. P. 262; but *semble*, that an unregistered assistant may recover his salary from a registered practitioner; S. C. The Act applies to medical attendance given on board a foreign man-of-war in an English port. S. C. By sect. 46 the general council may dispense with the provisions of the Act, or its own regulations, in favour of certain persons practising before the Act passed. A resident physician or medical officer of a hospital solely for foreigners (not being a British subject) is not affected by the Act if he has a foreign degree or diploma of M.D., and has passed such examination as entitles him to practise in his own country, and is in no other medical practice except as such resident officer; 22 V. c. 21, s. 6.

By the Dentists Act, 1878 (41 & 42 V. c. 33), s. 5, a person registered under that Act may practise dental surgery; and no person who is not registered under that Act, or is a legally qualified medical practitioner, is entitled to recover any fee for any dental operation, attendance, or advice. An unregistered dentist may, however, recover the price of material, such as gold or false teeth, supplied. *Hennan v. Duckworth*, 90 L. T. 546; *Seymour v. Pickett*, 74 L. J. K. B. 413; [1905] 1 K. B. 715. Cf. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252. As to evidence of registration, see sect. 29.

By the Midwives Act, 1902 (2 E. 7, c. 17), s. 1, midwives acting as such habitually and for gain after April 1st, 1910, must, unless acting under a qualified medical practitioner, be certified. As an uncertified woman is in general liable to a penalty for practising (sect. 1 (2)), it seems that she is precluded from recovering a fee for so doing. Cf. *Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740, decided on stat. 63 & 64 V. c. 51, s. 2 (c). As to evidence of certification, see sects. 6, 7.

By the Veterinary Surgeons Act, 1881 (44 & 45 V. c. 62), s. 17 (2), no

person not for the time being on the register of veterinary surgeons, or who on August 27th, 1881, held the veterinary certificate of the Highland and Agricultural Society of Scotland, shall be entitled to recover any fee for performing any veterinary operation or for giving attendance or advice. See *R. College of Veterinary Surgeons v. Robinson*, 61 L. J. M. C. 146; [1892] 1 Q. B. 557; *R. College of Veterinary Surgeons v. Collinson*, 77 L. J. K. B. 689; [1908] 2 K. B. 248; *Att.-Gen. v. Churchill's Vet. Sanatorium*, 79 L. J. Ch. 741; [1910] 2 Ch. 401; *R. College of Veterinary Surgeons v. Kennard*, 83 L. J. K. B. 267; [1914] 1 K. B. 92.

In the Scottish case of *Edgar v. Lamont*, [1914] S. C. 277, it was held that the ground of action in a claim for damages against a medical man for unskilful treatment is breach of duty to his patient, and not breach of contract with the employer. Accordingly a married woman was held entitled to maintain an action against a medical man, although he had been employed to attend her by the patient's husband.

The superintendent of a station of a railway company cannot, as such, and without express authority, make the company liable for a surgeon's bill for attendance on a person injured by an accident on the railway; *Cox v. Midland Counties Ry. Co.*, 18 L. J. Ex. 65; 3 Ex. 268; but the general manager of a railway has, incidental to his employment, authority to bind the company to pay for surgical attendance bestowed at his request on a servant of the company injured by an accident on their railway. *Walker v. Gt. W. Ry. Co.*, 36 L. J. Ex. 123; L. R. 2 Ex. 228.

Defence.

If the defendant have received no benefit, in consequence of the plaintiff's want of skill, the latter cannot recover. *Kannen v. M'Mullen*, Peake, 59; *Duffit v. James*, cited 7 East, 480. But the remuneration of a practitioner who has used due skill and diligence does not depend on his effecting a cure. In the case of a surgeon, if an operation which might have been useful has failed in the event, he is nevertheless entitled to charge; but if it could have been useful in no event, he has no claim. *Per Alderson, J.*, in *Hill v. Featherstonhaugh*, 7 Bing. 574. See also *Dickson v. Hygienic Institute*, [1910] S. C. 352, as to the degree of skill the law will assume to be possessed by a registered and unregistered practitioner.

Physicians' Fees.

At common law, a physician could maintain no action for his fees; *Chorley v. Bolcot*, 4 T. R. 317; nor for travelling expenses; *Veitch v. Russell*, 3 Q. B. 928; 12 L. J. Q. B. 13; unless there were a special contract proved by unambiguous evidence, and not by mere letters acknowledging a "debt" or an "account," in vague general terms; S. C.; *Att.-Gen. v. R. College of Physicians*, *infra*; or unless he had rendered services as a surgeon. *Battersby v. Lawrence*, Car. & M. 277. But the Medical Act, 1886, s. 6, replacing the Medical Act, 1858, s. 31, gives a general right of action to all registered medical practitioners; and a physician, if registered, may now sue without proof of any express contract or implied understanding with the patient that he should be paid. *Gibbon v. Budd*, 2 H. & C. 92; 32 L. J. Ex. 182. By that section, however, any college of physicians in the United Kingdom may make a bye-law that their fellows shall not sue for their fees; and if they do, the bye-law may be pleaded in bar. The R. College of Physicians has passed such a bye-law, but this does not include members. *Vide S. C.* That college can grant licences without restricting their licentiates from compounding and selling the medicine they prescribe. *Att.-Gen. v. R. College of Physicians*, 1 J. & H. 561; 30 L. J. Ch. 757.

ACTION FOR WAGES AND WRONGFUL DISMISSAL.

In an action by a servant for his wages the plaintiff must prove a hiring, of which service will be evidence, the length of time of service, and the amount of wages due.

An indefinite hiring in the case of servants, without mention of time, is presumably a hiring for a year. *Lilley v. Elwin*, 11 Q. B. 742; 17 L. J. Q. B. 132; *Turner v. Robinson*, *infra*. The fact that the wages are payable monthly makes no difference. If the servant leave his service during the year without good cause, he cannot recover any of the current wages; *Huttman v. Boulnois*, 2 C. & P. 510. So, if he be discharged for good cause during the year, either by his master or a magistrate's order: *Lilley v. Elwin*, *supra*; *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171; 4 L. J. K. B. 157; even though the master has recovered damages against him for misconduct. *Turner v. Robinson*, 5 B. & Ad. 789. So, if the servant die during the year. *Plymouth v. Throgmorton*, 1 Salk. 65. But where S. was employed as consulting engineer, at £500 payable in equal quarterly instalments, for 15 months, to complete certain works, and died after two instalments became due, but before the work was finished, his administrator was held entitled to recover the two instalments. *Stubbs v. Holywell Ry. Co.*, L. R. 2 Ex. 311; 36 L. J. Ex. 166. The rule that an indefinite hiring is to be taken as a yearly one is not a rule of law; but the jury are to say what the terms of hiring were, judging from the circumstances of the case, including evidence, if any, of usage; thus, on an indefinite hiring at certain weekly wages, the jury may infer that the hiring is weekly. *Baxter v. Nurse*, 6 M. & Gr. 935. So, a hiring at "£2 2s. a week for one year," *Robertson v. Jenner*, 15 L. T. 514, Bramwell, B.; or at "£2 a week and a house," *Evans v. Roe*, L. R. 7 C. P. 138; is a hiring by the week and not by the year. See also *R. v. Droitwich*, 3 M. & S. 243. And where there is such a written contract, oral evidence that, at the time it was signed it was intended to be a hiring for a year, is inadmissible. *Evans v. Roe*, *supra*. Where the plaintiff was engaged as a clerk at a yearly salary of £150, and was paid his wages weekly, and accepted a month's notice as determining his service, and afterwards re-entered the service at a salary of £250, and was paid weekly; it was held properly left to the jury to say whether the last hiring was on the same terms as the first, and well determined by a month's notice. *Fairman v. Oakford*, 5 H. & N. 635; 29 L. J. Ex. 459. In the case of the master of a ship, the hiring is not for a year certain, and requires reasonable notice to determine it. *Green v. Wright*, 1 C. P. D. 591. Questions may arise as to whether the hiring is even a weekly one. See *Warburton v. Heyworth*, 50 L. J. Q. B. 137; 6 Q. B. D. 1.

With regard to a menial or domestic servant, there is a common understanding (except where a different custom is shown to prevail), though the contract is for a year, that it may be dissolved by either party on giving a month's warning or a month's wages. *Beeston v. Collyer*, 4 Bing. 309, 313; 5 L. J. (O. S.) C. P. 180; *Fawcett v. Cash*, 5 B. & Ad. 908; 3 L. J. K. B. 113; *Nowlan v. Ablett*, 2 C. M. & R. 54. In *Moult v. Halliday*, 67 L. J. Q. B. 451; [1898] 1 Q. B. 125, it was held that there was no notorious custom of which judicial notice would be taken, that such servant should leave at the end of the first month on a fortnight's previous notice. But *semble*, such custom if proved would be good. S. C.; and in *George v. Davies*, 80 L. J. K. B. 924; [1911] 2 K. B. 445, it was held that the county court judge who tried the case, having had the custom previously proved before him, was entitled to take judicial notice of it. If the master without reasonable cause turn the servant away without notice, the latter would be enabled to recover a month's wages, beyond the arrears; *Robinson v. Hindman*, 3 Esp. 235; the claim must be for wrongful dismissal, and not for work and labour; *Fewings v. Tisdal*, 1 Ex. 295; 17 L. J. Ex. 18; recognizing *Smith v. Hayward*, 7 Ad. & E. 544; 7 L. J. Q. B. 3; and dissenting from *Eardly v. Price*,

2 B. & P. N. R. 333; on this special claim the servant can only recover the month's wages, and not the wages down to the dismissal. *Hartley v. Harman*, 11 Ad. & E. 798; 9 L. J. Q. B. 179. Although the general rule that the damages recoverable by a domestic servant for wrongful dismissal are a month's wages without board wages, that rule is inapplicable where the servant is wrongfully dismissed during the currency of a month's notice given by the servant. In that case board wages are recoverable in respect of the period between the date of the wrongful dismissal and the date when the service would have terminated under the notice. *Lindsay v. Queen's Hotel*, 88 L. J. K. B. 535; [1919] 1 K. B. 212.

The term "menial servant" within this rule includes a head gardener, though living in a separate house in his master's grounds. *Nowlan v. Ablett*, *supra*; *Johnson v. Blenkinsop*, 5 Jur. 870. So, a huntsman, although hired at yearly wages, with perquisites that cannot be fully realized till the end of the year. *Nicoll v. Greaves*, 17 C. B. (N. S.) 27; 33 L. J. C. P. 259. But does not include a governess. *Todd v. Kerrich or Kellage*, 8 Ex. 151; 22 L. J. Ex. 1.

Although a general hiring of an agent at a certain sum per annum, simply, is a hiring for a year, yet a custom to discharge upon notice may be engrafted on such general hiring though the contract be in writing, if the terms are not inconsistent with the custom; and they are not inconsistent where the hiring was at a yearly salary, stipulating for a gratuity at the end of a year on approval. *Metzner v. Bolton*, 9 Ex. 518; 23 L. J. Ex. 130; *Parker v. Ibbetson*, 4 C. B. (N. S.) 346; 27 L. J. C. P. 236. The custom must be of some reasonable antiquity and standing, uniform and sufficiently notorious and well understood that people would make their contracts on the supposition that it exists. *Foxall v. International Land Credit Co.*, 16 L. T. 637. Whether a written contract excludes the custom, is for the judge, and not for the jury, to decide. *Parker v. Ibbetson*, *supra*. When, however, the hiring is expressly for a time certain, a custom of the trade for a master or a servant to determine it at any time without notice is inadmissible to control the contract. *Peters v. Staveley*, 15 L. T. 275. In *Fairman v. Oakford*, *supra*, Pollock, C.B., observed "that juries in London usually find that clerks are entitled to three months' notice." 29 L. J. Ex. 460. *Foxall v. International Land Credit Co.*, 16 L. T. 637. In *Darke v. Grosvenor Hotel Co.*, Q. B., 1865, *ex rel. editoris*, the court awarded the secretary of that public company three months' salary in lieu of notice. In the case of the employment of an advertising and canvassing agent, the jury found that a month's notice was sufficient. *Hiscox v. Batchellor*, 15 L. T. 543. It was in this case said to make no difference, whether the remuneration is by salary or commission; S. C. *Id. cor. Byles, J.* In *In re Illustrated Newspaper Corporation*, 16 T. L. R. 157, Cozens-Hardy, J., held that a month's notice was reasonable in the case of a lady journalist who was paid so much per column contributed with an additional amount for extra services. In *Landa v. Greenberg*, 24 T. L. R. 441, where the plaintiff performed editorial and managerial functions it was held that she was entitled to three months' notice. In *Grundy v. Sun Printing, &c., Association*, 33 T. L. R. 77, the C. A. held that a finding of the jury that an editor of a newspaper was entitled to twelve months' notice could not be said to be unreasonable. In *McCabe v. Pathé Frères*, 35 T. L. R. 313, the editor of a reel film for cinemas, the film dealing with current events, was held not to be entitled to six months' notice, there being no evidence that the custom applied to him. The actual position of the employee in each case has to be considered in deciding what notice he is entitled to. It has to be reasonable, and what is so, apart from custom or express agreement, is a question of fact—*African Association v. Allen*, 79 L. J. K. B. 259; [1910] 1 K. B. 396—*Payzu v. Hannaford*, 87 L. J. K. B. 1017; [1918] 2 K. B. 348. On the question of notice it may be material to consider whether there exists a contract of *service* between the parties. See on this point, *R. v. Negus*, 42 L. J. M. C. 62; L. R. 2 C. C. R. 34.

It has never been decided whether, on a hiring for a year without any express contract as to notice, if the service continue beyond the first year either party can determine the contract at the end of the current year, without notice, or whether a reasonable notice ought to be given previously. See *Beeston v. Collyer*, 4 Bing. 309; 5 L. J. (O. S.) C. P. 180. Cf. *Lowe v. Walter*, 8 T. L. R. 358. A contract "for one whole year, and so from year to year so long as the parties should respectively please," can only be determined at the end of a current year. *Williams v. Byrne*, 7 Ad. & E. 177; 6 L. J. K. B. 239; and *semble*, by reasonable notice. S. C. An agreement between master and servant, "to be binding between the parties for twelve months certain from the date, and to continue from time to time until three months' notice be given by either party" may be determined by three months' notice expiring at the end of the first year. *Brown v. Symons*, 8 C. B. (N. S.) 208; 29 L. J. C. P. 251. An agreement "for twelve months certain, after which time either party should be at liberty to terminate the agreement" by three months' notice, may be determined without notice at the end of the twelve months. *Langton v. Carleton*, 43 L. J. Ex. 54; L. R. 9 Ex. 57. *Sed quære*. An agreement of hiring for six months and "six months' notice from either side to terminate the agreement," may be determined at any time after the expiration of the first six months. *Keon v. Hart*, 1 R. 2 C. L. 138; 1 R. 3 C. L. 388; and see *Ryan v. Jenkinson*, 25 L. J. Q. B. 11. An agreement that the plaintiff's engagement should be for one year, subject to the plaintiff's carrying out his duties "to the satisfaction of the directors" may be terminated by the directors before the end of the year if they are genuinely dissatisfied with the plaintiff's discharge of his duties, even though it is found by the jury that they had no ground for such dissatisfaction. *Diggle v. Ogston Motor Co.*, 84 L. J. K. B. 2165.

The right to bring an action for wrongful dismissal is a mere illustration of the general legal rule that an action will lie for unjustifiable repudiation of a contract. *In re Rubel Bronze &c. Co. & Voss*, 87 L. J. K. B. 466; [1918] 1 K. B. 315.

Where the master has dispensed with the plaintiff's services before he has entered on the service, and has refused to abide by his contract, the servant may elect to treat it as at an end and bring an action then before the time for its commencement has arrived. *Hochster v. De La Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455. *Frost v. Knight*, 41 L. J. Ex. 78; L. R. 7 Ex. 111. See also *Johnstone v. Milling*, 55 L. J. Q. B. 162; 16 Q. B. D. 460. An offer by the plaintiff to serve is unnecessary; readiness and willingness to serve, which implies ability, is sufficient. *Wallis v. Warren*, 4 Ex. 361; *In re Rubel Bronze &c. Co. & Vos*, *supra*. Whether a contract by A. to employ B. to perform certain duties at a fixed salary is broken by A., who although paying the salary has refused to allow B. to perform those duties, depends on the nature of the employment. Thus in the case of a representative salesman to a cotton warp agent there was held to be no breach. *Turner v. Sawdon*, 70 L. J. K. B. 897; [1901] 2 K. B. 653. *Secus*, where B. was an actor, or a musical director, engaged as such by A., the theatre manager. *Fechter v. Montgomery*, 33 Beav. 22; *Bunning v. Lyric Theatre*, 71 L. T. 396. See also *In re Rubel Bronze &c. Co. & Vos*, *supra*, where *Turner v. Sawdon*, *supra*, is commented on and doubted. As to implied contract by employer to find work, see *Devonald v. Rosser*, 75 L. J. K. B. 688; [1906] 2 K. B. 728.

If a servant misconduct himself, the master may turn him away without any warning. *Spain v. Arnott*, 2 Stark. 256. If however he does not dismiss the workman but elects to treat the contract as continuing, he cannot, by suspending the workman assess his own damages for the workman's default by deducting the wages for the period of suspension. *Hanley v. Pease*, 84 L. J. K. B. 532; [1915] 1 K. B. 698. Refusal to obey a lawful order (as to remain at home at a certain time, or to do a proper day's harvest work) is good ground of dismissal; *Spain v. Arnott*, *supra*; *Lilley v. Elwin*,

17 L. J. Q. B. 132; 11 Q. B. 742; however reasonable or urgent the excuse for the servant's wilful absence may be. *Turner v. Mason*, 14 M. & W. 112; 14 L. J. Ex. 311. As to what amounts to a refusal to work, see *Bowes & Partners v. Press*, 63 L. J. Q. B. 165; [1894] 1 Q. B. 202. A single case of forgetfulness causing damage to a valuable machine, of which the servant had management, may be ground for dismissal, *Baster v. L. & County Printing Works*, 68 L. J. Q. B. 622; [1899] 1 Q. B. 901. If a clerk wrongfully claim to be a partner, the master may dismiss him forthwith as clerk. *Amor v. Fearon*, 9 Ad. & E. 548; 8 L. J. Q. B. 95. So, where a clerk disobeys a direction to apply remittances in a particular way; *Smith v. Thompson*, 8 C. B. 44; 18 L. J. C. P. 314; or, a traveller neglects immediately to remit sums collected, in accordance with the terms of his engagement; *Blenkarn v. Hodges' Distillery Co.*, 16 L. T. 608; or where he sells his employer's goods (wines) to a brothel-keeper; S. C.; or, where a servant embezzles, though his wages due exceed what he has embezzled. *Brown v. Croft*, 1 Chitty, Prac. of the Law, 82. So, where a servant employed to purchase goods for his master, accepts even on a single occasion a commission from the seller without his master's knowledge. *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339. If the master dismisses the servant on the ground of having taken a secret commission and establishes a *prima facie* case, the burden of proof is shifted, and it rests upon the servant to prove the innocence of the transaction. *Federal Supply, &c., Co. v. Angehrn*, 80 L. J. P. C. 1. The master does not waive his rights by postponing action until he is fully satisfied of the servant's guilt. S. C. So, where a servant is guilty of such misconduct, outside his employment, as is incompatible with a safe performance of his duties, he may be dismissed; as where a confidential clerk of a firm of merchants who had large dealings in securities, was in the habit of speculating to an enormous amount in "differences" on the Stock Exchange. *Pearce v. Foster*, 55 L. J. Q. B. 306; 17 Q. B. D. 536. Where evidence of misconduct is given, it is a question of fact for the jury, whether there has been such misconduct as justified the dismissal. *Clouston & Co. v. Corry*, 75 L. J. P. C. 20; [1906] A. C. 122. The master is not bound to assign the cause at the time of the dismissal; and where good ground for dismissal existed at the time, it is immaterial whether or not it was the real cause; *Ridgway v. Hungerford Market Co.*, 3 Ad. & E. 171; 4 L. J. K. B. 157; or indeed whether the good ground was known then to the master or not till a long time after. *Boston Deep Sea, &c., Co. v. Ansell*, *supra*. Where a master, having a right to discharge his servant for misconduct, condones the act of misconduct and retains the servant, he cannot afterwards discharge him for the same act. *Phillips v. Foxall*, L. R. 7 Q. B. 680, *per* Blackburn, J. The master cannot condone a wrong which he does not believe the servant to have committed, and of which he accepts the servant's denial. *Federal Supply, &c., Co. v. Angehrn*, *supra*.

"A servant who is dismissed for wrongful behaviour cannot recover his current salary, that is to say, he cannot recover salary which is not due and payable at the time of his dismissal, but which is only to accrue due and become payable at some later date, and on the condition that he had fulfilled his duty as a faithful servant down to that later date." *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 364, *per* Bowen, L.J. He may, however, recover wages due and payable at the time of his dismissal; *Taylor v. Laird*, 1 H. & N. 266; 25 L. J. Ex. 329; *Button v. Thompson*, 38 L. J. C. P. 225; L. R. 4 C. P. 330; *Parkin v. S. Hetton Colliery, &c., Co.*, 98 L. T. 162; *Healey v. Société Anonyme Française Rubastic*, 86 L. J. K. B. 1254; [1917] 1 K. B. 946; unless this right be altered by the terms of the hiring, as where the plaintiff was employed on the terms that if he left without notice he should forfeit all wages due. *Walsh v. Walley*, 43 L. J. Q. B. 102; L. R. 9 Q. B. 367.

The bankruptcy of the master is not a dissolution of the contract of hiring. *Thomas v. Williams*, 1 Ad. & E. 585; 3 L. J. K. B. 202. Dissolution of the partnership of the employers is not necessarily a breach of the

contract of the firm to employ the plaintiff; at all events, if the plaintiff entered into the service of the altered firm, this is evidence in proof of a defence of voluntary exoneration from the first contract before breach. *Hobson v. Cowley*, 27 L. J. Ex. 205. But dissolution of partnership has been held to be a breach of an agreement to teach a business, contained in an agreement of apprenticeship. *Couchman v. Sillar*, 22 L. T. 480; see also *Eaton v. Western*, 52 L. J. Q. B. 41; 9 Q. B. D. 636. If there be a contract for service for a time certain between the plaintiff and A. and B., then in partnership, the death of one of the partners puts an end to the contract; and no action can be maintained against the survivor for not employing the plaintiff. *Tasker v. Shepherd*, 6 H. & N. 575; 30 L. J. Ex. 207; see hereon *Phillips v. Alhambra Palace Co.*, 70 L. J. K. B. 26; [1901] 1 K. B. 59. But a voluntary parting with the business is a breach of such a contract to employ. *Stirling v. Maitland*, 5 B. & S. 840; 34 L. J. Q. B. 1; *Turner v. Goldsmith*, 60 L. J. Q. B. 247; [1891] 1 Q. B. 544; *Brace v. Calder*, 64 L. J. Q. B. 582; [1895] 2 Q. B. 253. See *Cook v. Sherwood*, 3 F. & F. 729; 11 W. R. 595, and *Ogdens v. Nelson*, 74 L. J. K. B. 433; [1905] A. C. 109. An agent or servant paid by commission on the profits of the business carried on, cannot however sue his employer for giving up the business before the expiration of the term for which he was engaged, unless there be an expressed or implied agreement to employ him; *Rhodes v. Forwood*, 47 L. J. Ex. 396; 1 App. Cas. 256, distinguished in *Turner v. Goldsmith*, *supra*; nor for giving it up without notice *Ex pte. Maclure*, 39 L. J. Ch. 685; L. R. 5 Ch. 737; *L. Leith, &c., Shipping Co. v. Ferguson*, 13 Sc. C. of Sess. Cases, 1850, p. 51. An order for winding up a company, where an official liquidator is appointed and the business is not carried on after the order; *MacDowall's Case*, 55 L. J. Ch. 620; 32 Ch. D. 366; or for the appointment of a manager and receiver on behalf of debenture holders: *Reid v. Explosives Co.*, 56 L. J. Q. B. 388; 19 Q. B. D. 264; operates as a discharge of its servants. It is otherwise however in the case of a voluntary winding up, for the company then continues to be the employer. *Midland Counties District Bank v. Attwood*, 74 L. J. Ch. 286; [1905] 1 Ch. 357.

In contracts for personal service it is an implied condition that the death of either party shall dissolve the contract. *Farrow v. Wilson*, 38 L. J. C. P. 326; L. R. 4 C. P. 744. The plaintiff was hired as a farm bailiff by A. at weekly wages, with a stipulation for 6 months' notice or 6 months' pay; it was held that the contract was dissolved by A.'s death, and that the stipulation as to notice did not apply. *Id.*

Where an apprenticeship is dissolved by the death of a master during the term, no part of the premium paid is recoverable from his executors. *Whincup v. Hughes*, 40 L. J. C. P. 104; L. R. 6 C. P. 78. In *Hirst v. Tolson*, 2 Mac. & G. 134; 19 L. J. Ch. 441, an articulated clerk was allowed to prove against the estate of his master, an attorney, who died during the articles, for the proportionate part of the premium the clerk had paid. *Sed quære*, for this decision was founded on an erroneous view of the rule at common law; see judgments in *Whincup v. Hughes*, *supra*, and it was not followed in *Ferns v. Carr*, 54 L. J. Ch. 478; 28 Ch. D. 409. See further *Leary v. Brook*, 60 L. J. Q. B. 373; [1891] 1 Q. B. 431. Incapacity in a servant from illness, arising after a contract for personal service, absolute in its terms, had been entered into, is an answer to an action for its breach. *Boast v. Firth*, 38 L. J. C. P. 1; L. R. 4 C. P. 1. So in the case of a contract involving personal skill; as a pianoforte player. *Robinson v. Davison*, 40 L. J. Ex. 172; L. R. 6 Ex. 269. But where from the circumstances it can be given, the employer is entitled to reasonable notice of such disability. S. C., *per* Brett, J., at N. P., *Id.* p. 271. Incapacity of the servant from sickness is not a determination of the contract, nor will it justify dismissal without regular notice. *R. v. Wintersett*, Cald. 298. So where a person entered into service as a brewer for a term certain at weekly wages, and became disabled by illness for several months, but afterwards was employed by the defendant as before,—held, that this voluntary inability

did not suspend the right to wages; nor negative the allegation of readiness and willingness to serve. *Cuckson v. Stones*, 1 E. & E. 248; 28 L. J. Q. B. 25. But permanent disability, such as paralysis, &c., would have justified putting an end to the contract. *Per Cur.*, S. C. The question in such cases is, whether the illness is such as to put an end in a business sense to, and to frustrate the object of, the engagement. *Storey v. Fulham Steel Works*, 24 T. L. R. 89. As to the right of a teacher, a married woman, who was absent from work for some time prior to her confinement, to salary during that time see *Davies v. Ebbw Vale Urban Council*, 9 L. G. R. 1226. Total inability to perform his duty will not prevent a servant from recovering wages for the time he actually served, where the agreement is not for any specific term. *Bayley v. Rimmell*, 1 M. & W. 506; 5 L. J. Ex. 192. A seaman disabled in the course of his duty is entitled to wages for the whole voyage. *Chandler v. Grieves*, 2 H. Bl. 606, n. Inability to perform his duty by reason of incompetency or ignorance will justify the dismissal of an artificer, notwithstanding a contract for a term, where he was hired on the express representation that he had the requisite skill; *Harmer v. Cornelius*, 5 C. B. (N. S.) 236; 28 L. J. C. P. 85; and where a person is employed to do something requiring skill, there is an implied warranty that he possesses the requisite skill. S. C. Where the contract of yearly service is determined by *consent* in the middle of a quarter, there is no necessarily implied contract to pay *pro ratâ*; but a jury may infer such an agreement from circumstances. *Lamburn v. Cruden*, 2 M. & Gr. 253; 10 L. J. C. P. 121; *Thomas v. Williams*, 1 Ad. & E. 685; 3 L. J. K. B. 202. The wrongful dismissal of a servant who by the contract is under restrictive conditions against engaging in the like business being a repudiation of the whole contract, the restrictive covenant comes to an end with the contract itself, notwithstanding that the servant has recovered damages for the wrongful dismissal. *General Billposting Co. v. Atkinson*, 78 L. J. Ch. 77; [1909] A. C. 118; see also *Measures Bros. v. Measures*, 79 L. J. Ch. 707; [1910] 2 Ch. 248.

Where a contract of apprenticeship provides that the apprentice's father shall provide him with board and lodging, but is silent as to the place where the apprentice is to be taught, the master is bound to teach him at or near the place where the business was carried on at the time the contract was executed. *Eaton v. Western*, 52 L. J. Q. B. 41; 9 Q. B. D. 636. But it seems it is otherwise where the apprentice resides in his master's house. *Id.*; *Coventry v. Windal*, Brownl. 67. An apprentice may be bound to a corporation. *Burnley, &c., Society v. Casson*, 60 L. J. M. C. 59; [1891] 1 Q. B. 75.

As to agreements for service within the Stat. of Frauds, s. 4, see *post*, pp. 411 *et seq.* See also the Employers and Workmen Act, 1875 (38 & 39 V. c. 90), as to the contracts to which that Act applies.

As to the service and dismissal of an assistant master of an endowed school, see 8 Ed. 7, c. 39, modifying the effect of *Wright v. Zetland* (*Marquis*), 77 L. J. K. B. 152; [1908] 1 K. B. 63.

Servants of the Crown hold their offices during the pleasure of the Crown only. *Shenton v. Smith*, 64 L. J. P. C. 119; [1895] A. C. 229; *Dunn v. The Queen*, 65 L. J. Q. B. 279; [1896] 1 Q. B. 116. Where a colonial government engages a person W. for military service, it does so on behalf of the Crown under whom W. serves. *Williams v. Howarth*, 74 L. J. P. C. 115; [1905] A. C. 551.

Damages.] A dismissed servant may (and, if he can, ought to) enter into another service. *Per Cur.*, in *Hochster v. De La Tour*, 2 E. & B. 690; 22 L. J. Q. B. 458. He is not entitled to his full salary for the unexpired period of the contract for service, but that is to be reduced by the probabilities of his having other employment during such service. *Hartland v. General Exchange Bank*, 14 L. T. 863. See *Yelland's Case*, L. R. 4 Eq. 350; *Ex pte. Clark*, 38 L. J. Ch. 562; L. R. 7 Eq. 550; and *Ex pte. Logan*,

L. R. 9 Eq. 149. In *Gandell v. Pontigny*, 4 Camp. 375; 1 Stark. 198, where wages were payable quarterly, the clerk, who was tortiously discharged in the middle of the quarter, was allowed, on a tender of his services, to recover for the whole quarter. But this decision, which is inconsistent with those above cited, is not now followed. See *Smith v. Hayward*, 7 Ad. & E. 544; 7 L. J. Q. B. 3; *Goodman v. Pocock*, 10 Q. B. 576; 19 L. J. Q. B. 410. The damages for wrongful dismissal cannot include compensation for the injured feelings of the servant, or for the loss he may sustain from the fact that the dismissal itself makes it more difficult for the servant to obtain fresh employment. *Addis v. Gramophone Co.*, 78 L. J. K. B. 1122; [1909] A. C. 488. Where it is an implied term of the contract that the servant shall be at liberty to receive tips from customers, the servant, on being wrongfully dismissed, is entitled to claim as part of his damages an amount in respect of the loss of tips which he would have received but for the wrongful dismissal. *Manubens v. Leon*, 88 L. J. K. B. 311; [1919] 1 K. B. 208.

Defence.

The defence of dismissal for misconduct must be specially pleaded. Rules, 1883, O. xix. r. 15.

It is a good defence that the servant has already recovered damages for wrongful dismissal from the service; for he cannot by subsequently tendering his services recover for a continued refusal to employ him throughout the original time of service. *Barnsley v. Taylor*, 37 L. J. Q. B. 39. See, however, *Unwin v. Clarke*, 35 L. J. M. C. 193; L. R. 1 Q. B. 417. A workman at weekly wages, who has under the Workmen's Compensation Act, 1906, claimed and received compensation for an injury causing him partial incapacity to work, is not entitled to wages during the time he is so incapacitated. See *Elliott v. Liggins*, 71 L. J. K. B. 483; [1902] 2 K. B. 84. But the receipt of compensation under the Act is not of itself a determination of the employment. *Warburton v. Co-operative Wholesale Society*, 86 L. J. K. B. 529; [1917] 1 K. B. 663. It is a defence to an action against the master for not teaching an apprentice A. that the latter refuses to be taught; *Raymond v. Minton*, 35 L. J. Ex. 153; L. R. 1 Ex. 244; or that he is a habitual thief. *Learoyd v. Brook*, 60 L. J. Q. B. 373; [1891] 1 Q. B. 431. In such case no part of the premium paid is recoverable. S. C.

An order made by a Naval Court under the Merchant Shipping Act, 1894, s. 483, discharging a seaman from his ship is a bar to an action by him against the shipowner for wages or wrongful dismissal. *Hutton v. Ras S.S. Co.*, 76 L. J. K. B. 562; [1907] 1 K. B. 834. By *Id.* s. 165, no seaman or apprentice can in general sue in a superior court for his wages, where they do not amount to £50; but this defence must be specially pleaded. The term "claim for wages" in 31 & 32 V. c. 71, s. 3 (2), has been held to include a claim for wrongful dismissal. *The Blessing*, 3 P. D. 35.

ACTION ON CONTRACT OF SALE OF GOODS.

The law relating to the sale of goods has been codified by the Sale of Goods Act, 1893, 56 & 57 V. c. 71.

The Contract.] Where it must have been within the contemplation of the parties that the post might be used as a means of communicating the acceptance of an offer, the acceptance is complete as soon as it is posted, and it matters not that the letter may not reach the offeror. *Duncan v. Topham*, 8 C. B. 225; 18 L. J. C. P. 310; *Dunlop v. Higgins*, 1 H. L. C.

381; S. C. 9 Sc. C. of Sess. Cases, 1847, p. 1407; *Harris's Case*, 41 L. J. Ch. 621; L. R. 7 Ch. 587; *Household, &c., Insur. Co. v. Grant*, 48 L. J. Ex. 577; 4 Ex. D. 216; *Henthorn v. Fraser*, 61 L. J. Ch. 373; [1892] 2 Ch. 27; see also *Brogden v. Metropolitan Ry.*, 2 App. Cas. 666, 692, *per* Ld. Blackburn. The acceptance must be unconditional in order to bind the party offering. *Chaplin v. Clarke*, 4 Ex. 403. If, therefore, the acceptance introduce any variation, there is no contract, unless there be evidence of assent by the other party to the alteration, either express or implied. Illustrations of this rule will be found in *Wontner v. Shairp*, 17 L. J. C. P. 38; 4 C. B. 404; *Duke v. Andrews*, 17 L. J. Ex. 231; 2 Ex. 290; *Cheveley v. Fuller*, 13 C. B. 122; *Hutton v. Upphill*, 2 H. L. C. 674; *Barker v. Allan*, 5 H. & N. 61; 29 L. J. Ex. 100; *Appleby v. Johnson*, 43 L. J. C. P. 146; L. R. 9 C. P. 158. A tender to supply goods at specified prices, followed by an order for specified quantity of such goods, constitutes a valid contract. *Gt. N. Ry. Co. v. Witham*, 43 L. J. C. P. 11; L. R. 9 C. P. 16. A mere mental assent to the terms of a proposed contract is not binding, but acting on those terms may amount to evidence of the adoption of the contract. *Brogden v. Metropolitan Ry.*, 2 App. Cas. 666. See also *Carlill v. Carbolic Smoke Ball Co.*, 62 L. J. Q. B. 257; [1893] 1 Q. B. 256, and cases therein cited: and *Keighley Maxsted & Co. v. Durant*, 70 L. J. K. B. 662; [1901] A. C. 240. Where the contract is entered into by telegram, the sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, 40 L. J. Ex. 15; L. R. 6 Ex. 7. As to correspondence by a telegraphic code, see *Falck v. Williams*, [1900] A. C. 176.

A mere quotation of terms must be distinguished from an offer to sell. Thus in *Boyers v. Duke*, [1905] 2 I. R. 617, the plaintiffs wrote to manufacturers, asking their lowest quotation for 3,000 yards canvas, 32½ inches wide, and the shortest time for delivery. The manufacturers replied: "We enclose samples . . . Lowest price 32½ inches wide, is 4½d. per yard 36 inches measure. Delivery of 3,000 yards in 5/6 weeks." The plaintiffs ordered 3,000 yards of canvas as *per* quotation. It was held that the manufacturers' letter was not an offer to sell, but merely a quotation of terms; that the plaintiffs' letter in reply was an offer of an order and not an acceptance of an offer; and that there was no completed contract between the parties.

Where an agent V. makes a contract purporting to sell goods to L. in the name of his principal T., but fraudulently intending to sell them on his own account, T. may ratify and take the benefit of the contract against L. *In re Tiedemann v. Ledermann*, 68 L. J. Q. B. 852; [1899] 2 Q. B. 66.

Conditions cannot be attached to ordinary goods on their sale so as to bind subsequent purchasers with notice. *Taddy v. Sterious & Co.*, 73 L. J. Ch. 191; [1904] 1 Ch. 354; *McGruther v. Pitcher*, 73 L. J. Ch. 653; [1904] 2 Ch. 306. Conditions may however be attached to the sale of a patented article and if these are brought to the notice of the purchaser at the time of sale he is bound by them. *National Phonograph Co. v. Menck*, 80 L. J. P. C. 105; [1911] A. C. 336.

As to the assignability of contracts of sale, see *Tolhurst v. Associated Portland Cement, &c.*, 72 L. J. K. B. 834; [1903] A. C. 414; and *Kemp v. Baerselman*, 75 L. J. K. B. 873; [1906] 2 K. B. 604.

The validity of contracts of sale without writing will now be considered. The principal decisions on the Stat. of Frauds, so far as relates to contracts not to be performed within a year, and on the S. of G. Act, 1893, s. 4, for the sale of goods therefore may be conveniently collected here.

Stat. of Frauds, s. 4. By the Stat. of Frauds, 29 C. 2, c. 3, s. 4, no action shall be brought whereby to charge any person "upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

Contracts within the Stat. of Frauds, s. 4.] Sect. 4 applies "to contracts the complete performance of which is of necessity extended beyond the space of a year." . . . "Where the agreement distinctly shows, upon the face of it, that the parties contemplated its performance to extend over a greater space of time than one year, the case is within the statute, but that where the contract is such that the whole *may* be performed within a year, and there is no express stipulation to the contrary, the statute does not apply." *Per* Tindal, C.J., *Souch v. Strawbridge*, 2 C. B. 808, 815; 15 L. J. C. P. 170, 172; *Boydell v. Drummond*, 11 East, 142; *Knowlman v. Bluett*, 43 L. J. Ex. 29, 151; L. R. 9 Ex. 1, 307; *McGregor v. McGregor*, 57 L. J. Q. B. 591; 21 Q. B. D. 424; *Reeve v. Jennings*, 79 L. J. K. B. 1137; [1910] 2 K. B. 522; *Prested Miners Co. v. Garner*, 79 L. J. K. B. 1143; 80 L. J. K. B. 819; [1910] 2 K. B. 776; [1911] 1 K. B. 425; Smith's L. C., notes to *Peter v. Compton*.

The following cases have been decided on this section. An agreement to serve for £70 the first year, £90 the second, and so on, is within the section, and requires a writing; and such writing cannot be explained by showing a contemporary or subsequent agreement to pay the salary quarterly. *Giraud v. Richmond*, 15 L. J. C. P. 180; 2 C. B. 835. A contract for a year's service to commence on the next day is not within the section. *Smith v. Gold Coast, &c., Explorers*, 72 L. J. K. B. 235; [1903] 1 K. B. 538. *Secus*, where it is to commence on a subsequent day; *Bracegirdle v. Heald*, 1 B. & A. 722; *Snelling v. Huntingfield (Lord)*, 1 C. M. & R. 20; 3 L. J. Ex. 232; *Britain v. Rossiter*, 48 L. J. Q. B. 362; 11 Q. B. D. 123; *Elliott v. Roberts*, 107 L. T. 18. A contract for a definite period exceeding one year is within the statute, although the service is subject to be determined by a notice within the year. *Dobson v. Collis*, 1 H. & N. 81; 25 L. J. Ex. 267; *Hanau v. Ehrlich*, 81 L. J. K. B. 397; [1912] A. C. 39. An agreement by a company that E. "shall be the solicitor to the company," "and shall not be removed from his office except for misconduct," was held to be within the section. *Eley v. Positive Assur. Co.*, 45 L. J. Ex. 58, 451; 1 Ex. D. 20, 88. A continuing offer to the plaintiff of immediate employment accepted by the plaintiff's letter, complies with sect. 4. *Curtis v. B. U. R. T. Co.*, 28 T. L. R. 585. So, an agreement that S. should not carry on a certain trade during the joint lives of himself and another person. *Davey v. Shannon*, 48 L. J. Ex. 459; 4 Ex. D. 81. So, a contract to maintain a child about 5 years old, "until she is able to do for herself." *Farrington v. O'Donohoe*, 1 R. 1 C. L. 675. The reason for the above decisions was that the parties contemplated that the agreement would not be performed within a year, notwithstanding it might, owing to the death of S. or of the child, before the expiration of the year, be then completely performed.

In *Murphy v. Sullivan*, 11 Ir. Jur. (N. S.) 111, the Irish Court of Exch. Ch. held, however, that a contract to maintain a child for life was not within the section, as it might die within the year. In *McGregor v. McGregor*, 57 L. J. Q. B. 591; 21 Q. B. D. 424, where the agreement by the husband in a separation deed was to pay his wife £1 a week it was held not to be within the statute. The decision in *Davey v. Shannon*, *supra*, was the only one of the above cases of which the C. A. distinctly disapproved; but the principle of *Murphy v. Sullivan*, *supra*, if logically carried out, would prevent any contract for a life annuity, or for personal service, from coming within the section; and it must be observed that although *McGregor v. McGregor*, *supra*, was decided on the principle of *Knowlman v. Bluett*, 43 L. J. Ex. 151; L. R. 9 Ex. 307, as an action for money paid at the defendant's request, the C. A. declined to decide the case on that ground. *McGregor v. McGregor*, *supra*, was considered in *Hanau v. Ehrlich*, *supra*.

A contract, not enforceable, because of the statute, is an existing contract, and a fresh contract cannot be implied from acts done in pursuance of it: *Britain v. Rossiter*, 48 L. J. Q. B. 362; 11 Q. B. D. 123; but where A. orally agreed to serve B. for the year, the service to commence on a subsequent day, and A. entered upon the service upon the day named, and B.

paid him wages on account, it was held that the jury might infer a new implied contract from that day. *Cawthorn v. Cordrey*, 13 C. B. (N. S.) 406; 32 L. J. C. P. 152.

The section applies only to contracts which are not to be performed on either side within the year. *Bracegirdle v. Heald*, 1 B. & A. 722; *Donellan v. Read*, 3 B. & Ad. 899; 1 L. J. K. B. 269. If all that is to be done by one party as the consideration for the promise of the other, can be done within the year, it is not within the section. S. C.; *Smith v. Neale*, 2 C. B. (N. S.) 67; 26 L. J. C. P. 143.

Where in a contract between the plaintiff and the defendant, one of several terms to be performed by the defendant falls within the section, the contract cannot be enforced; but if the entire work be done under the contract by the plaintiff, and accepted by the defendant, the plaintiff can recover on a *quantum meruit*, without before action electing to abandon the contract. *Savage v. Canning*, 1 R., 1 C. L. 134, C. P.; following *Gray v. Hill*, Ry. & M. 420; and see *Teal v. Auty*, 2 B. & B. 99; *Harman v. Reeve*, 18 C. B. 587; 25 L. J. C. P. 257. Where there was a contract for 24 numbers of a periodical work, to be delivered monthly at 21s. a number, it was held that the plaintiff might sue for the price of the numbers actually delivered, the defendant having refused to accept the remainder. *Mavor v. Pyne*, 3 Bing. 285. See *Knowlman v. Bluett*, *supra*.

The consideration must appear in the memorandum, at least by necessary inference. *Wain v. Warlters*, 5 East, 10.

The doctrine of part performance was held in *Britain v. Rossiter*, *supra*, to apply only to contracts relating to land. This, however, has been doubted, see *Maddison v. Alderson*, 52 L. J. Q. B. 737; 8 App. Cas. 467, and *McManus v. Cooke*, 56 L. J. Ch. 662; 35 Ch. D. 681, 697. See also *Elliott v. Roberts*, 107 L. T. 18.

A contract for the sale of goods which is not in writing and not to be performed within a year is unenforceable under sect. 4, notwithstanding that it comes within sect. 4 of the Sale of Goods Act by reason of the acceptance by the buyer of part of the goods. *Prested Miners Co. v. Garner*, 79 L. J. K. B. 1143; 80 L. J. K. B. 819; [1910] 2 K. B. 776; [1911] 1 K. B. 425.

The Contract—Sale of Goods Act, 1893, s. 4. By the S. of G. Act, 1893, s. 4, (1.) "A contract for the sale of any goods of the value of £10 or upwards shall not be enforceable by action, unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf.

(2.) "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery.

(3.) "There is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale whether there be an acceptance in performance of the contract or not."

Sub-sects. 1, 2, replace and are almost identical with the Stat. of Frauds, s. 17 (sect. 16 in Stat. of the Realm), and *Ld. Tenterden's Act*, 9 G. 4, c. 14, s. 7. But under this section, an agreement required by law to be in writing is merely not enforceable by law if not in writing; it is not invalid for all purposes, and the law as laid down in sect. 17 is altered to that extent. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1. "Sect. 4 assumes the existence of a contract, and provides that it shall only be enforceable by action as between the parties in certain events. The section makes it necessary to produce certain evidence in support of the contract. It matters

not when the memorandum is signed, or when the payment is made. The date of the contract remains the same, and, as soon as the evidence required by the statute is forthcoming, one party can enforce the contract against the other." *Meggeson v. Groves*, 86 L. J. Ch. 145, 148; [1917] 1 Ch. 158, 163. A provision in a contract that goods are to be delivered within a certain time may be waived even after that period is expired, but if the contract is within sect. 4 it would seem that the waiver must be evidenced by writing. *Hartley v. Hyman*, 90 L. J. K. B. 14; [1920] 3 K. B. 475.

By sect. 62 (1), "action" includes counter-claim and set off; it also defines "goods."

Contracts within the Sale of Goods Act, 1893, s. 4.] The following cases were nearly all decided under the repealed sections, the effect of which were in this respect identical with the S. of G. Act, 1893, s. 4.

Contracts for the sale of existing or future goods, are included; sect. 4 (2). See also sect. 5. So are sales by auction. *Kenworthy v. Schofield*, 2 B. & C. 945; 2 L. J. (O. S.) K. B. 175; and see sect. 58. A sale of shares of a joint stock banking company is not within sect. 4. *Humble v. Mitchell*, 11 Ad. & E. 205. Nor of shares in a canal company. *Latham v. Barber*, 6 T. R. 67. Nor of railway shares. *Bowlby v. Bell*, 3 C. B. 284; 16 L. J. C. P. 18; *Tempest v. Kilner*, 3 C. B. 249. Nor of shares in a mining company. *Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53. Nor is a sale or contract to deliver foreign stock consisting of bonds and certificates. *Heseltine v. Siggers*, 18 L. J. Ex. 166; 1 Ex. 856. Sales of timber and growing crops where they are not an "interest in land" within the Stat. of Frauds, s. 4, may be within the S. of G. Act, 1893, s. 4. Trees lying felled are within sect. 4. *Acraman v. Morrice*, 8 C. B. 449; 19 L. J. C. P. 57. A contract for work and labour, as an agreement by a printer to print a book, although it involves finding materials, is not within sect. 4; *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237; but a contract to make a set of artificial teeth to fit the mouth of the employer is a contract for the sale of a chattel, and therefore within the section. *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252. If the substance of the contract be goods to be sold and delivered, by the one party to the other, it is within the section. *S. C.*; *Atkinson v. Bell*, 8 B. & C. 277; 6 L. J. (O. S.) K. B. 258; *Grafton v. Armitage*, 2 C. B. 336; 15 L. J. C. P. 20. A sale is not less within the statute because it also includes an exchange; *Bach v. Owen*, 5 T. R. 409; or a collateral agreement touching the thing sold. *Harman v. Reeve*, 18 C. B. 587; 25 L. J. C. P. 257. Thus a contract whereby H. agreed to sell a horse of the value of £10 to R., and to agist it and also another horse of R.'s for a fixed time, and R. was to pay £30, is within sect. 4. *S. C.* The section applies to a single contract for the sale of several articles, of the aggregate value of £10, although each is under that value. *Baldehy v. Parker*, 2 B. & C. 37; 1 L. J. (O. S.) K. B. 229. A contract for the sale of goods, not enforceable by reason of sect. 4 (1) is not thereby avoided, and the property in the goods may pass to the purchaser. *Taylor v. Gt. E. Ry. Co.*, 70 L. J. K. B. 499; [1901] 1 K. B. 774.

Acceptance and receipt within the Sale of Goods Act, 1893, s. 4.] The S. of G. Act, 1893, s. 4 (3); has laid down a definite rule on the subject of "acceptance," and the cases decided on the Stat. of Frauds, s. 17, must be carefully considered before they are followed as guides as to what amounts to "acceptance," under the present section. See *Abbott v. Wolsey*, 64 L. J. Q. B. 587; [1895] 2 Q. B. 97. The statute uses the term "acceptance," in two different senses; the acceptance required under sect. 4, to make the contract binding, is different from that mentioned in sect. 35, which is necessary to bind the purchaser to pay for the goods. *S. C.* The rule in sect. 4 (3) follows the principle laid down by Bowen, L.J., in *Page v. Morgan*, 54 L. J. Q. B. 434; 15 Q. B. D. 228. Where hay sold was delivered to the buyer, who took a sample from it, and after examination said "The hay is

not to my sample and I shall not have it," it was held that this was evidence of an act done by him in relation to the hay which recognised a pre-existing contract of sale, and therefore evidence of acceptance within sect. 4 (3). *Abbott v. Wolsey*, 64 L. J. Q. B. 587; [1895] 2 Q. B. 97. So where B. sold his barley which had been warehoused with the defendant R. to S., and R. advised S. that it was awaiting his orders; S. did not inspect it or take a sample from the bulk, but endeavoured to re-sell the barley by another sample he obtained from the seller, and did not repudiate the sale within 5 weeks. *Taylor v. Gt. E. Ry. Co.*, 70 L. J. K. B. 499; [1901] 1 K. B. 778. Acceptance without a delivery is insufficient, for the words are "accept and actually receive;" but the acceptance may be prior to the actual receipt and need not be contemporaneous with or subsequent to it. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159; *Morton v. Tibbett*, 15 Q. B. 429; 19 L. J. Q. B. 382.

By sect. 41 (2) the seller may exercise his right of lien although in possession as agent or bailee for the buyer; the cases therefore which decided that there could be no delivery so long as the goods were subject to the seller's right of lien no longer apply.

The following cases were decided under the Stat. of Frauds, s. 17. A delivery of goods to a wharfinger or agent who has been accustomed to forward goods from the plaintiff to the defendant, and a delivery by him to the carrier, is not an acceptance, the carrier having no authority, though named by the vendee, to accept the goods for him, but only to receive them for the purpose of being carried. *Hanson v. Armitage*, 5 B. & A. 557; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401. So where goods bought abroad were delivered at a foreign port on board a ship chartered by the buyer, this was held to be no acceptance. *Acebal v. Levy*, 10 Bing. 376; 3 L. J. C. P. 98. So, where the buyer appointed the mode in which the goods should be conveyed, and directed a third person, in whose possession the goods temporarily were, to see them delivered and measured and put up properly, and they were accordingly sent to another warehouse of the seller, where the clerk gave an invoice to the buyer, who did not pay for the goods, but the same day gave notice that he would not accept them, these circumstances were held not to amount to an acceptance. *Astey v. Emery*, 4 M. & S. 262. So where a hogshead of wine in the warehouse of the London Dock Company was sold for £13 and a delivery order given to the buyer, but there was no assent on the part of the Dock Company to hold the wine as the agents of the buyer, it was held that there was no actual receipt within the statute. *Bentall v. Burn*, 3 B. & C. 423; 3 L. J. (O. S.) K. B. 42; *Farina v. Home*, 16 M. & W. 119; 16 L. J. Ex. 73. Where A. employed B. to construct a waggon, and while it was in B.'s yard unfinished, A. employed a third person to fix upon it some iron work and a tilt, it was held this did not amount to an acceptance; but, *per Tindal, C.J.*, it might perhaps have been otherwise if these acts had been done after the waggon was completed. *Maberley v. Sheppard*, 10 Bing. 99; 2 L. J. C. P. 181. Where the goods were sent with an invoice, and the buyer declined to receive them of the carrier, who kept them for a month, and until the end of that time the buyer, who had received the invoice, did not communicate with the seller, it was held that there was not sufficient evidence of acceptance to justify a jury in finding one. *Norman v. Phillips*, 14 M. & W. 277; 14 L. J. Ex. 306. Where spruce deals, bought by the defendant, were taken by a carrier, chosen by the defendant, to the carrier's wharf and there inspected by the defendant, who did not move them, and within a reasonable time gave notice to the vendor that he rejected them, it was held there had been no acceptance. *Taylor v. Smith*, 61 L. J. Q. B. 331; [1893] 2 Q. B. 65.

There may, however, be a *constructive acceptance* by acquiescence. Thus, where the goods were sent by a named carrier, and a letter of advice was forwarded to the buyer stating that the credit was three months, and the goods, after arrival, were seen by him in the warehouse of the carrier,

when he told the carrier that he refused to take them, but made no communication whatever to the seller till after five months, it was held that this was evidence to be left to the jury of acceptance and actual receipt. *Bushel v. Wheeler*, 15 Q. B. 442. In another case, where wheat was sent by a carrier named by the buyer, who was to take it to a market town, where the buyer resold it by the same sample which he had taken from the seller himself, but never inspected the bulk, this was held to be evidence of acceptance and receipt. *Morton v. Tibbett*, 15 Q. B. 428; 19 L. J. Q. B. 382. Goods not specified in the original contract, but selected by the seller, and shipped by him for delivery to an inland carrier named by the buyer, who was to convey them to the buyer's residence, were lost at sea, a bill of lading had been sent to the inland carrier; held, that this was not evidence of an acceptance and receipt by the buyer, though it would have been a sufficient delivery to him if the contract had been binding; and that the mere silence of the buyer, on hearing that the goods were shipped, would not justify a verdict for the seller; neither the selection by the seller, nor the receipt by the carrier, being an acceptance of those particular goods by the buyer. *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401; *Hart v. Bush*, E. B. & E. 494; 27 L. J. Q. B. 271; and *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145. But where the buyer has received the bill of lading, and dealt with it as owner of the property, this is evidence of an acceptance and receipt. *Currie v. Anderson*, 2 E. & E. 592; 29 L. J. Q. B. 87. Where the buyer receives the articles sold, but disputes the alleged terms of sale on the delivery, the sale is good, and the terms may be proved by oral evidence. *Tomkinson v. Staight*, 17 C. B. 697; 24 L. J. C. P. 85.

The circumstances in the following cases were held to constitute an acceptance and receipt within the Stat. of Frauds, s. 17. The defendant bought a quantity of hay from the plaintiff, and sold it to another person, by whom it was taken away; it was held that the jury might presume an acceptance by the defendant. *Chaplin v. Rogers*, 1 East, 192. Where defendant selected and orally agreed to purchase certain goods of the plaintiff, and directed them to be sent to a particular wharf, where he was in the habit of warehousing his goods, that was held sufficient to constitute an acceptance; and the goods having been placed on the wharf under the control of the defendant, so as to put an end to any rights of the plaintiff as unpaid vendor, that was held a sufficient actual receipt. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261. Where the defendants agreed to purchase of the plaintiff four specific stacks of cotton waste at so much per lb.; they sent their packer with sacks and carts to fetch it; he packed the waste in 81 sacks; 21 were weighed, loaded, and taken to the defendant's premises; the other sacks were not weighed; on arrival of the 21 sacks, the defendants refused to accept any of the waste, on the ground that it was of inferior quality to that purchased; and it was held that there was evidence of an acceptance and receipt. *Kershaw v. Ogden*, 3 H. & C. 717; 34 L. J. Ex. 159. So, where on a sale of wheat by sample, the buyer received several sacks of wheat, delivered under the contract on his premises, and, immediately after opening the sacks and examining their contents, gave notice to the seller that he refused the wheat, as not equal to sample, this was held evidence for the jury of an acceptance. *Page v. Morgan*, 54 L. J. Q. B. 434; 15 Q. B. D. 228, following *Kibble v. Gough*, 38 L. T. 204. For "the acceptance contemplated by the statute was such a dealing with the goods as amounts to a recognition of the contract." 15 Q. B. D. 233, *per* Bowen, L.J.

Though the goods remained in the personal possession of the seller, yet if it were agreed between the seller and buyer that the possession should thenceforth be kept, not as seller, but as bailee for the buyer, there was a sufficient receipt to satisfy the statute, as the right of lien was gone. *Cusack v. Robinson*, 1 B. & S. 299; 30 L. J. Q. B. 261; citing *Beaumont v. Brengeri*, and *Marvin v. Wallis*, *infra*. The defendant bought two horses from the plaintiff, a livery-stable keeper, and desired him to keep them at livery for him; it was held that the plaintiff, by assenting to this order, and

changing the horses from the stables in which they had been kept to his livery-stables, had relinquished his lien, and that there was a constructive delivery of them to the defendant. *Elmore v. Stone*, 1 Taunt. 458; *Beau-mont v. Brengeri*, 5 C. B. 301. And sect. 41 (2), which retains the right of lien in such cases seems not to affect the two decisions last cited. Where, on an oral sale of a horse by A. to B., B., without having had it in his possession lent it to A., at his request for a few weeks, and B. afterwards refused to receive or pay for it; and the jury found that the contract of sale was completed before the loan of it to the vendor: held that there was an acceptance and actual receipt within the statute. *Marvin v. Wallis*, 6 E. & B. 726; 25 L. J. Q. B. 369. So, where the defendant bought some spirits from the plaintiffs, who sent an invoice of certain specified casks, terms six months' credit, and to lie in plaintiffs' warehouse till wanted, free six months; the plaintiffs kept a general bonded warehouse, and transferred the particular casks to the defendant's name in their warehouse book, as sold to him, after which the plaintiffs could not take them out; at the end of the six months the defendant asked the plaintiffs to take them back, or sell them for him; held, there was evidence of a receipt and acceptance, as the character of the plaintiffs had changed from sellers to warehousemen or agents of the defendant. *Castle v. Swoorder*, 6 H. & N. 828; 30 L. J. Ex. 310. Wool, bought by defendant was removed to the warehouse of a third person, M., by defendant's direction, and weighed and packed by him; the course of dealing was, that it should not be taken out of M.'s warehouse till payment; this nevertheless was held a delivery and acceptance, as the seller had parted with possession, and had no lien, properly so called. *Dodsley v. Varley*, 12 Ad. & E. 632. Where the goods sold were in the defendant's possession at the time of the sale, a dealing with them by the defendant, and an account rendered to the plaintiffs by defendant, debiting himself with the price, are evidence of an acceptance by defendant. *Edan v. Dudfield*, 1 Q. B. 302. Where the act done by the buyer is an ambiguous act, which may or may not be done as an act of ownership, it is evidence on which it ought to be left to the jury to say whether or not there had been an acceptance. *Parker v. Wallis*, 5 E. & B. 21. A bargained for a horse then in a stable, and soon afterwards brought in a third person and stated to him that he had bought the horse, and offered to sell it to him for a profit of £5; it was held that it ought to be left to the jury to say whether this was or was not a delivery and acceptance. *Blenkinsop v. Clayton*, 7 Taunt. 597; and see *Phillips v. Bistolli*, 2 B. & C. 511. A wrongful taking by the buyer after a tender and refusal of the money is not an acceptance to bind the seller. *Taylor v. Wakefield*, 6 E. & B. 765; see *Smith v. Hudson*, 6 B. & S. 431; 34 L. J. Q. B. 145.

There need not be an actual delivery, but there may be something tantamount; such as the delivery to the buyer of a key of the warehouse in which the goods are lodged, or the delivery of other *indicia* of property; per *Ld. Kenyon, C.J., Chaplin v. Rogers*, 1 East, 192, 195; and this is evidence of acceptance as well as of delivery. *Elmore v. Stone*, 1 Taunt. 460. So, where the purchaser cut down and sold some of a number of trees he had bought, this was held to be an acceptance and receipt. *Marshall v. Green*, 45 L. J. C. P. 153; 1 C. P. D. 35. A written order given by the seller of goods to the buyer, directing the person in whose care the goods are to deliver them to the buyer, is a sufficient receipt within the statute, provided the person to whom it is directed accept the order for delivery, and assent to hold the goods as the agent of the buyer. *Searle v. Keeves*, 2 Esp. 598; *Bentall v. Burn*, 3 B. & C. 426; 3 L. J. (O. S.) K. B. 42; *Salter v. Wool-lams*, 2 M. & Gr. 650.

When a *joint order* is given for several classes of goods, the acceptance of one class is a part acceptance of the whole, under this section; *Elliott v. Thomas*, 3 M. & W. 170; 7 L. J. Ex. 129; and *Thompson v. Maceroni*, 3 B. & C. 1, *contra*, is there explained. Part acceptance is sufficient, although the rest are not even made. *Scott v. Eastern Counties Ry. Co.*,

12 M. & W. 33; 13 L. J. Ex. 14. But the contract for several things must be a joint one. Thus, if A. give to B. an absolute order for one, and a conditional order for another article, and B. sends both, A.'s acceptance of the former is not an acceptance of the latter. *Price v. Lea*, 1 B. & C. 156; 1 L. J. (O. S.) K. B. 245. Where a buyer selected separate lots of timber, at different and distant places, and various prices, shown to him by the same seller on one day, and afterwards included in one unsigned note, acceptance of one lot dispenses with a signed note. *Bigg v. Whisking*, 14 C. B. 195. The delivery and acceptance of a sample, if considered to be part of the thing sold, is sufficient; *Hinde v. Whitehouse*, 7 East, 588; but otherwise where it is a sample merely, and forms no part of the bulk. *Talver v. West*, Holt, N. P. 178; *Cooper v. Elston*, 7 T. R. 14.

Earnest or part payment.] If there be no note or memorandum in writing and no acceptance or receipt of the goods, then, to satisfy the statute, the buyer must give something in earnest to bind the bargain, or in part payment. Earnest is given by the buyer, and not by the seller, and the part delivery of goods is not (as Blackstone, 2 Comm. 447—8, assumes) by the way of earnest. In cases of sale at common law, earnest has an effect different from that of the *arræ* of the civil law, by binding the bargain instead of merely affording additional proof of it. It is either money or other thing given, to bind the bargain, and to show that it is concluded, and no longer remains in mere proposal or in *feri*. If given in money, it presumably forms part of the price, like a deposit at an auction. *Pordage v. Cole*, 1 Wms. Saund. 319. If it be some other article, it is in the nature of a pledge. Pothier, Cont. de Vente, p. 6, c. 1, art. 3, s. 2. Acceptance of earnest changes the property. *Langfort v. Tiler*, 1 Salk. 113; *Hinde v. Whitehouse*, 7 East, 558, 571. Customary forms of concluding bargains, as where the purchaser draws the edge of a shilling across the hand of the seller and returns the money into his own pocket, are not equivalent to earnest or part payment, within the statute. *Blenkinsop v. Clayton*, 7 Taunt. 597. A bargain, that the seller shall take, in part payment, a debt due from him to the buyer, is not in itself a sufficient part payment to dispense with a writing—no money having actually passed, nor receipt for the debt given by the buyer; for this would in effect let in proof of the contract itself in order to evade the statute. *Walker v. Nussey*, 16 M. & W. 302; 16 L. J. Ex. 120; *Norton v. Davison*, 68 L. J. Q. B. 265; [1899] 1 Q. B. 401. For a part payment to satisfy sect. 4 (1) of the Sale of Goods Act, there must be an acceptance of it by the seller of such a nature as affords some evidence of the contract which is in question, but the acceptance need not be unqualified. *Parker v. Crisp*, 88 L. J. K. B. 775; [1919] 1 K. B. 481. There the plaintiff verbally agreed to buy from the defendants for a specified sum a quantity of saccharine, and on the same day he sent his cheque in accordance with the agreed mode of payment. On the following day—the duty on saccharine having in the meantime been increased—the defendants wrote to the plaintiff saying that unless he would pay the increased duty they would be unable to send the saccharine, adding: "We will return your cheque with pleasure upon hearing from you that you will not require the goods." The plaintiff refused to pay the increased duty and after some further correspondence the defendant returned the plaintiff's cheque a few days later. It was held that there was a part payment to satisfy the section. The court distinguished *Davis v. Phillips, Mills & Co.*, 24 T. L. R. 4, where it was held that the sending of a cheque, which was immediately returned with a repudiation of there ever having been a concluded contract, did not constitute part payment.

What note is sufficient within the Sale of Goods Act, 1893, s. 4.] The note in writing must contain all the terms of the agreement, or be connected with some other document which does. *Kenworthy v. Schofield*, 2 B. & C. 947; 2 L. J. (O. S.) K. B. 175. Several documents, if sufficiently connected, will constitute a good memorandum within the statute. *Jackson*

v. *Lowe*, 1 Bing. 9; *Saunderson v. Jackson*, 2 B. & P. 238; *Allen v. Bennet*, 3 Taunt. 169; *Warner v. Willington*, 3 Drew. 523; 25 L. J. Ch. 662. A promise in writing, signed, to pay any one unnamed who shall furnish goods to the writer or a third person making default, will become a binding contract with any one, whosoever he may be, who shall accept the promise in writing and furnish the goods. *Williams v. Byrnes*, 1 Moo. P. C. (N. S.) 154, 198. It must contain the names of both the contracting parties or their agents; *Champion v. Plummer*, 1 B. & P. N. R. 252; *Graham v. Musson*, 7 Scott, 569; 5 Bing. N. C. 603; 8 L. J. C. P. 324; *Williams v. Byrnes*, *supra*; as buyer and seller, *Vandenbergh v. Spooner*, 35 L. J. Ex. 201; L. R. 1 Ex. 316. In this last case the memorandum was as follows: "S. (the defendant) agrees to buy the whole of the lots of marble purchased by V. (the plaintiff) now lying at L. C., at 1s. a foot. (Signed) S."; it was held that it did not satisfy the statute, because V. did not appear to be the seller. But in *Newell v. Radford*, 37 L. J. C. P. 1; L. R. 3 C. P. 52, the following memorandum was held sufficient: "N. (the plaintiff), 32 sacks cullasses (flour) at 39s.; 280 lbs. to wait orders. J. W."; it was proved orally that J. W. was the defendant's agent, that the defendant was a flour dealer, and the plaintiff a baker, and the court drew inferences from the surrounding circumstances to explain the ambiguity in the memorandum.

Where there is an insufficient memorandum, such as an unsigned order for goods, a subsequent letter signed by the defendant, referring to the order, is sufficient; *Saunderson v. Jackson*, 2 B. & P. 238; *Buxton v. Rust*, 41 L. J. Ex. 173; L. R. 7 Ex. 279; but the plaintiff cannot avail himself of a subsequent letter from the defendant, in which, though he recognizes the order, he disaffirms or adds to the terms of the memorandum. *Cooper v. Smith*, 15 East, 103. A letter, however, referring to all the essential terms of the contract, but refusing to carry it out, is sufficient. *Bailey v. Sweeting*, 9 C. B. (N. S.) 843; 30 L. J. C. P. 150; *Buxton v. Rust*, *supra*; *Wilkinson v. Evans*, 35 L. J. C. P. 224; L. R. 1 C. P. 407. So, a memorandum, written and signed by the defendant on the back of an invoice of those goods sold to him by the plaintiff; "The cheese came to-day, but I did not take them in, for they were very badly crushed. So the candles and cheese is returned," was held sufficiently to refer to the contents of the invoice, and the two together were a sufficient memorandum to satisfy the statute. S. C. The letter referring to the terms of the contract need not be to the other party to the sale. Thus, when the defendant's agent bought for him a mare of the plaintiff, and the agent wrote to the defendant telling him the purchase he had made of the plaintiff (naming him), and the price, and the defendant wrote back saying he would send the agent a cheque for the mare "which you have purchased for me," these letters were held a sufficient memorandum. *Gibson v. Holland*, 35 L. J. C. P. 5; L. R. 1 C. P. 1. But a letter by the party's agent which, while referring to other letters, denies that they contain the terms of the contract, is not sufficient. *Thirkell v. Cambi*, 89 L. J. K. B. 1; [1919] 2 K. B. 590.

The omission of the particular mode, or time of payment, or even of the price itself, does not necessarily invalidate the contract. *Valpy v. Gibson*, 16 L. J. C. P. 241; 4 C. B. 837. Where the price is omitted, and it does not appear upon the evidence that any specific price was agreed upon, a reasonable price must be presumed, and the contract should be so stated; *Hoadley v. M'Laine*, 3 L. J. C. P. 162; 10 Bing. 482; and see sect. 8; but where the memorandum is silent as to price, and it appears by the evidence that a specific price was agreed upon, the written memorandum is imperfect, and cannot be given in evidence. *Elmore v. Kingscote*, 5 B. & C. 583; *Goodman v. Griffiths*, 1 H. & N. 574; 26 L. J. Ex. 145.

An agreement to sell on "moderate terms" is enough. *Ashcroft v. Morrin*, 11 L. J. C. P. 265; 4 M. & Gr. 450. Where the price is ambiguous, as where hops are sold "at 100s.," this may be explained orally to mean *per cwt.* *Spicer v. Cooper*, 10 L. J. Q. B. 241; 1 Q. B. 424. A buyer wrote his address in the seller's order book, which had the seller's name on the

fly-leaf, and a description and the price of the article : held a sufficient note of the buyer, though it did not specify an alteration in it to be made by the seller. *Sarl v. Bourdillon*, 1 C. B. (N. S.) 188; 26 L. J. C. P. 78.

The written memorandum must be made before action brought. *Bill v. Bament*, 11 L. J. Ex. 81; 9 M. & W. 36; *Lucas v. Dixon*, 58 L. J. Q. B. 161; 22 Q. B. D. 357. Where a written order was given by defendant for goods of the price of £10 and upwards, which defendant accepted with the accompanying invoice, and neither order nor invoice mentioned the time of payment, defendant was allowed to prove a previous conversation between plaintiff and defendant showing that the sale was to be on credit. *Lockett v. Nicklin*, 19 L. J. Ex. 403; 2 Ex. 98. In this case the acceptance was sufficient within the statute, and no written memorandum being necessary, the oral evidence was admitted as not inconsistent with the writing, and forming with it the complete contract.

The terms of the written contract cannot be orally varied. *Plevins v. Downing*, 45 L. J. C. P. 695; 1 C. P. D. 220. But forbearance on the part of the plaintiff is not a variation. *Ogle v. Vane*, 37 L. J. Q. B. 77; L. R. 3 Q. B. 272; *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598. Where the buyer, after an oral contract, receives without objection an invoice or sold note signed by the seller differing from the contract, he cannot, in a case within the statute, set up the original terms to contradict the sold note. *Harnor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53. Although the terms of a written contract required by sect. 4 to be in writing cannot be orally varied, it may be impliedly rescinded by parol. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1.

To be made and signed by the party to be charged.] It is not necessary that the note or memorandum should be signed by both parties to the contract. It is sufficient if it be signed by the party to be charged. *Laythorp v. Bryant*, 5 L. J. C. P. 217; 2 Bing. N. C. 735. A proposal in writing signed by the party to be charged and verbally accepted by the person to whom it is made is sufficient. *Reuss v. Picksley*, 35 L. J. Ex. 218; L. R. 1 Ex. 342; *Buxton v. Rust*, 41 L. J. Ex. 173; L. R. 7 Ex. 279; see *Watts v. Ainsworth*, 1 H. & C. 83; 31 L. J. Ex. 448. And it makes no difference that there is no remedy against the person who does not sign. *Allen v. Bennet*, 3 Taunt. 169. It is immaterial where the signature is placed on the document. A person writing at the head of a note, I, A. B., agree, or A. B. agrees, is sufficient, although the document is not signed at the bottom. *Knight v. Crockford*, 1 Esp. 190; *Saunderson v. Jackson*, 2 B. & P. 238; *Schneider v. Norris*, 2 M. & S. 286; *Durrell v. Evans*, 31 L. J. Ex. 337; 1 H. & C. 174; see also *Evans v. Hoare*, 61 L. J. Q. B. 470; [1892] 1 Q. B. 593, decided on Stat. of Frauds, s. 4. But the signature must be so introduced as to govern or authenticate every material part of the instrument. *Hubert v. Turner*, 11 L. J. C. P. 78; 4 Scott, N. R. 486; *Caton v. Caton*, 36 L. J. Ch. 886; L. R. 2 H. L. 127, decided on Stat. of Frauds, s. 4. The question, however, is always open to the jury, whether the party, not having regularly signed it at the foot, meant to be bound by it as it stood, or whether it was left so unsigned because he refused to complete it; but where it is ascertained that he meant to be bound by it as a complete contract, the statute is satisfied, there being a note in writing showing the terms of the contract, and recognized by him; per Ld. Abinger in *Johnson v. Dodgson*, 6 L. J. Ex. 185; 2 M. & W. 653; in which case the defendant wrote, "Sold J. Dodgson" (his own name), so and so, and requested the plaintiff's agent to sign the entry; and the court held the defendant bound by such entry. Where a person is in the habit of printing instead of writing his name that will be a sufficient signature. Per Eldon, C.J., *Saunderson v. Jackson*, supra. Where the name of a vendor is printed on a bill of parcels on which the name of the vendee is written by the vendor, that is a sufficient signature to charge the vendor. *Schneider v. Norris*, supra. Signature by mark or initials is sufficient.

Or by his agent in that behalf.] An agent, to bind the defendant by his signature, must be some third person, and not the other contracting party. *Farebrother v. Simmons*, 5 B. & A. 333; *Wright v. Dannah*, 2 Camp. 203; *Bird v. Boulter*, 4 B. & Ad. 443; *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720. A solicitor instructed by his client to deny a contract is not an agent to make or sign a note or memorandum within the section. *Thirkell v. Cambi*, 89 L. J. K. B. 1; [1919] 2 K. B. 590.

It is not necessary that an agent should have the authority of his principal by a written instrument; an oral authority is sufficient. *Rucker v. Cammeyer*, 1 Esp. 105; *Emmerson v. Heelis*, 2 Taunt. 38. Although the agent may not have had authority at the time of signature, it will be sufficient if the principal subsequently recognize the agent's act and adopt the contract. *Maclean v. Dunn*, 4 Bing. 722; 6 L. J. (O. S.) C. P. 184. Where A., by his traveller B., sold goods to C., and at the time of the sale B., at the request and in the presence of C., made an entry of the sale in C.'s book, and signed it in his, B.'s, own name, it was held there was no sufficient note within the statute to bind C., because the circumstances did not show any authority to B. to sign on C.'s behalf. *Graham v. Musson*, 5 Bing. N. C. 603; 8 L. J. C. P. 324. The plaintiff, his agent N., and the defendant E., met, and after agreeing upon the price of certain hops, N. wrote a sale note heading it "E., bought of," &c. At E.'s request an alteration was made in one of the terms of the note which was then given to him. It was held that N. was E.'s agent to draw up and sign for him a memorandum of the contract between them, and therefore E. was bound thereby. *Durrell v. Evans*, 1 H. & C. 174; 31 L. J. Ex. 337. "If the name appears on the contract and be written by the party to be bound, or by his authority, and issued or accepted by him, or intended by him as the memorandum of a contract, that is sufficient." *Per Blackburn, J., S. C.; see Thompson v. Gardiner*, 1 C. P. D. 777.

A letter signed by an agent, which, while referring to other letters, denies that they contain the terms of the contract, is not a sufficient note or memorandum of the contract. *Thirkell v. Cambi, supra*.

But the mere writing by the plaintiff's traveller in the presence of the defendant of a duplicate memorandum of the defendant's order, with his name as purchaser, which duplicate was handed to and kept by the defendant, was held insufficient, as it did not appear that the traveller had signed as agent for the defendant, or had authority so to do. *Murphy v. Boese*, 44 L. J. Ex. 40; L. R. 10 Ex. 126.

As to a telegram sent by the defendant being a sufficient signed memorandum, see *Godwin v. Francis*, 39 L. J. C. P. 121; L. R. 5 C. P. 295. The sender is not liable for a mistake of the telegraph clerk in sending the message. *Henkel v. Pape*, 40 L. J. Ex. 15; L. R. 6 Ex. 7.

Sale by auction.] A sale of goods by auction is within sect. 4. *Kenworthy v. Schofield*, 2 B. & C. 945; 2 L. J. (O. S.) K. B. 175. By the Sale of Goods Act, 1893, sect. 58, "In the case of a sale by auction—(1) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale: (2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid." An auctioneer is for some purposes an agent for both parties; therefore, where an auctioneer writes down the buyer's name in the catalogue opposite the lot, together with the price bid, it is a sufficient memorandum. *Emmerson v. Heelis, supra; Kenworthy v. Schofield, supra; Sims v. Landray*, 63 L. J. Ch. 535; [1894] 2 Ch. 318. But where the conditions of sale are not annexed or referred to in the catalogue, signing the buyer's name in the catalogue is not a compliance with the statute. *Hinde v. Whitehouse*, 7 East, 558; *Kenworthy v. Schofield, supra; Peirce v. Corf*, 43 L. J. Q. B. 52; L. R. 9 Q. B. 210; *Rishton v. Watmore*, 47 L. J. Ch. 629; 8 Ch. D. 467; nor is it if there is nothing to indicate that the name is that of the purchaser. *Dewar v.*

Mintoft, 81 L. J. K. B. 885; [1912] 2 K. B. 373. It must, however, be observed that the auctioneer only becomes the vendee's agent after his bid is accepted; before then he is exclusively the vendor's agent. *Warlow v. Harrison*, 1 E. & E. 295, 309; 28 L. J. Q. B. 18; 29 L. J. Q. B. 14. Where the defendant bid for one lot by mistake and on discovering this refused to sign the contract whereupon the auctioneer signed it as his "agent," it was held that the auctioneer had no authority to sign and the defendant was not bound. *Van Praagh v. Everidge*, 72 L. J. Ch. 260; [1903] 1 Ch. 434. Where the auctioneer himself sues, his signature for the defendant cannot be relied upon as a compliance with the statute. See *Farebrother v. Simmons*, 5 B. & A. 333; *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720. Where a person, to whom money was due from the owner of goods sold by auction, agreed with the owner before the auction that goods bought by him should be set against the debt, and he became the purchaser of goods, and was entered as such by the auctioneer, it was held that he was not bound by the conditions of sale which specified that purchasers should pay part of the price at the time of the sale and the rest on delivery. *Bartlett v. Purnell*, 4 Ad. & E. 792; 5 L. J. K. B. 169. But, in general, where there are printed conditions of sale, no oral declaration made by the auctioneer at the time of the sale is admissible in evidence to alter them. *Shelton v. Livius*, 2 C. & J. 411. Though where the goods are of less value than £10, and there is no signature, such declarations are admissible; *Eden v. Blake*, 13 M. & W. 614; 14 L. J. Ex. 194; and *semble, per Rolfe*, B., S. C., that as the contract would be complete on the fall of the hammer, a subsequent signing by the auctioneer would make no difference. Where the sale is known to be subject to a reserve, the acceptance of a bid is conditional on the reserve having been reached. *McManus v. Fortescue*, 76 L. J. K. B. 393; [1907] 2 K. B. 1.

As to the liability of the auctioneer to the buyer, see *Warlow v. Harrison*, 29 L. J. Q. B. 14; 1 E. & E. 309; *Mainprice v. Westley*, 34 L. J. Q. B. 229; 5 B. & S. 420; *Wolfe v. Horne*, 46 L. J. Q. B. 534; 2 Q. B. D. 355; *Rainbow v. Howkins*, 73 L. J. K. B. 641; [1904] 2 K. B. 322.

Sale by a broker.] Where a broker is the agent of both parties, he may bind them by signing the same contract on behalf of the buyer and seller. See the usual forms, and the effect of broker's notes fully considered in Blackburn's *Treatise on Contract of Sale*, Part I., c. 5. The practice (at least among London brokers) is to make an entry of the contract in his book and sign it, and then to send a copy of it to each party, and, in general, the "bought note" to the buyer, and "sold note" to the seller, and these notes, duly delivered by the broker to the parties, have been held, if not the contract itself, proper evidence of the contract, and constitute a sufficient note in writing to bind each party. *Rucker v. Cammeyer*, 1 Esp. 105; *Thornton v. Meux*, M. & M. 43; *Trueman v. Loder*, 11 Ad. & E. 589. And such notes are admissible, where the entry in the broker's book has never been signed by him. *Goom v. Aflalo*, 6 B. & C. 117; 5 L. J. (O. S.) K. B. 31. But if the entry in the book has been signed, it is questionable whether this is not the best evidence, as being the original entry of the contract. See *Heyman v. Neale*, 2 Camp. 337. "Where there has been an entry of the contract by the broker in his book, signed by him, I should hold . . . that this entry is the binding contract between the parties, and that a mistake made by him when sending them a copy of it, in the shape of a bought or sold note, would not affect its validity." . . . "But the broker, to save himself trouble, now omits to enter and sign any contract in his book, and still sends the bought and sold note as before. If these agree they are held to constitute a binding contract. If there be any material variance between them they are both nullities, and there is no binding contract." *Per* Ld. Campbell, C.J., in *Siewewright v. Archibald*, 17 Q. B. 124-5; 20 L. J. Q. B. 538; and see *per* Patteson, J., S. C. Where there is a material variance between the bought and sold notes, and the

broker has not signed the contract in his book, there is no valid contract. *Grant v. Fletcher*, 5 B. & C. 436; *Gregson v. Ruck*, 4 Q. B. 737; *Cowie v. Remfrey*, 5 Moo. P. C. 232. But where the differences can be reconciled by oral testimony of mercantile usage, and shown to be only apparent, such evidence is admissible. *Bold v. Rayner*, 1 M. & W. 343; *Kempson v. Boyle*, 3 H. & C. 763; 34 L. J. Ex. 191. Where the bought note was in the form "Bought of R. & Co., for account of H. & Co.," and the sold note in the form "Sold to our principals for account of R. & Co.," it was held there was no variance between them, oral evidence being admissible to show who the principals were. *Cropper v. Cook*, L. R. 3 C. P. 194. Where the sold note is in the name of an agent, it may be shown orally on behalf of the buyer, that in all previous transactions between them the vendor had contracted in the agent's name. *Trueman v. Loder*, 11 A. & E. 589. So where the contract was made by a broker, on behalf of principals whose names were not disclosed, oral evidence that by the usage in London in such a case the broker is liable to be treated as principal, is admissible to charge the broker, unless the contract provides for the final determination of differences by him.

Where a broker employed to buy goods for his principal, A., himself sells the goods, he cannot sign a valid note, so as to bind A., and, indeed, it seems that there is no contract at all. *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720. If pretending to execute an order to buy, he sells his own property, the sale may be rescinded notwithstanding that the value of the thing sold has decreased between the date of the sale and the date of the action for rescission. *Armstrong v. Jackson*, 86 L. J. K. B. 1375; [1917] 2 K. B. 822. In an action by the purchaser against the seller of goods for not delivering them, the bought note *per se* is evidence of the contract against the seller on proof of the employment of the broker by him. *Hawes v. Rorster*, 1 M. & Rob. 368. The conduct of the defendant may afford evidence that the broker was authorized to contract for him. *Thompson v. Gardiner*, 1 C. P. D. 777. If the seller intend to insist on a variance between the bought and sold note, it is for him to produce and prove the latter. *Hawes v. Forster*, *supra*. So the sold note signed by the broker acting for both parties, and delivered by him to the purchaser, is a sufficient memorandum to bind the purchaser within sect. 17, in the absence of proof of any variance between it and the bought note. *Parton v. Crofts*, 13 C. B. (N. S.) 11; 33 L. J. C. P. 189. Even if they differ, yet if one be signed by a principal in the contract, it will be evidence of the contract as against him. *Rowe v. Osborne*, 1 Stark. 140. So where the notes disagree, the entry in the book, if brought home to the knowledge of the parties, or even if not known to them, may be evidence of the contract: *semb. Thornton v. Charles*, 9 M. & W. 802; 11 L. J. Ex. 302; and see the observations of Parke, B., in that case; but the point is not a settled one; see *Heyman v. Neale*, 2 Camp. 337; *Siewewright v. Archibald*, 20 L. J. Q. B. 529; 17 Q. B. 103; and *Parton v. Crofts*, *supra*. Where the broker in the bought and sold notes described the sellers' firm as A., B., and C.; but the firm had, unknown to the broker, been changed to A., D., and E., it was held that A., D., and E. might sue on the contract, it not appearing that the defendant had been prejudiced or excluded from a set-off, and there being some evidence of his having treated the contract as subsisting with the plaintiffs. *Mitchell v. Lapage*, Holt, N. P. 253.

A material alteration in the sale note by the broker, at the instance of the seller, after the bargain made and without the consent of the purchaser, precludes the seller from recovering. *Powell v. Divett*, 15 East, 29. See also *Roe v. Naylor*, 87 L. J. K. B. 958. So, where the buyers altered the bought note in a material particular by an addition at the foot of it (referred to by an asterisk in the body of it), though the breach was unconnected with the alteration. *Mollett v. Wackerbarth*, 5 C. B. 181; 17 L. J. C. P. 47. Where the sold note was sent back altered and signed by the seller, and the buyer proceeded on it as the contract, it was held to be a question for

the jury whether this was a contract, or only an offer by the seller provided a bought note to the like effect were signed by the buyer. In this case there was no bought note in evidence at all, and the broker was agent of the buyer only. *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310. If the two principals agree in the broker's presence, and the broker's note does not correspond with the terms agreed upon, then there is no written contract by an agent lawfully authorized, and a party, who did not assent to the alteration, is not bound. *Pitts v. Beckett*, 13 M. & W. 743; 14 L. J. Ex. 358; *contra*, where there is evidence from which a subsequent assent to such alteration may be implied. *Harnor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53.

A distinction has been made between a *contract in writing* and a *note or memorandum in writing of a contract* within the Stat. of Frauds, s. 17 (now the S. of G. Act, 1893, s. 4); see the judgments in *Sievewright v. Archibald*, 17 Q. B. 107, 114, 124; 20 L. J. Q. B. 538; and in *Parton v. Crofts*, 13 C. B. (N. S.) 11; 33 L. J. C. P. 189, but in many cases this distinction seems to have been lost sight of.

Duties of Seller and Buyer.] It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them in accordance with the terms of the contract, sect. 27; and unless otherwise agreed, payment and delivery are concurrent conditions, sect. 28. Under a contract each shipment of the goods was to be deemed a separate contract, and payment was to be "by confirmed bankers' credit." The seller made some shipments with knowledge of the fact that the buyer had not opened a "confirmed" bankers' credit, but afterwards, without previous notice to the buyer, he purported to cancel the contract upon the ground that the credit was not in order. It was held that the seller, by waiving for a time the breach of the condition as to a confirmed credit, was not thereby bound to continue to waive it, but that he was not entitled to cancel the contract without notice to the buyer so as to give him an opportunity of complying with the condition. *Panoutsos v. Raymond Hadley Corporation*, 86 L. J. K. B. 1325; [1917] 2 K. B. 473.

ACTION FOR NOT ACCEPTING GOODS SOLD.

Sect. 50 (1), "Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may maintain an action against him for damages for non-acceptance."

In an action for not accepting goods sold, the plaintiff may be put to proof of the contract, the performance of all conditions precedent on his part, the refusal to receive, and the amount of damage.

Readiness of the plaintiff to deliver.] By sect. 28, unless otherwise agreed, delivery and payment are to be concurrent acts, *i.e.* the seller must be ready and willing to give possession of the goods in exchange for the price. Sect. 29, lays down the rules as to delivery. Where readiness and willingness is denied it is enough for the plaintiff to show, either that he has offered to deliver, or that the defendant has dispensed with delivery, or has made it an idle and useless form to attempt to deliver. The plaintiff must also prove his *ability* to deliver; see *Lawrence v. Knowles*, 5 Bing. N. C. 399; an article corresponding with that which was contracted for, *per* Cresswell, J., in *Boyd v. Lett*, 1 C. B. 222, 225; 14 L. J. C. P. 111. It is sufficient "that the non-completion of the contract was not the fault of the plaintiffs, and that they were disposed and able to complete it, if it had not been renounced by the defendant." *Cort v. Ambergate Ry. Co.*, 17 Q. B. 127, 144; 20 L. J. Q. B. 460; *Baker v. Farminger*, 28 L. J. Ex. 130; *Braithwaite v. Foreign Hardwood Co.*, 74 L. J. K. B. 688; [1905] 2 K. B. 543.

Under a contract for the sale of a cargo, if the buyer reject a cargo tendered, the seller may, within the time limited by the contract, tender another cargo. *Borrowman v. Free*, 4 Q. B. D. 500; 48 L. J. Q. B. 65. As to what is sufficient tender of bills of lading, on the sale of goods to be shipped, see *Sanders v. Maclean*, 11 Q. B. D. 327; *Landauer v. Craven*, 81 L. J. K. B. 650; [1912] 2 K. B. 94.

Where the plaintiff has, otherwise than at the buyer's request, delayed delivery beyond the proper time, he cannot enforce acceptance, unless the defendant has entered into a new hinding contract. *Plevins v. Downing*, 45 L. J. C. P. 695; 1 C. P. D. 220. As to waiver by the buyer of performance by the seller of a term of the contract, see *Leather Cloth Co. v. Hieronimus*, 44 L. J. Q. B. 54; L. R. 10 Q. B. 140. See, however, *Sanderson v. Graves*, 44 L. J. Ex. 210; L. R. 10 Ex. 234.

Refusal to receive.] It must be shown that the defendant has refused to receive under circumstances which do not warrant a refusal. Therefore, where a tender is necessary, it must be made at a reasonable time and place, and be such as to afford the defendant an opportunity of examining and receiving the goods; for without such opportunity it is no tender. See sect 34 (2). Thus, a tender of articles in closed casks, so as to prevent inspection, is no tender. *Isherwood v. Whitmore*, 11 M. & W. 347; 12 L. J. Ex. 318. Nor is it sufficient to show a tender of the goods at the defendant's warehouse at a late hour after it is shut up, and the defendant has left it. But if the defendant be present, and able to examine and receive them, the tender will not be bad merely because the hour is late and unreasonable. *Startup v. Macdonald*, 6 M. & Gr. 593; 12 L. J. C. P. 477. On the sale of goods for shipment by steamer or steamers, the defendant must accept such part of the goods as arrives in one steamer. *Brandt v. Lawrence*, 46 L. J. Q. B. 237; 1 Q. B. D. 344. But, where, on the sale of 25 tons of pepper, October shipment, the name of vessel, &c., were to be declared within 60 days from the date of the bill of lading, and within the time 25 tons were declared by the B. vessel, only 20 tons of which complied with the contract, and no further declaration was made, it was held that the defendant need not accept the 20 tons. *Reuter v. Sala*, 48 L. J. C. P. 492; 4 C. P. D. 239. The tender must not be of a larger quantity than was bought unless the excess is relatively trifling and not charged for. *Shipton Anderson & Co. v. Weil*, 81 L. J. K. B. 910; [1912] 1 K. B. 574. If the buyer give a limited order for certain specified goods, and the seller send those and others from a distant place in one package, charged at a lump sum, the consignee may repudiate the whole and refuse to receive the package. *Levy v. Green*, 8 E. & B. 575; 27 L. J. Q. B. 111; 1 E. & E. 969; 28 L. J. Q. B. 319; and see *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J. Q. B. 293; 29 L. J. Q. B. 256; *Tamvaco v. Lucas*, 1 E. & E. 581; 28 L. J. Q. B. 150, 301. If the defendant notify his intention to refuse, and forbid the plaintiff to deliver goods ordered to be made, then the plaintiff need not proceed to complete the contract on his part, and may show this under an alleged refusal to accept, although the goods are not ready for delivery, and could not be delivered; for the plaintiff is thereby "discharged" from proceeding further; and such a notice to the plaintiff will support an allegation that the defendant "prevented and discharged" the plaintiff from supplying the goods and executing the contract. *Cort v. Ambergate Ry. Co.*, 20 L. J. Q. B. 460; 17 Q. B. 127. And a countermand by the person ordinarily representing the defendant in his dealings with the plaintiff (as the engineer of a railway) is sufficient, although the defendant be a corporate body, and the notice not under seal; S. C.

Damages.] In an action for not accepting goods, by sect. 50 (2), "The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the buyer's breach of contract. (3) Where there is an available market for the goods in question the

measure of damages is *prima facie* to be ascertained by the difference between the contract price and the market or current price at the time or times when the goods ought to have been accepted, or, if no time was fixed for acceptance, then at the time of the refusal to accept."

By sect. 37, "When the seller is ready and willing to deliver the goods, and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery, and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract."

By sect. 48, "(3) Where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to re-sell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract.

"(4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim the seller may have for damages."

The measure of damages under sect. 50 (3) is not affected by notice given by the buyer, while the goods are on their way, that he would not accept them. See *Phillipotts v. Evans*, 9 L. J. Ex. 33; 5 M. & W. 475; and see *Leigh v. Patterson*, 8 Taunt. 540. Where the defendant has ordered goods and then wrongfully countermanded the order, and thereupon the vendor ceases to manufacture them, he is entitled to damages for the goods in hand, and to such profit as he would have made if the contract had been fully carried out. *Dunlop v. Higgins*, 1 H. L. C. 381; *In re Vic Mill Co.*, 82 L. J. Ch. 251; [1913] 1 Ch. 465. Where the payment was to be by bill, plaintiff may recover the amount which would have accrued on it for interest. *Boyce v. Warburton*, 2 Camp. 480. Where no difference is proved between the contract price and the market price, only nominal charges are recoverable. See *Valpy v. Oakeley*, 20 L. J. Q. B. 380; 16 Q. B. 941.

Defence.

By Rules, 1883, O. xix. r. 15, the defendant must plead specially all facts not previously stated on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim. Where, therefore, the defence is that the contract is materially different from the one alleged in the statement of claim, or that the goods were in fact sold with a qualification or condition annexed, which the goods tendered did not satisfy, this must be specially pleaded in the defence.

The admissibility of evidence under certain common defences will be found under the general head of *Defences in actions on simple contracts*, post.

Denial of contract.] By Rules, 1883, O. xix. r. 20, a denial of a contract operates only as a denial of the making of the contract in fact, and not of its legality or its sufficiency in law, whether with reference to the Statute of Frauds or otherwise. This requires the defendant specifically to allege in his defence that he relies on the objection to the contract arising under that statute. *Clarke v. Callow*, 46 L. J. Q. B. 53. An objection on the ground of non-compliance with the Sale of Goods Act, 1893, s. 4, must also be specially pleaded.

The following are defences which must also be specially pleaded:—Where

a joint order is given for several articles at several prices, the contract is entire, and the purchaser may refuse to accept one, unless the others are delivered; *Champion v. Short*, 1 Camp. 53; and where goods are sold as "about" a certain quantity, "more or less," the latter words are intended to provide only for a small excess, and the purchaser is not bound to accept 350 tons on a bargain for "about 300 tons, more or less"; at least, not unless it be shown that a large excess was contemplated. *Cross v. Eglin*, 2 B. & Ad. 106; *Tamvaco v. Lucas*, 1 E. & E. 581; 28 L. J. Q. B. 150, 301. See also *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; 26 L. J. C. P. 194; *Macdonald v. Longbottom*, 1 E. & E. 977, 987; 28 L. J. Q. B. 293; 29 L. J. Q. B. 256; *Beckh v. Page*, 5 C. B. (N. S.) 708; 7 *Id.* 861; 28 L. J. C. P. 164, 341; *Miller v. Borner*, 69 L. J. Q. B. 429; [1900] 1 Q. B. 691; and *Jardine, Matheson & Co. v. Clyde Shipping Co.*, 79 L. J. K. B. 634; [1910] 1 K. B. 627. As to the effect of delivery of the wrong quantity of goods, or of goods mixed with others, or by instalments, see sect. 30 and sect. 31 (2). Delivery of a slightly excess quantity, if not to be paid for, does not vitiate the delivery. *Shipton, Anderson & Co. v. Weil*, 81 L. J. K. B. 910; [1912] 1 K. B. 574. Where the defendant instructed the plaintiffs to buy for him 500 tons of sugar, "50 tons more or less of no moment if you are enabled to get a suitable vessel"; and the plaintiffs bought 400 tons, parcel by parcel, according to the usage of the market, and could buy no more at the price named, it was held that the defendant was not bound to accept the 400 tons, as the usage could not affect the express order. *Ireland v. Livingston*, L. R. 5 Q. B. 516 (reversed on another ground, 41 L. J. Q. B. 201; L. R. 5 H. L. 395). See, however, *Johnston v. Kershaw*, 36 L. J. Ex. 44; L. R. 2 Ex. 82. A contract to sell "all spars manufactured by M., say about 600 red pine spars," was held not to amount to a warranty as to the quantity of the spars. *M'Connel v. Murphy*, L. R. 5 P. C. 203. See also *Gwillim v. Daniell*, 2 C. M. & R. 61. A contract to buy a "cargo of about the following lengths, &c., in all about 60 fathoms," is not satisfied by the delivery of 60 fathoms, part of a cargo of 80 fathoms, although the 60 fathoms were severed from the remainder, for "cargo" means the whole loading of the ship. *Kreuger v. Blanck*, 39 L. J. Ex. 160; L. R. 5 Ex. 179, following *Sargent v. Reed*, Str. 1228; *Borrowman v. Drayton*, 46 L. J. Ex. 273; 2 Ex. D. 15; *Anderson v. Morice*, 46 L. J. C. P. 11; 1 App. Cas. 713; distinguished in *Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co.*, 56 L. J. P. C. 19; 12 App. Cas. 128; see also *In re Harrison & Micks, Lambert & Co.*, 86 L. J. K. B. 573; [1917] 1 K. B. 755. A contract to supply "the whole steel" required for the Forth Bridge, subject to conditions which contained the clause, "the estimated quantity of steel we understand to be 30,000 tons, more or less," is not limited by the clause. *Tancred v. Steel Co. of Scotland*, 15 App. Cas. 125.

A sale of goods "on arrival," or "to arrive" in a particular ship, is a contract for the sale of goods at a future period, subject to the double condition of the arrival of the ship and the goods being on board, and is not a warranty on the part of the seller that the goods shall arrive. *Boyd v. Siffkin*, 2 Camp. 326; *Hawes v. Humble*, *Id.* 327, n.; *Lovatt v. Hamilton*, 5 M. & W. 639; *Johnson v. Macdonald*, 9 M. & W. 600; 12 L. J. Ex. 99. See also *Smith v. Myers*, L. R. 5 Q. B. 429; L. R. 7 Q. B. 139; 41 L. J. Q. B. 91; and *Nickoll v. Ashton*, 70 L. J. K. B. 600; [1901] 2 K. B. 126. While there is no warranty in such a case that the goods will arrive, the seller is under an obligation to ship the goods or get them so far under his control that they are placed on board a ship. *Barnett v. Javeri*, 85 L. J. K. B. 1703; [1916] 2 K. B. 390. But a contract for the sale of goods "now on passage and expected to arrive by," or "to be delivered on the safe arrival of," a certain ship; *Gorrissen v. Perrin*, 2 C. B. (N. S.) 681; 27 L. J. C. P. 29; *Hale v. Rawson*, 4 C. B. (N. S.) 85; 27 L. J. C. P. 189; is conditional on the arrival of the ship only. The stipulation in a contract of sale, "the cotton to be taken from the quay," was held an independent

stipulation for the seller's benefit, and not a condition precedent which the purchaser had a right to insist on being performed. *Neill v. Whitworth*, 35 L. J. C. P. 304; L. R. 1 C. P. 684. See also *Castle v. Playford*, 41 L. J. Ex. 44; L. R. 7 Ex. 98. A sale of a cargo "from the deck" means that the vendor is to pay the harbour dues. *Playford v. Mercer*, 22 L. T. 41.

When goods are supplied under a single special contract with a committee of several persons, and a new member of the committee is added before the contract has been performed, he cannot be joined as co-defendant in an action for not accepting, though he assented to and recognized the contract after he had become a member; *Beale v. Mouls*, 16 L. J. Q. B. 410; 10 Q. B. 976; accord. *Newton v. Belcher*, 18 L. J. Q. B. 53; 12 Q. B. 921; and it matters not whether the property in the goods sold vested in successive portions during the execution of the contract. But it might be otherwise, if the circumstances were such that a new contract could be implied, on successive deliveries, or successive acts, done by the plaintiff; as on a standing contract to work for a firm, on certain terms, when required; see the cases, *supra*, and *Helsby v. Mears*, 5 B. & C. 504; 4 L. J. (O. S.) K. B. 214. A person employed by the defendant, as broker to buy the goods, cannot himself be the vendor; *Sharman v. Brandt*, 40 L. J. Q. B. 312; L. R. 6 Q. B. 720; *King, Viall & Benson v. Howell*, 27 T. L. R. 114; even by the usage of the market, if the principal were ignorant of the usage. *Robinson v. Mollett*, 39 L. J. C. P. 290; L. R. 7 H. L. 802.

Repudiation of the goods.] By sect. 13, "Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description." The first paragraph applies "to all cases in which the purchaser has not seen the goods, but is relying on the description alone." *Varley v. Whipp*, 69 L. J. Q. B. 333; [1900] 1 Q. B. 513. "If a man agrees to sell something of a particular description, he cannot require the buyer to take something which is of a different description, and a sale of goods by description implies a condition that the goods shall correspond to it. But if a thing of a different description is accepted in the belief that it is according to the contract, then the buyer cannot return it after having accepted it; but he may treat the breach of the condition as if it was a breach of warranty; that is to say, he may have the remedies applicable to a breach of warranty. That does not mean that it was really a breach of warranty, or that what was a condition in reality had come to be degraded or converted into a warranty. It does not become degraded into a warranty *ab initio*, but the injured party may treat it as if it had become so, and he becomes entitled to the remedies which attach to a breach of warranty." *Per* Ld. Loreburn, L.C., in *Wallis v. Pratt*, 80 L. J. K. B. 1058; [1911] A. C. 394.

Sect. 14 defines the implied condition as to quality and fitness on the sale of goods.

Sale by sample.] Sect. 15. "(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. (2) In the case of a contract for sale by sample—(a) there is an implied condition that the bulk shall correspond with the sample in quality. (b) there is an implied condition that the buyer shall have a reasonable opportunity of comparing the bulk with the sample: (c) there is an implied condition that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample."

Hence in the case of sales by sample, if the bulk do not correspond with it, the defendant may refuse to receive it, and may keep the article any reasonable time to examine, and then repudiate it. But where a contract for the sale of barley was "about as *per sample*," and contained an arbitration

clause, a custom of the London Corn Exchange applicable to such contracts, that the buyer might not reject for difference or variation in quality, unless excessive or unreasonable, and so found by arbitration, is good, and by sect. 55 varies the condition implied by sect. 15 (2). *In re Walkers, &c., & Shaw & Co.*, 73 L. J. K. B. 325; [1904] 2 K. B. 152.

In sales by sample as to the obligation on broker, where he is acting for both parties, to communicate to buyer depreciatory statements as to the quality of the goods, which he has heard, but which he honestly believes to be untrue, see *Payne v. Lewis & Peat*, [1917] W. N. 195.

Sect. 36: "Unless otherwise agreed, where goods are delivered to the buyer, and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them."

By sect. 53 (1), where there is a sale of a specific article with a warranty, it cannot be returned for breach of warranty only. In the case, however, of an executory contract for the supply of goods of a particular quality, the goods may be refused or returned, if not of the kind contracted for. *Street v. Blay*, 2 B. & Ad. 463; *Heilbutt v. Hickson*, 41 L. J. C. P. 228; L. R. 7 C. P. 438. Thus, where a contract is made for the purchase of hops by sample, conditional on sulphur not having been used in their growth, if sulphur have been so used, the defendant may reject the hops, although they correspond with the sample; *Bannerman v. White*, 10 C. B. (N. S.) 844; 31 L. J. C. P. 28; and where goods are sold under a certain denomination, the defendant is entitled to have such goods delivered to him as are commercially known under this denomination, though he may have bought after inspection of the bulk and without warranty. *Josling v. Kingsford*, 13 C. B. (N. S.) 447; 32 L. J. C. P. 94; and see *Hopkins v. Hitchcock*, 14 C. B. (N. S.) 65; 32 L. J. C. P. 154; *Jones v. Just*, 37 L. J. Q. B. 89; L. R. 3 Q. B. 197, and *Bowes v. Shand*, 2 App. Cas. 455, 480; 46 L. J. Q. B. 561. A contract for the sale of 600 tons (8,200 bags) of rice to be shipped at Madras "during the months of March and/or April," *per Rajah*, is not satisfied by the delivery of rice all shipped in February except 50 bags shipped on March 2nd. S. C.; *In re General Trading Co. & Van Stolk's Commissiehandel*, 16 Com. Cas. 95; *Aron & Co. v. Comptoir Wegimont*, 37 T. L. R. 879. See also *Reuter v. Sala*, 48 L. J. C. P. 492; 4 C. P. D. 239. On the sale of goods by a manufacturer of such goods, who is not otherwise a dealer in them, the buyer is entitled to receive the goods as of the manufacturer's own make; *Johnson v. Raylton*, 50 L. J. Q. B. 753; 7 Q. B. D. 438; unless a custom in the particular trade is proved that the goods of another maker may be substituted. S. C.

So, if the sale note refer to the sample, and the bulk prove not to be of the same kind as the sample, the buyer may reject the goods, even though there be a condition in the contract that the contract should not be avoided if the bulk prove of inferior quality to the sample, but that an allowance should in that case be made. *Azémar v. Caselar*, 36 L. J. C. P. 124, 263; L. R. 2 C. P. 431, 677; see *Vigers v. Sanderson*, 70 L. J. K. B. 383; [1901] 1 K. B. 608. But, generally, where the seller produces a sample, and represents that the bulk is of equal quality, and the sale note does not refer to any sample, the defence that the goods are not equal to it is inadmissible. *Meyer v. Everth*, 4 Camp. 22; *Pickering v. Dowson*, 4 Taunt. 779; *Kain v. Old*, 2 B. & C. 634. The defendant may, however, show that all sales of tobacco are by sample by general usage in that trade, though there was no mention of sample in the contract. *Syers v. Jonas*, 2 Ex. 111. And the plaintiff may show in reply the custom of certain markets as to the time for objecting to the bulk, or as to returning, or allowing for, articles not answering to the sample. *Sanders v. Jameson*, 2 Car. & K. 557; *Cooke v. Riddellien*, 1 Car. & K. 561.

By sect. 15 (2, b) there is an implied condition that the purchaser by sample shall have a reasonable opportunity of comparing the bulk with the sample. The place of inspection is, in the absence of express stipulation,

presumed to be the place of delivery; *Perkins v. Bell*, 62 L. J. Q. B. 91; [1893] 1 Q. B. 193; if after an inspection of a sample there the purchaser orders the goods to be sent to his sub-vendee, he cannot afterwards reject them. S. C.

Sect. 10 (1): "Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulation as to time is of the essence of the contract or not depends on the terms of the contract."

Although time specified for delivery of goods is of the essence of the contract, the buyer may, after the period has expired, lead the seller to believe that the contract still subsists, and to act upon the belief at serious expense to himself; in such a case a new agreement may be implied for an extension of the time for delivery. *Hartley v. Hymans*, 90 L. J. K. B. 14; [1920] 3 K. B. 475.

Where a contract for the sale of goods, to arrive by ship, provides that the name of the vessel, marks, and particulars shall be declared "within 60 days from the date of the bill of lading," such time is of the essence of the contract, and if such declaration be not made within the time limited the buyer is not bound to accept the goods. *Reuter v. Sala*, 4 C. P. D. 239, 249; 48 L. J. C. P. 492. See, further, *Hoare v. Rennie*, 5 H. & N. 19; 29 L. J. Ex. 73 (explained by C. A. in *Mersey Steel and Iron Co. v. Naylor*, 9 Q. B. D. 658, 671; 51 L. J. Q. B. 576; see also S. C., 53 L. J. Q. B. 497; 9 App. Cas. 446, 447); *Coddington v. Paleologo*, 36 L. J. Ex. 73; L. R. 2 Ex. 193; and *Bowes v. Shand*, 46 L. J. Q. B. 561; 2 App. Cas. 455. But in general a partial breach by the plaintiff of his contract to deliver does not justify the defendant in subsequently refusing to accept. *Jonassohn v. Young*, 4 B. & S. 296; 32 L. J. Q. B. 385. See further as to the effect of a partial breach, *Simpson v. Crippin*, 42 L. J. Q. B. 28; L. R. 8 Q. B. 14, and *Freeth v. Burr*, 43 L. J. C. P. 91; L. R. 9 C. P. 208.

Fraud.] A wilful misrepresentation by the vendor, which induced the defendant to purchase, will warrant the defendant in refusing to complete the contract; but this must be pleaded specially. Even where the sale is "with all faults," any artifice to disguise a fault may vitiate the sale. *Baglehole v. Walters*, 3 Camp. 154; *Schneider v. Heath*, *Id.* 506. See *Ward v. Hobbs*, 48 L. J. C. P. 281; 4 App. Cas. 13.

Sect. 58: "(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer. (4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller. Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

ACTION FOR GOODS BARGAINED AND SOLD.

By sect. 49, "(1) Where, under a contract of sale, the property in the goods has passed to the buyer, and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may maintain an action against him for the price of the goods.

"(2) Where, under a contract of sale, the price is payable on a day certain irrespective of delivery, and the buyer wrongfully neglects or refuses to pay such price, the seller may maintain an action for the price, although the property in the goods has not passed, and the goods have not been appropriated to the contract." See *Stein, Forbes & Co. v. County Tailoring Co.*, 115 L. T. 215.

Sects. 16—19 relate to the passing of the property on a contract of sale; see *post*, *Action for conversion—Vesting of the property—Sale of goods*.

The plaintiff, an artist, agreed "to finish three pictures for F. (the defendant), which are now submitted to him, in my best manner, for £60 and a clock." The pictures were not then completed, but afterwards the defendant expressed approval of them and said he would send for them: held, to constitute sufficient appropriation of the pictures to support the common counts for goods bargained and sold, and sold and delivered. *Girardot v. Fitzpatrick*, 21 L. T. 470. Where acceptance of goods is conditional on something to be done by the seller, if the buyer prevent the possibility of the seller's fulfilling the condition, the contract is satisfied. *Mackay v. Dick*, 6 App. Cas. 251; applied in *Kleinert v. Abbosso Gold Mining Co.*, 58 S. J. 45.

The plaintiffs in London sold to the defendants a quantity of butter, expected from Sligo, of specified quality and price. The butter was to be shipped for London in October, and paid for by bill at two months from the landing. The butter was not shipped till November; but the defendants waived the objection, and accepted the invoice and bill of lading. The butter having been lost by shipwreck on the passage, it was held that the property had passed to the defendants, and that they might be sued for goods bargained and sold, or, *per Park, J.*, for goods sold and delivered. *Alexander v. Gardner*, 1 Bing. N. C. 671. Where goods are destroyed, the question is not necessarily whether the property had passed, but at whose risk the goods were; *Castle v. Playford*, L. R. 7 Ex. 98; 41 L. J. Ex. 44; *Martineau v. Kitching*, 41 L. J. Q. B. 227; L. R. 7 Q. B. 436, 455, 459; in such case, if the price were not ascertained prior to the destruction, it must be ascertained as nearly as possible. S. C. *Id.*; see, further, *Woodburn v. Motherwell*, [1917] S. C. 533.

Sect. 20: "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not. Provided that where the delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault. Provided also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodian of the goods of the other party."

As to re-sale by the seller on default of the buyer, see sect. 48 (3, 4).

By Rules, 1883, O. xxi. r. 3, a defence in denial must deny the order or contract or the amount claimed.

ACTION FOR NOT DELIVERING GOODS SOLD.

Sect. 51 (1): "Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery."

In an action against the seller of goods for not delivering them, the plaintiff may be called upon, by proper defences, to prove the contract and the breach, the performance of all conditions precedent on his part, and the amount of damages. Much of the matter under the last preceding head applies equally to this action.

Construction of the contract—Time, &c.] Where L. & Co., brokers, sold hemp by auction (described in the invoice as bought of "L. & Co."), and received part of the price, it was held that they had made themselves responsible as sellers, and that they could not defend themselves in an action for non-delivery, by evidence that they sold as agents only, and that the invoice had been made out in their names according to a local custom of

brokers to secure the passing of the purchase-money through their hands. *Jones v. Littledale*, 6 Ad. & E. 486. But where the invoice does not itself constitute a contract (as in fact it rarely does), but is only used to show that the defendant was the vendor of goods sold by a previous contract, the defendant may contradict it by showing that he was not the real vendor, and that his name was put in the invoice at the plaintiff's request. *Holding v. Elliott*, 5 H. & N. 117; 29 L. J. Ex. 134; and *per cur.*, an invoice is, generally, not *per se* a contract or any estoppel. S. C. An auctioneer may be liable for non-delivery of goods sold by him, although his principal's name appears on the conditions. *Woolfe v. Horne*, 46 L. J. Q. B. 534; 2 Q. B. D. 355; *Rainbow v. Howkins*, 73 L. J. K. B. 641; [1904] 2 K. B. 322.

As to when stipulations as to time amount to a condition precedent, see sect. 10 (1). Where the contract was for the sale of sponge, to be paid for by ochre, at, &c., the value to be delivered on or before the 24th inst., in an action for not delivering the sponge, it was held that the delivery of the ochre on the 24th was a condition precedent to the plaintiff's right of action. *Parker v. Rawlings*, 4 Bing. 280; 5 L. J. (O. S.) C. P. 174. So where the defendant undertook to supply a steam-engine for a vessel of the plaintiff according to drawings and specifications of P. B., and the specification required its completion within two months: the court held that time was essential, and that an action lay for non-delivery within that time. *Wimshurst v. Deeley*, 2 C. B. 253. But where the defendant has sold to plaintiff specific goods, to be taken and paid for at a certain time, and the plaintiff fails to pay at the end of that time, the defendant, though he retains a lien on them if in his possession, cannot resell them; but the plaintiff, on tendering the money at a subsequent day, will entitle himself to receive them. *Martindale v. Smith*, 1 Q. B. 389; *Woolfe v. Horne*, *supra*; *Page v. Cowasjee*, L. R. 1 P. C. 127, 145. So if there be a sale of goods to be delivered to the vendee "as required," the specification requiring delivery must be made within a reasonable time; *Ross v. Shaw*, [1917] 2 I. R. 367; also that the contract must be completed within a reasonable time after specification. *Id.* Such reasonable time for delivery may be explained and controlled by a trade custom or usage. *Id.* But the vendor cannot rescind the contract till he has called on the vendee to require or take them, even though an unreasonable time has elapsed; *Jones v. Gibbons*, 8 Ex. 920; 22 L. J. Ex. 347; unless an inordinate length of time has elapsed without the buyer calling for, or the seller requiring him to take, further deliveries. In such a case the court may infer an abandonment of the contract. *Pearl Mill Co. v. Ivy Tannery Co.*, 88 L. J. K. B. 134; [1919] 1 K. B. 78. Where, too, a reasonable time has elapsed, and the country where the goods are produced is enemy territory, trading with persons in which is illegal, the vendor may repudiate the contract without being obliged to offer delivery of the goods to the buyer. *Ross v. Shaw*, [1917] 2 I. R. 367.

Where a contract is to make and deliver goods "as soon as possible," there is, at any rate, an implied contract that the maker has all the necessary appliances ready for the manufacture. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670.

An invitation to tender for supplying meat to a workhouse specified that a written contract would be required to be signed upon acceptance of the tender: held that a written tender of the defendant, withdrawn by him after acceptance by the plaintiffs, was not a contract on which they could sue. *Kingston-on-Hull (Guardians) v. Petch*, 10 Ex. 610; 24 L. J. Ex. 23. A contract to deliver 150 tons of girders by three deliveries of 50 each on certain days, according to drawings provided by the plaintiff, is one entire contract; and if the plaintiff do not supply drawings within a reasonable time, the defendant is under no obligation to deliver any girders. *Kingdom v. Cox*, 17 L. J. C. P. 155; 5 C. B. 522. The intention of the parties is to be looked at in the construction of all contracts; and the decision on one is seldom a guide to the construction of another. *Bannerman v. White*,

10 C. B. (N. S.) 844; 31 L. J. C. P. 28. See further the cases cited under the next heading.

A promise by the seller M. to a purchaser, following a contract of sale, "If we are satisfied with you as a customer, we would favourably consider an application from you at the expiration of the term for a renewal of the same for another period," imposes on M. no obligation to renew the contract. *Montreal Gas Co. v. Vasey*, 69 L. J. P. C. 134; [1900] A. C. 595.

Readiness to accept and to pay.] In order to prove that the plaintiff was ready and willing to accept the goods and to pay for the same, it will not be necessary to prove a tender of the money; *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447; and a demand of the goods is sufficient evidence that the plaintiff was ready and willing to pay; *Wilks v. Atkinson*, 1 Marsh, 412; *Levy v. Herbert (Lord)*, 7 Taunt. 318; and this though the demand may be by the plaintiff's servant. *Squier v. Hunt*, 3 Price, 68.

Sect. 31 (2): "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a severable breach giving rise to a claim for compensation but not to a right to treat the whole contract as repudiated."

When the vendee becomes insolvent, and takes no steps to obtain delivery in performance of the contract, he practically gives notice to his creditors that he does not intend to perform his contract, and this, when assented to by the vendor, amounts to a rescission of the contract. *Ex pte. Chalmers*, 42 L. J. Bk. 37; L. R. 8 Ch. 289, followed in *Morgan v. Bain*, 44 L. J. C. P. 47; L. R. 10 C. P. 15. See also *Bloomer v. Bernstein*, 43 L. J. C. P. 375; L. R. 9 C. P. 588, as to the questions to be left to the jury in such a case. But the insolvency must be an inability to pay, avowed either in act or word, and a consequent intention of the vendee not to pay his debts when due. *Ex pte. Carnforth, & Co.*, 4 Ch. D. 108. It is sufficiently avowed if the vendee file a petition for liquidation, and within a reasonable time, tender of the price in cash be not made by the trustee appointed thereunder; *Ex pte. Stapleton*, 10 Ch. D. 586; or, it seems, by his subvendee. S. C. Where the delivery is to be by monthly quantities, the plaintiff can compel the defendant in a subsequent month to make up for short deliveries in the previous months, although the defendant had forborne to deliver the full quantities at the plaintiff's request. *Tyers v. Rosedale, & Co.*, *Iron Co.*, 44 L. J. Ex. 130; L. R. 10 Ex. 195.

Non-delivery.] By sect. 28 payment and delivery are concurrent conditions. Where goods are sold under a c.i.f. contract, "terms net cash," the buyer is not entitled to wait for the arrival of the goods in order to examine them before paying the price; he is bound to pay for the goods upon presentation by the seller of the shipping documents, even where the goods have not arrived. *Clemens Horst & Co. v. Biddell Bros.*, 81 L. J. K. B. 42; [1912] A. C. 18. Under a c.i.f. contract the seller's obligation is performed by delivering to the buyer within a reasonable time from the agreed date of shipment, the bill of lading, the invoice, and policy of insurance, these entitling him to delivery of the goods on their arrival or, if they have been lost by a peril agreed to be covered to recover their value; it is immaterial in whom the property in the goods was before the tender of the documents; the seller must be in a position to pass the property in the goods by the bill of lading if they are in existence, but he need not have appropriated the particular goods in the particular bill of lading to the particular buyer until the moment of tender, nor is it necessary that he should

have obtained any right to deal with the bill of lading until that moment. *Groom v. Barber*, 84 L. J. K. B. 318; [1915] 1 K. B. 316. The seller can make an effective tender of the proper documents, even though at that time he knows that the vessel on which the goods were loaded has been totally lost. *Mambre Saccharine Co. v. Corn Products Co.*, 88 L. J. K. B. 402; [1919] 1 K. B. 198. The buyer is entitled to demand a policy of insurance, which covers only the goods mentioned in the bill of lading and invoice; he is not bound to accept a letter by the seller guaranteeing to hold the buyer covered, or a cover note or certificate of insurance. *Wilson, Holgate & Co. v. Belgian Grain, &c., Co.*, 89 L. J. K. B. 300; [1920] 2 K. B. 1. As to the amount of the policy to be effected by the seller, see *Tamvaco v. Lucas*, 30 L. J. Q. B. 234; 31 L. J. Q. B. 296; 1 B. & S. 185; 3 B. & S. 89. The rules as to delivery are laid down in sect. 29.

"(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, express or implied, the place of delivery is the seller's place of business, if he have one, and if not, his residence: Provided that, if the contract be for the sale of specific goods, which to the knowledge of the parties when the contract is made are in some other place, then that place is the place of delivery.

"(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

"(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf; provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

"(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

"(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller."

Sect. 30 (3) relates to the case of delivery of the wrong quantity of goods or of goods mixed with others.

Sect. 31 (1): "Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments."

By sect. 34 (2) the seller, on tendering delivery of the goods, must, on request, give the buyer reasonable opportunity of examining them to ascertain if they are in conformity with the contract.

If the vendor be to deliver, but the contract do not (expressly or impliedly) provide where the delivery is to take place, as on board ship, he is not bound to deliver, or offer to deliver, till the place of delivery is notified by the vendee. *Armitage v. Insole*, 19 L. J. Q. B. 202; 14 Q. B. 728. Hops, when sold by T. to W., were lying at a warehouse to T.'s use. W. paid for them and took away part from the warehouse with the consent of the warehouseman, F.; but before he had carried away the rest, they were seized by a creditor of T.'s vendor under a claim of right; held, that W. could not sue T. for non-delivery, although the latter had given no delivery order to W. *Wood v. Tassell*, 6 Q. B. 234. In this case F. had, in fact, become T.'s agent, and it was not shown that the seizure was rightful. If it had appeared that F. had, from the first, refused to deliver on the order of T., an action for non-delivery would have lain against T. *Semb. Thöl v. Hinton*, 4 W. R. 26. If, before the time of delivery, the seller announce to the buyer his intention not to deliver, the latter may sue at once. *Roper v. Johnson*, 42 L. J. C. P. 65; L. R. 8 C. P. 167, following *Frost v. Knight*, 41 L. J. Ex. 78; L. R. 7 Ex. 111. See also *Melachrino v. Nickoll*, 89 L. J. K. B. 906; [1920] 1 K. B. 693. If goods sold be in a carrier's hands, subject to lien, an action for non-delivery lies against the seller if the carrier

refuse to deliver, on readiness by the buyer to pay charges thereon. *Buddle v. Green*, 27 L. J. Ex. 33.

Sect. 33: "Where the seller of goods agrees to deliver them at his own risk at a place other than that where they are when sold, the buyer must, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit."

Damages.] In an action for non-delivery of goods, by sect. 51 (2) "the measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract." This follows the principle enunciated in *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179. See *Borries v. Hutchinson*, 18 C. B. (N. S.) 445; 34 L. J. C. P. 169; *Hinde v. Liddell*, 44 L. J. Q. B. 105; L. R. 10 Q. B. 265; and *Hughes v. Grame*, 33 L. J. Q. B. 335, 340. Thus, if a ship be ordered to be made or be left for repair and is not delivered at the stipulated time, the measure of damages is *primâ facie* the sum which would have been earned by the ship in the ordinary course of trade since the period when it should have been delivered. *Fletcher v. Tayleur*, 17 C. B. 21; 25 L. J. C. P. 65; *Ex pte. Cambrian S. Packet Co.*, L. R. 4 Ch. 112, 117. See *Cory v. Thames Ironworks Co.*, 37 L. J. Q. B. 68; L. R. 3 Q. B. 181. So, where sets of waggon wheels and axles were to be made by the defendant according to patterns furnished by the plaintiffs, the jury may give damages for the loss of the use of the waggons. *Elbinger Actien-Gesellschaft v. Armstrong*, 43 L. J. Q. B. 211; L. R. 9 Q. B. 473.

Sect. 51 (3): "Where there is an available market for the goods in question the measure of damages is *primâ facie* to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

The rule that the measure of damages in case of non-delivery of goods is the difference between the contract price and the market price at the time when they ought to have been delivered is not affected by the fact that before the date when the goods should have arrived the purchaser has resold them for less than the market value. *Rodocanachi v. Milburn*, 56 L. J. Q. B. 202; 18 Q. B. D. 67; *Williams v. Agius*, 83 L. J. K. B. 715; [1914] A. C. 510; *Slater v. Hoyle & Smith*, 89 L. J. K. B. 401; [1920] 2 K. B. 11. But in late delivery, as distinguished from non-delivery—and, as pointed out by *Ld. Dunedin* in the last-cited case, there is a distinction between the two cases—if the purchaser has resold the goods at a price in excess of that prevailing at the date of delivery, he must, in estimating his damages, give credit therefor. *Wertheim v. Chicoutimi Pulp Co.*, 80 L. J. P. C. 91; [1911] A. C. 301.

Sect. 51 (3) applies although there are several periods of delivery and the action was commenced before the periods of delivery have elapsed; for the repudiation of the contract before the time of its fulfilment goes to the question of breach, but does not affect the damages. *Brown v. Muller*, 41 L. J. Ex. 214; L. R. 7 Ex. 319; *Roper v. Johnson*, 42 L. J. C. P. 65; L. R. 8 C. P. 167; see also *Melachrino v. Nickoll*, 89 L. J. K. B. 906; [1920] 1 K. B. 693. But where delivery was to be made between January and May, and on default the defendants to pay a fine per ton per week, it was held that the fine was to be computed from May until delivery actually was complete. *Bergheim v. Blaenavon Iron, &c., Co.*, 44 L. J. Q. B. 92; L. R. 10 Q. B. 319. The rule in sub-sect. 3, that if no time for delivery is fixed the measure of damages is to be ascertained by the difference between the contract price and the market or current price at the time of the refusal to deliver the goods, does not apply in the case of an anticipatory breach. *Millett v. Van Heek*, 90 L. J. K. B. 671; [1921] 2 K. B. 369. Under a c.i.f. contract the shipping documents, if sent forward with reasonable despatch, would have reached London on July 21, and the goods themselves would have arrived on August 30. The goods not having in fact been shipped, it was held in

an action by the buyers that the damages were to be measured by the difference between the contract price and the market price on July 21, not August 30. *Sharpe v. Nosawa*, 87 L. J. K. B. 33; [1917] 2 K. B. 814. The contract itself may, however, provide for a date upon which appropriation is to take place, and that date where there has been default in delivery will be that on which the assessment of damages is to take place. *Produce Brokers Co. v. Weis*, 87 L. J. K. B. 472.

If no difference be proved between the contract and market prices, the damages must be nominal. *Valpy v. Oakeley*, 16 Q. B. 941; 20 L. J. Q. B. 380; *Griffiths v. Perry*, 1 E. & E. 680; 28 L. J. Q. B. 204. When the price has been paid, the measure of damages is the market price, without deducting the contract price; and this will be the rule where the payment is by bills which are still outstanding. But if the bills be dishonoured, even though after breach of the contract to deliver, the parties are placed in the same position as if the bills had never been given, or the contract had been to pay in ready money; and the vendee can only recover the difference between the contract price and the market price of the goods. S. CC. This principle applies, even although the goods are not specific. S. CC.

If the buyer, at the request of the seller, forbear, to enforce the contract at the time the goods ought to be delivered, but afterwards do so, the measure of damages is the difference between the contract price and the market price when the buyer so enforces the contract, e.g., by buying the goods in the market. *Ogle v. Vane (Earl)*, L. R. 3 Q. B. 272; 37 L. J. Q. B. 77. See *Tyers v. Rosedale, &c., Iron Co.*, 44 L. J. Ex. 130; L. R. 10 Ex. 195, where the postponement of delivery was at the request of the buyer. Where there has been a written contract, the vendee cannot enhance the damages by oral proof that the contract price was higher than the market price, by reason of the shortness of the time fixed by the contract for delivery. *Brady v. Oastler*, 3 H. & C. 112; 33 L. J. Ex. 300.

Where the contract provides for the delivery of goods at a place where there is no market for them, damages for non-delivery should be calculated with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage. *Wertheim v. Chicoutimi Pulp Co.*, 80 L. J. P. C. 91; [1911] A. C. 301. But see observations on this case in *Slater v. Hoyle & Smith*, 89 L. J. K. B. 401; [1920] 2 K. B. 11. There may be an "available market," although the goods are not kept in stock and are not purchasable in the open market, but are specially made to specification. *Marshall v. Nicoll*, [1919] S. C. (H. L.) 129.

Where the goods delivered were of inferior quality to those contracted for, and plaintiff (vendee) had paid for them in advance, but objected to them when delivered and resold them at a reduced price, and the resale was within a reasonable time, the measure of damages is the difference between the market price of goods of the quality contracted for at the date of delivery and the resale price. *Loder v. Kekulé*, 3 C. B. (N. S.) 128; 27 L. J. C. P. 27.

The purchaser is entitled to recover general loss occasioned to him by the non-delivery. *Bridge v. Wain*, 1 Stark. 504. But he cannot recover damages arising from any reason peculiar to himself or from any special contract into which he may have entered, of which the vendor had no notice, for such damages could not have been contemplated by the vendor. Thus, where A. contracts to repair an engine for B. within a certain time; C. agrees to execute part of the work for A. within a less time, but without any knowledge of the contract between A. and B. C. fails to do his part within the time stipulated by him; A. cannot recover from C., as special damage, compensation made by A. to B. for the delay in the completion of A.'s contract occasioned by C.'s breach of contract. *Portman v. Middleton*, 4 C. B. 322; 27 L. J. C. P. 231. See also *Prior v. Wilkinson*, 8 W. R. 260; and *Hales v. L. & N. W. Ry. Co.*, 4 B. & S. 66; 32 L. J. Q. B. 292; and other cases cited *post*, *Actions against carriers—Damages*. Defendant con-

tracted to deliver a steam threshing-engine on a day fixed, at which time he knew the plaintiff would want to thresh his wheat. He failed to deliver it till six weeks after the day. He was held liable for damage and expense occasioned by long exposure of the corn, kiln-drying, stacking, &c.; but not to the loss caused by a fall in the market price of corn. *Smeed v. Foord*, 1 E. & E. 602; 28 L. J. Q. B. 178. So, where the defendant contracted with the plaintiffs to make for them a part of a machine which the plaintiffs, to the defendant's knowledge, had contracted to make for J. by a given time, and the defendant did not deliver according to his contract, so that the plaintiffs could not deliver the machine to J. by the given time, J. therefore rejected it: it was held that the plaintiffs might recover damages for the loss of profit on their contract with J., and for the expenditure uselessly incurred by them in making the rest of the machine. *Hydraulic Engineering Co. v. McHaffie*, 4 Q. B. D. 670. Where the seller knows that the buyer is under a sub-contract he may recover damages in respect of his probable liability thereunder; that liability is the limit, but not as a matter of law the measure of such damages. *Elbinger Actien-Gesellschaft v. Armstrong*, 43 L. J. Q. B. 211; L. R. 9 Q. B. 473; *Grèbert-Borgnis v. Nugent*, 54 L. J. Q. B. 511; 15 Q. B. D. 85. And if R. sue E., and A. repudiate liability and refuse to defend the action, and E. thereupon prudently pay £20 into court and succeed at the trial, by showing this to be enough, E. may recover from A. the £20 and the excess of his costs in the action R. v. E. beyond what he received from R. *Agius v. Gt. W. Colliery Co.*, 68 L. J. Q. B. 312; [1899] 1 Q. B. 413. On a contract to sell cotton of a certain quality at a certain price, the buyer cannot recover for his loss of profit which he would have made by carrying out a resale, at a higher price, made in the interval between the contract and the time for delivery. *Williams v. Reynolds*, 6 B. & S. 495; 34 L. J. Q. B. 221; *Borries v. Hutchinson*, 34 L. J. C. P. 169; 18 C. B. (N. S.) 445. But evidence of such resale may be admissible to show that there has been a rise in the market value. See *Engel v. Fitch*, 38 L. J. Q. B. 304, 306; L. R. 4 Q. B. 659, 667. The plaintiff, a timber merchant, bought timber from the defendant, who was aware that the plaintiff intended to dispose of it in the ordinary way of his trade. Similar timber was not procurable in the market. On the refusal of the defendant to allow the timber to be cut the plaintiff was held entitled to recover the difference between the contract price plus the expense which he would have incurred in cutting, removing, and making it marketable, and the amount which he would have realised by the sale of the timber. *M'Neill v. Richards*, [1899] 1 I. R. 79. The rule with regard to the right to recover damages where to the seller's knowledge there has been a sub-sale when the contract is made, or where the goods have been bought for sub-sale, may be summarised as follows: (1) Where there is a market the buyer's duty is to buy the goods in the market to supply the sub-buyer, the seller being liable (in the absence of special damage) only for the difference in price as general damages; (2) where there is no market the buyer may recover the loss of his actual or anticipated profits, together with a reasonable indemnity against his liability to his sub-buyer and costs reasonably incurred. Benjamin on Sale (6th ed.), p. 1115. The vendor cannot diminish the damages by giving previous notice to the purchaser of his intention not to deliver the goods, as such notice does not alter the time at which the damages are to be assessed, which is the date appointed for delivery. *Leigh v. Paterson*, 8 Taunt. 540; and see *Phillpotts v. Evans*, 9 L. J. Ex. 33; 5 M. & W. 475, and *Brown v. Muller*, 41 L. J. Ex. 214; L. R. 7 Ex. 319. The plaintiff may, under the Sale of Food and Drugs Act, 1875 (38 & 39 V. c. 63), s. 28, in some cases recover special damages if goods of the kinds mentioned in the Acts of an inferior quality are delivered to him.

Where a commission agent, A., purchases and ships goods for his principal, B., inferior in quality to those ordered by B., B. can recover from A. the actual loss only which he has sustained, and not the difference

between the price which the goods fetch, and what they would have fetched if of the proper quality. *Cassaboglou v. Gibb*, 9 Q. B. D. 220; 11 Q. B. D. 797; *Salvesen v. Rederi Aktiebolaget, &c.*, [1905] A. C. 302; *Johnston v. Braham & Campbell*, 85 L. J. K. B. 1166; [1916] 2 K. B. 529; *affid. in C. A.*, the question of principle not being dealt with, 86 L. J. K. B. 613; [1917] 1 K. B. 586.

What steps a plaintiff in an action for breach of contract ought to have taken towards mitigating the damages is in each case a question of fact, and not a question of law. *Payzu v. Saunders*, 89 L. J. K. B. 17; [1919] 2 K. B. 581.

Where either seller or buyer on breach of contract has to pay a sum in foreign currency, the amount in sterling on an English judgment will depend on the rate of exchange ruling between the British and the foreign currency at the time of the breach. *Barry v. Van den Hurk*, 89 L. J. K. B. 899; [1920] 2 K. B. 709; *Di Ferdinando v. Simon, Smits & Co.*, 89 L. J. K. B. 1039; [1920] 3 K. B. 409; approved in H. L., in *Celia (Owners) v. Volturmo (Owners)*, [1921] W. N. 278.

Specific performance.] By sect. 52, "In any action for breach of contract to deliver specific or ascertained goods the court may, if it thinks fit, on the application of the plaintiff, by its judgment or decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The judgment or decree may be unconditional, or upon such terms and conditions as to damages, payment of the price, and otherwise, as to the court may seem just, and the application by the plaintiff may be made at any time before judgment or decree." See the observations of Sankey, J., in *Thames Sack and Bag Co. v. Knowles*, 88 L. J. K. B. 585, as to the expression "ascertained goods." A writ of delivery is now issued and enforced under Rules, 1883, O. xlvi. r. 1.

Defence.

The defence arising under the Sale of Goods Act, 1893, s. 4, must, if relied on, be specially pleaded. Rules, 1883, O. xix. r. 20.

Where goods sold under a contract required by the Stat. of Frauds to be in writing were to be delivered at a certain place or time, and the parties afterwards orally varied their stipulation as to delivery, it was held that this did not amount to a rescission of the original contract; *Moore v. Campbell*, 10 Ex. 323; 23 L. J. Ex. 310; *Noble v. Ward*, 36 L. J. Ex. 91; L. R. 2 Ex. 135; but if the goods had been actually accepted, or even a delivery order accepted under the agreement as so varied, that would have been a defence under a plea of accord; *semb. Moore v. Campbell, supra*. A contract required to be in writing cannot be varied by parol, but parol evidence is admissible to prove a total abandonment or rescission of a written contract. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1. Though a contract made in error may be avoided, yet the vendor cannot treat as void, at law or in equity, a sale to the vendee of an article misrepresented by the vendor in error, unless the vendee consents. *Semble, Scott v. Littledale*, 8 E. & B. 815; 27 L. J. Q. B. 201.

ACTION FOR GOODS SOLD AND DELIVERED.

The plaintiff in an action for goods sold and delivered must be in a condition to prove, if denied, 1. The contract of sale; 2. The delivery of goods according to contract; 3. The value or price.

The contract of sale.] The necessity of a writing under the S. of G. Act, 1893, seldom comes in question in this action, because the delivery, on which the action is founded, generally, though not necessarily, amounts also to a receipt and acceptance by the defendant. In general, proof of the

delivery of the goods to, and receipt of them by, the defendant is *prima facie* evidence of the contract, and supersedes the proof of an order. *Bennett v. Henderson*, 2 Stark. 550. But this may, of course, be rebutted; as by proof that the defendant was in the habit of selling such goods for the plaintiff on commission. *Miller v. Newman*, 4 M. & Gr. 646; 11 L. J. C. P. 265. Defendant sent an order to A., who had meanwhile sold his business to B.; B supplied goods to defendant, who consumed them, and was sued for them by B.; it was held, that the defendant, having a previous set-off against A., and having never contracted with B., nor been informed of B.'s position and ownership till after the goods had been consumed, so that they could not be returned or refused, was not liable on a contract express or implied. *Boulton v. Jones*, 2 H. & N. 564; 27 L. J. Ex. 117.

In some cases where goods have been wrongfully taken, the plaintiff may waive the tort, and sue on the implied contract. Thus, where the defendant by fraud procured the plaintiff to sell goods to an insolvent, and afterwards got them into his own possession, he was held liable in an action for goods sold. *Hill v. Perrott*, 3 Taunt. 274. *Accord. Abbotts v. Barry*, 2 B. & B. 369. But see B. N. P. 130; *Bennett v. Francis*, 2 B. & P. 554. So, where a father fraudulently represented that he was about to relinquish his business in favour of his son, to whom (being a minor) goods were, upon such representation, supplied, which the father took into his own hands, he was held liable for goods sold and delivered. *Biddle v. Levy*, 1 Stark. 20. Where the owner of property, which has been taken away by another, waives the tort, and seeks to raise an implied assumpsit, it is incumbent on him to show a title to the property; and mere possession is not sufficient. *Per Abbot, C.J., Lee v. Shore*, 1 B. & C. 94. A carrier misdelivered teas to the defendant of more value than the teas which he had really ordered. The defendant kept them in ignorance, and mixed and sold part. On the discovery of the error, defendant offered to pay the carrier for tea of the price really ordered: held, that this was some evidence of goods sold and delivered by the carrier to the defendant. *Coles v. Bulman*, 6 C. B. 184; 17 L. J. C. P. 302.

Where goods are lent, and if damaged to be taken by the bailee at a certain price, if they are damaged, an action for goods sold lies; *Bianchi v. Nash*, 1 M. & W. 545; 5 L. J. Ex. 252; so if goods are delivered on terms of approval or return, and they are retained an unreasonable time; *Beverley v. Lincoln Gas Co.*, 6 Ad. & E. 829; *Moss v. Sweet*, 16 Q. B. 493; 20 L. J. Q. B. 167; see also *Ray v. Barker*, 48 L. J. Ex. 569; 4 Ex. D. 279; and in such case the property passes under sect. 18, rule 4. But where they are destroyed without the fault of the bailee before the lapse of such reasonable time, no action lies against him. See *Elphick v. Barnes*, 49 L. J. C. P. 698; 5 C. P. D. 321, sect. 7, and sect. 20.

The value of fixtures cannot be recovered under a claim for goods sold and delivered. *Lee v. Risdon*, 7 Taunt. 188; 2 Marsh. 495. But the value of trees, which the defendant has purchased and carried away, may be recovered under a claim for trees sold and delivered. *Bragg v. Cole*, 6 B. Moore, 114. The value of growing crops may be recovered on a claim for crops bargained and sold; *Parker v. Staniland*, 11 East, 362; and the value of crops taken by an incoming from an outgoing tenant, may be recovered under a claim for goods sold; *per Holroyd, J., in Mayfield v. Wadsley*, 3 B. & C. 364. *Poulter v. Killingbeck*, 1 B. & P. 397. The price of railway shares may be recovered under a claim for "goods and chattels sold and delivered." *Lawton v. Hickman*, 9 Q. B. 563; 16 L. J. Q. B. 20. A builder is not entitled to recover the value of the building materials employed by him in building a house for the defendant, under a claim for goods sold and delivered; *Cotterell v. Apsey*, 6 Taunt. 322; nor can one who contracts to make and erect a steam-engine on the defendant's premises recover the contract price in this form. *Clark v. Bulmer*, 12 L. J. Ex. 463; 11 M. & W. 243; see *Atkinson v. Bell*, 8 B. & C. 277, 283; 6 L. J. (O. S.) K. B. 258.

Where the contract was, that certain goods should be paid for partly in money and partly in huttons, Buller, J., held that the plaintiff could not recover under a count for goods sold, but should have declared specially. *Harris v. Fowle*, cited 1 H. Bl. 287; *Talver v. West*, Holt, N. P. 179. But see *Hands v. Burton*, 9 East, 349. And generally, a contract of barter must be declared upon as such, and the mere neglect or omission of the defendant to send his goods will not make it a contract of goods sold. *Harrison v. Luke*, 14 M. & W. 139; 14 L. J. Ex. 248. However, where A. agreed to give a horse in exchange for a horse of B. and a sum of money, and the horses were exchanged, but B. refused to pay the money, it was held that A. might recover for a horse sold and delivered. *Sheldon v. Cox*, 3 B. & C. 420. So in an action to recover the value of a gun, for which the defendant was to give another gun and £15 15s., *Ld. Ellenborough* held that, upon the refusal of the purchaser to pay for the gun in that mode, a contract resulted to pay its value in money. *Forsyth v. Jervis*, 1 Stark. 437; accord. *Ingram v. Shirley*, *Id.* 185.

An auctioneer may maintain an action in his own name against the buyer of goods sold and delivered by him in the course of his employment, though known to be the principal's, for he has possession, and an interest in respect of his lien, and is not a mere servant. *Williams v. Millington*, 1 H. Bl. 81; *Manley v. Berkett*, 81 L. J. K. B. 1232, 1234; [1912] 2 K. B. 329, 333. Therefore, payment to his employer is no answer to an action by the auctioneer. *Robinson v. Rutter*, 4 E. & B. 954; 24 L. J. Q. B. 250. But the auctioneer has only the same right as the party employing him to sell, and the defendant may therefore show that the rightful owner has claimed the value. *Dickenson v. Naul*, 4 B. & Ad. 638; see also *Grice v. Kenrick*, 39 L. J. Q. B. 177; L. R. 5 Q. B. 340.

As to the power of corporations to sue and their liability to be sued on parcel sales of goods, *vide*, Part III., *Actions by and against companies—Contracts by Corporations*, *post*.

Proof of delivery.] A party cannot maintain this action unless he has either delivered the goods or done something equivalent to delivery. *Smith v. Chance*, 2 B. & A. 755. The acceptance required to satisfy the statute is not the same as that necessary to create a liability to pay for the goods.

A term of the contract as to the mode of delivery is not a condition entirely for the benefit of either party to the contract, and neither party can waive it without the consent of the other. So, where under a written contract goods are to be delivered f.o.b., the buyers are not entitled to claim delivery before the goods are put on board ship. *Wackerbarth v. Masson*, 3 Camp. 270; *Marine Spinning Co. v. Sutcliffe*, 87 L. J. K. B. 382.

Where A. agreed to sell to B. certain goods, an earnest was paid, and the goods were packed in cloths furnished by B. and deposited in a building belonging to A., till B. should send for them, A. declaring at the same time that they should not be carried away till he was paid,—it was held that this was not such a delivery as to entitle A. to maintain an action for goods sold and delivered; for there must be a transfer of possession as well as property. *Goodall v. Skelton*, 2 H. Bl. 316; see *Simmons v. Swift*, 5 B. & C. 857; 5 L. J. (O. S.) K. B. 10. So, where goods sold for ready money were packed up in boxes of the buyer for him and in his presence, but remained at his request on the premises of the seller, it was held that a count for goods sold and delivered would not lie. *Boulter v. Arnott*, 2 L. J. Ex. 97; 1 C. & M. 333. Where there is an entire contract to deliver a large quantity of goods consisting of distinct parcels, within a specified time, and the seller delivers part, he cannot before the expiration of that time bring an action to recover the price of the part delivered, because the purchaser may, if the vendor fail to complete his contract, return the part delivered; but if he retain the part delivered after the seller has failed in performing his contract, the latter may recover the value of the goods so delivered. *Oxendale v. Wetherell*, 9 B. & C. 386; *Shipton v. Casson*, 5 B. & C. 378; 4 L. J. (O. S.) K. B. 199;

Colonial Insur. Co. of New Zealand v. Adelaide Marine Insur. Co., 56 L. J. P. C. 19; 12 App. Cas. 128.

Where the delivery deviates from the mode pointed out by the buyer, yet if notice be sent to him and he do not repudiate it, he is liable. *Richardson v. Dunn*, 2 Q. B. 218. Sale and delivery by a former agent of an intestate between the time of the death and grant of administration will support an action by the administrator, as such, for goods sold. *Foster v. Bates*, 13 L. J. Ex. 88; 12 M. & W. 226. Under a c.i.f. contract unless the seller effects a policy of insurance on the goods for the transit and tenders it with the other document, the buyer is not bound, although the goods arrive safely, to accept them, the delivery not being in accordance with the contract. *Orient Co. v. Brekke*, 82 L. J. K. B. 427; [1913] 1 K. B. 531.

A symbolical delivery of goods, if sufficient to enable the vendee to take possession and to divest the seller's lien for the price, is a sufficient delivery; as the delivery of the key of the warehouse, or of a delivery order on a wharfinger, or of other *indicia* of property, so as to put it under the control of the vendee. See *Chaplin v. Rogers*, 1 East, 192, 194; *Elmore v. Stone*, 1 Taunt. 460. And this species of constructive delivery is particularly applicable to ponderous goods not capable of ordinary delivery, as timber; or which the vendor has not engaged to deliver in any other way. Where a ship or goods at sea are sold, the delivery is by delivery of the documentary proofs of title, as the bill of sale or lading, &c. 2 Kent's Comm. 500, 501. *Sanders v. Maclean*, 52 L. J. K. B. 481, 486; 11 Q. B. D. 327, 341; *Clemens Horst Co. v. Biddell*, 81 L. J. K. B. 42, 44; [1912] A. C. 18, 22, 23. An order by seller for delivery to defendant of a rick of hay made on a third person who has consented to let it remain on his land, is a sufficient delivery as between the seller and buyer, the latter having undertaken to carry it away himself. *Salter v. Woollams*, 2 M. & Gr. 650, 654; see further *Wrightson v. McArthur and Hutchinsons*, 90 L. J. K. B. 842; [1921] 2 K. B. 807.

To whom delivered—Carrier, agent, or servant.] Sect. 32 (1), "Where, in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer is *primâ facie* deemed to be a delivery of the goods to the buyer. (2) Unless otherwise authorized by the buyer, the seller must make such contract with the carrier on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omit so to do, and the goods are lost or damaged in course of transit, the buyer may decline to treat the delivery to the carrier as a delivery to himself, or may hold the seller responsible in damages." Delivery on board ship with the bill of lading indorsed so as to make the goods deliverable to the buyer or his assigns operates as a delivery to the buyer. *Groning v. Mendham*, 5 M. & S. 189; *Meredith v. Meigh*, 2 E. & B. 364; 22 L. J. Q. B. 401. *Secus*, if the bill of lading be for delivery to order of the *consignor* or *his assigns*, and the consignor does not indorse it to the buyer. *Wait v. Baker*, 17 L. J. Ex. 307; 2 Ex. 1. See sect. 19 (2, 3); *Gabarron v. Kreeft*, 44 L. J. Ex. 238; L. R. 10 Ex. 274; *Ogg v. Shuter*, 45 L. J. C. P. 44; 1 C. P. D. 47; *Karberg v. Blythe, Green, Jourdain & Co.*, 84 L. J. K. B. 1673, 1676; [1915] 2 K. B. 379, 387. But though the bill of lading be to the consignor's order, if it be indorsed at the time of shipment to the consignee's order, the property passes, and it was held that the consignee must pay for the goods though lost on the voyage; especially since the Bills of Lading Act, 1855. *Brown v. Hare*, 3 H. & N. 484; 27 L. J. Ex. 372; 4 H. & N. 822; 29 L. J. Ex. 6. Now by sect. 32 (3), "Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, under circumstances in which it is usual to insure, the seller must give such notice to the buyer as may enable him to insure them during their sea transit, and, if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit." This

provision does not apply to a contract on c.i.f. terms entered into in time of peace inasmuch as the contract itself provides for all the insurance contemplated or usual at the time it is entered into, nor does it impose any new obligation on the seller to give notice to the buyer so as to enable him to insure against war risks if, after the date of the contract, war becomes imminent. *Law & Bonar v. British American Tobacco Co.*, 85 L. J. K. B. 1714; [1916] 2 K. B. 605. Nor, *semble*, does it apply if the buyer already has sufficient information to enable him to insure the goods in the ordinary way. *Wimble v. Rosenberg*, 82 L. J. K. B. 1251; [1913] 3 K. B. 743. *Semble*, it does apply to an ordinary f.o.b. contract. *Id.* Where the written contract required by the S. of G. Act, 1893, s. 4, provides that the goods shall be sent by a particular route, and they are sent by another route, it may be shown that the buyer ratified this change of route, and such ratification need not be in writing. See *Leather Cloth Co. v. Hieronimus*, 44 L. J. Q. B. 54; L. R. 10 Q. B. 140; and *Hickman v. Haynes*, 44 L. J. C. P. 358; L. R. 10 C. P. 598.

The master of a ship has a general authority to bind the shipowner for goods sold or money lent; but in an action by the creditor against the owner the plaintiff must show that they were necessities. *Mackintosh v. Mitcheson*, 4 Ex. 175.

The members of a club managed by a committee are not, merely as such, personally liable for goods supplied on the order of the committee for the use of the club, it appearing that the committee are supplied with funds by the members, who are subject only to annual subscriptions, and to other ready money payments, and that the committee has no express authority to bind the members by contracts. *Fleming v. Hector*, 2 M. & W. 172; see *Wise v. Perpetual Trustee Co.*, 72 L. J. P. C. 31; [1903] A. C. 139. And it seems that such committees are not generally authorized to deal on credit; therefore the person who supplies goods on credit can only sue those members of the committee who were privy to the contract, unless he can prove that such dealing was in furtherance of the purposes for which the committee was appointed. *Todd v. Emly*, 7 M. & W. 427; *In re London Marine Assur. Assoc.*, L. R. 8 Eq. 176. Nor are the members of the committee liable as such on the contract of their servant, the house steward, unless there be some proof of an authority from them. *Todd v. Emly*, 8 M. & W. 505. But where the secretary of a club for supply of coals to each member, was authorized to deal on credit with the coal merchant, each member was held liable though there existed particular rules of the club for collecting and paying over the money from its members. *Cockerell v. Aucompte*, 2 C. B. (N. S.) 440; 26 L. J. C. P. 194. The commanding officer of a brigade is not as such liable to pay for goods supplied on the order of the mess committee. *Lascelles v. Rathbun*, 35 T. L. R. 242.

A master is not responsible for goods ordered by his servant in his name but without his authority unless he accepts and adopts them, or has accredited the servant by paying for goods so ordered before. *Maunder v. Conyers*, 2 Stark. 281; *Pearce v. Rogers*, 3 Esp. 214. When the master has always been used to give his servant money to pay for commodities as he buys them, and the servant buys them without paying and embezzles the money, the master is not liable. *Stubbing v. Heintz*, Peake, 47; *Anon.*, 1 Show. 95. But if even in one instance the master have employed the servant to buy on credit, he will be liable for any goods which the same servant subsequently orders until the authority is distinctly withdrawn by notice; *Hazard v. Treadwell*, Stra. 506; *Rusby v. Scarlett*, 5 Esp. 76; *Anon.*, *supra*; and see *Gilman v. Robinson*, Ry. & M. 226; *Filmer v. Lynn*, 4 Nev. & M. 559; though he has given the servant money to pay for the goods in some instances. *Wayland's Case*, 3 Salk. 234; *Bolton v. Arliden*, *Id.*; S. C. *sub nom.* *Bolton v. Hillersden*, 1 Ld. Raym. 225; *Rusby v. Scarlett*, *supra*. The coachman of G. has not, as such, ostensible authority to pledge G.'s credit for forage supplied for G.'s horses. *Wright v. Glyn*, 71 L. J. K. B. 497; [1902] 1 K. B. 745.

Where the contract has been made with an agent and delivery made to him, the seller may in some cases resort to the principal. As to suing the principal on a sale to his agent, the following cases are important. Where the principal is unnamed or unknown at the time of sale, the following has been laid down as the rule:—"If a person sells goods supposing at the time of the contract he is dealing with a principal, but afterwards discovers that the person with whom he has been dealing is not the principal in the transaction, but agent for a third person, though he may in the meantime have debited the agent with it, he may afterwards recover the amount from the real principal; subject, however, to this qualification, that the state of the account between the principal and the agent is not altered to the prejudice of the principal. On the other hand, if at the time of the sale the seller knows not only that the person who is nominally dealing with him is not principal but agent, and also knows who the principal really is, and, notwithstanding all that knowledge, chooses to make the agent his debtor, dealing with him and him alone, then, according to the cases of *Addison v. Gandassequi*, 4 Taunt. 574, and *Paterson v. Gandassequi*, 15 East, 62, the seller cannot afterwards, on the failure of the agent, turn round and charge the principal; having once made his election, at the time when he had the power of choosing between the one and the other." *Thomson v. Davenport*, 9 B. & C. 78, 86, *per* Ld. Tenterden, C.J. Where the seller has sued the agent to judgment, he cannot, although he has not received satisfaction, afterwards proceed against the principal. *Priestly v. Fernie*, 3 H. & C. 977; 34 L. J. Ex. 172; even in the case of the master and owner of a ship. S. C. But mere proof in bankruptcy against the estate of the agent will not amount to a binding election. *Curtis v. Williamson*, 44 L. J. Q. B. 27; L. R. 10 Q. B. 57.

Where F., an undisclosed principal, employs H. to carry on a business for him, he is liable for all the acts of H. within the authority usually confided to an agent of that character, and cannot by a secret reservation divest himself of that authority. *Watteau v. Fenwick*, [1893] 1 Q. B. 346; *Edmunds v. Bushell*, 35 L. J. Q. B. 20; L. R. 1 Q. B. 97; but there must be evidence that H. was in fact the agent of F. in the particular transaction, or that the goods were supplied for the use of F.'s business and not to H. personally. *Kinahan v. Parry*, 80 L. J. K. B. 276; [1911] 1 K. B. 459. The seller who has given credit to an agent, believing him to be the principal, cannot recover against the undisclosed principal, if the latter have *bonâ fide* paid the agent, when the vendor still gave credit to the agent, and knew of no one else as principal. *Armstrong v. Stokes*, 41 L. J. Q. B. 253; L. R. 7 Q. B. 598. See, however, the observations on this case in *Irvine v. Watson*, *infra*. The knowledge at the time of the contract that there is a principal, his name not being disclosed, does not enable the seller to make his election, and will not prevent him, although he has debited the agent, from afterwards resorting to the principal; *Thomson v. Davenport*, *supra*; even although the principal has in the meantime *bonâ fide* paid the agent, unless there has been conduct on the part of the seller which has misled the principal into the belief that the agent had already settled with the seller, and the payment was made in consequence of such belief. *Irvine v. Watson*, 49 L. J. Q. B. 531; 5 Q. B. D. 414; *Davison v. Donaldson*, 9 Q. B. D. 623. Mere delay in enforcing payment from the agent is not sufficient. S. CC. The fact of the principal's name being disclosed at the time of the sale does not until the seller has elected to charge the agent, prevent his resorting to the principal; such disclosure merely enables the seller to charge the principal in the first instance if he so desire. *Calder v. Dobell*, 40 L. J. C. P. 224; L. R. 6 C. P. 486. A., as agent of the defendant, a foreign merchant, bought goods of the plaintiff, and the plaintiff made out invoices describing them as bought by A. "on account of" the defendant, and drew for the amount on A., who accepted; the defendant remitted the amount to A. to meet the acceptances, but A. became insolvent before they were due; held that defendant was not liable.

Smyth v. Anderson, 18 L. J. C. P. 109; 7 C. B. 21. When the seller elects to sue an undisclosed principal, it is a good defence if the defendant show that he has paid his agent; S. C.; and the books of the seller cannot be admitted as evidence for him that he always debited the principal. S. C. The general custom of merchants, assuming its continued existence, according to which an agent in this country who makes a contract on behalf of an undisclosed foreign principal, thereby renders himself personally liable upon the contract, is a custom by which the agent renders himself personally liable to the exclusion of his principal; and it is therefore inconsistent with, and excluded by, a written contract which by its express terms makes the undisclosed foreign principal a party to the contract and directly liable to the other party thereto. *Miller, Gibb & Co. v. Smith and Tyrer*, 86 L. J. K. B. 1259; [1917] 2 K. B. 141. *Mercer v. Wright*, 33 T. L. R. 348.

It may be shown that a party professing to be acting as agent is the real principal, and he will be then liable to be sued as such. See *Carr v. Jackson*, 7 Ex. 382; 21 L. J. Ex. 137. So, if the principal for whom the agent professes to act does not at the time exist, the latter is liable. *Kelner v. Baxter*, 36 L. J. P. C. 94; L. R. 2 C. P. 174.

The receiver and manager of a business, appointed by the court, who orders goods for the purpose of the business, *primâ facie* does so on his own credit. *Burt v. Bull*, 64 L. J. Q. B. 292; [1895] 1 Q. B. 276. *Secus*, where appointed by trustees having power to carry on the business. *Owen v. Cronk*, 64 L. J. Q. B. 288; [1895] 1 Q. B. 265.

Where the defendant A. gave authority to his wife B. to order goods from the plaintiff C., on which authority B. acted: A. was held liable for goods ordered by B. of C. after A. had become insane, C. having no notice of such insanity. *Drew v. Nunn*, 48 L. J. Q. B. 591; 4 Q. B. D. 661.

Meat was supplied to I. during the lifetime of her husband, H., by his authority, for the support of herself and her family: it was held that I. was not liable for the price of the meat so supplied, after the death of H. on a distant voyage, before news of the death came to hand. *Smout v. Ilbery*, 12 L. J. Ex. 357; 10 M. & W. 1. In *Yonge v. Toynbee*, 79 L. J. K. B. 208; [1910] 1 K. B. 215, however, *Smout v. Ilbery*, *supra*, was questioned, Swinfen Eady, L.J., saying, "In my judgment *Smout v. Ilbery* can no longer be regarded as law, if and so far as it decided that an agent continuing to act without knowledge of the revocation of his authority is not under liability to the other party for his warranty or representation of authority."

Delivery to partner.] The general law of partnership is governed by the Partnership Act, 1890, 53 & 54 V. c. 39. The following paragraphs deal with the general law of partnership; the provisions of the Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), will be referred to in the next sub-heading.

Sect. 5, Act of 1890. "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner."

A partner is responsible for the act of his co-partner, within the general scope of his authority as partner, although such act is an actionable wrong. *Hamlyn v. John Houston & Co.*, 72 L. J. K. B. 72; [1903] 1 K. B. 81.

Sect. 6. "An act or instrument relating to the business of the firm and done or executed in the firm-name, or in any other manner showing an intention to bind the firm, by any person thereto authorized, whether a partner or not, is binding on the firm and all the partners.

"Provided that this section shall not affect any general rule of law relating to the execution of deeds or negotiable instruments." See *Mar-*

chant v. Morton Down & Co., 70 L. J. K. B. 820; [1901] 2 K. B. 829, and *Ex pte. Wright*, 75 L. J. K. B. 591; [1906] 2 K. B. 209.

Goods delivered in pursuance of an order by one partner are delivered to all, unless it appear that they were delivered on the exclusive credit of one only; but debiting one only, and taking the separate acceptance of that one, is not decisive of this. *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122; 28 L. J. C. P. 120; *Keay v. Fenwick*, 1 C. P. D. 745. A question sometimes arises in such actions whether all the defendants are liable as partners. Although the defendant cannot compel the joinder of a dormant partner, as co-defendant, yet the dormant partner may, at the option of the plaintiff, be so joined. *Lloyd v. Archbottle*, 2 Taunt. 327; *Ruppell v. Roberts*, 4 Nev. & M. 31. And such a partner may be joined as defendant, though the contract, which was in writing (not under seal) and *inter partes*, did not name him. *Drake v. Beckham*, 11 M. & W. 315; 12 L. J. Ex. 486. Though a partnership is constituted by deed, it may be proved by parol evidence. An examined copy of an answer in Chancery by two of the defendants, to a bill of a third defendant, charging them as partners and praying for an account, is good evidence to prove the partnership as against the persons so answering. *Studdy v. Sanders*, 2 D. & Ry. 347.

Persons may be partners in a particular concern or business, yet, if they do not hold themselves out as general partners, it will not make them liable in other cases not connected with that business. *De Berkorn v. Smith*, 1 Esp. 29. Where the publisher, editor, and printer agree to share the profits of a periodical work equally, and the printer is to furnish paper at cost price, the stationer who supplied the printer with paper cannot sue either publisher or editor as partners. *Wilson v. Whitehead*, 12 L. J. Ex. 43; 10 M. & W. 503. If there be a stipulation between apparent partners, that one of them shall not participate in the profit and loss, and shall not be liable as a partner, he is not liable as such to those persons who have notice of the stipulation. *Alderson v. Pope*, 1 Camp. 404, n.

Sect. 14. (1) "Every one who by words spoken or written or by conduct represents himself, or who knowingly suffers himself to be represented, as a partner in a particular firm, is liable as a partner to any one who has on the faith of any such representation given credit to the firm, whether the representation has or has not been made or communicated to the person so giving credit by or with the knowledge of the apparent partner making the representation or suffering it to be made. (2) Provided that where after a partner's death the partnership business is continued in the old firm-name, the continued use of that name or of the deceased partner's name as part thereof shall not of itself make his executor's or administrator's estate or effects liable for any partnership debts contracted after his death."

The plaintiff must show that the name of the defendant was used in the firm with his own consent. *Newsome v. Coles*, 2 Camp. 617; 2 H. Bl., 4th edit. 235, n. Where a person allows his name to remain in a firm, either exposed publicly over a shop door, or used in printed invoices or bills of parcels, or published in advertisements, this precludes him from disputing his liability as a partner. *Per Tindal, C.J., Fox v. Clifton*, 6 Bing. 794. Where the defendant, having advanced money to a person who was getting up a mining company, on the security of 200 shares, permitted the captain of the mine to represent, without naming the defendant, that the mine was being worked by a person of substance, and the plaintiff on the faith of these representations supplied goods, it was held that he could recover against the defendant as a partner in the mine. *Martyn v. Gray*, 14 C. B. (N. S.) 824.

Where a firm, consisting of several, carry on business in the name of one of the partners, the whole firm will be bound by acts done by him as representing the firm; *S. Carolina Bank v. Case*, 8 B. & C. 427; 6 L. J. (O. S.) K. B. 364; *Vere v. Ashby*, 10 B. & C. 293, *per Parke, J.*; unless it be proved that the act was done by that partner, on his own behalf alone,

and not on behalf of the firm. *Yorkshire Banking Co. v. Beatson*, 49 L. J. C. P. 380; 5 C. P. D. 109.

The liability of a person as partner, whether called one or not, may also be proved, *primâ facie*, by showing that he participated in the profits of the concern, sect. 2 (3), and it is immaterial whether he receives the profits for his own use, or as a trustee for others. Thus the executors of a deceased partner, carrying on trade for the benefit of the estate, are liable personally as partners. *Wightman v. Townroe*, 1 M. & S. 412. However small the stipulated portion of profits, the participation renders the party liable to all the engagements of the partnership. *R. v. Dodd*, 9 East, 527. And this whether the plaintiff knew or not, at the time of his dealing with the concern, that the person whom he charges as a partner participated in the profits. *Ex pte. Gellar*, 1 Rose, 297; *Vere v. Ashby*, 10 B. & C. 288; 8 L. J. (O. S.) K. B. 57.

The participation, to render the party liable, must be in the profits *as such*, and several illustrations are given in sect. 2 as to what receipt of profits will not of itself constitute a partnership.

A person employed to sell goods, and who was to have for himself whatever he could procure for them above a stated sum, was held not to be a partner. *Benjamin v. Porteus*, 2 H. Bl. 590.

But where a retiring proprietor of a newspaper guaranteed the purchaser of it a certain profit, stipulating for the surplus profit for a certain number of years in a certain event, he was held to be a partner. *Barry v. Nesham*, 16 L. J. C. P. 21; 3 C. B. 641. And this case would seem not to fall within 53 & 54 V. c. 39, s. 2 (3, e). An agreement between two persons, that one shall make purchases of goods for the other, and in lieu of brokerage shall have one-third of the profits of the sales, and bear a certain proportion of the losses, would make him liable as a partner as to third persons. *Per Holroyd, J., Smith v. Watson*, 2 B. & C. 409. A distinction is recognized between receiving a share of the profits, which renders the persons liable as partner, and relying on the profits as a fund for payment, which will not have that effect. See *Grace v. Smith*, 2 W. Bl. 998; *Ex pte. Hamper*, 17 Ves. 404; *Lyon v. Knowles*, 3 B. & S. 556; 32 L. J. Q. B. 71; 5 B. & S. 756; and *Mollwo v. Court of Wards*, L. R. 4 P. C. 436. In *Ex pte. Jones*, 65 L. J. Q. B. 681; [1896] 2 Q. B. 484, however, a contract that a person should receive £3 a week "out of the profits of the business" was held to be a contract for "a share of the profits" within sect. 2 (3).

The following cases give further instances in which the mere receipt of the profits of a business does not give rise to a partnership. Two persons, who carried on business as iron-smelters, in partnership, compounded with their creditors by means of a composition deed, conveying the partnership property to trustees, to carry on the business under the name of a company, and to divide the net profits annually among the creditors of the partnership; it was held, that a creditor who had executed the deed, was not liable as a partner for debts contracted by the trustees in carrying on the trade. *Cox v. Hickman*, 9 C. B. (N. S.) 47; 8 H. L. C. 268; 30 L. J. C. P. 125. The proper test of liability, as a partner, of a person not ostensibly a partner, is not merely whether the person sought to be charged has stipulated for participation in the profits, as such, but whether the person, by whom the trade was actually carried on, carried it on as agent for the other. S. C.; *In re English, &c., Assur. Society*, 1 H. & M. 85; *Kilshaw v. Jukes*, 3 B. & S. 847; 32 L. J. Q. B. 217; *Bullen v. Sharp*, L. R. 1 C. P. 86; 35 L. J. C. P. 105; *Holme v. Hammond*, 41 L. J. Ex. 157; L. R. 7 Ex. 218; *Mollwo v. Court of Wards, supra*; *Ex pte. Tennant*, 6 Ch. D. 303; and *Badeley v. Consolidated Bank*, 57 L. J. Ch. 468; 38 Ch. D. 283; *Gosling v. Gaskell*, 66 L. J. Q. B. 848; [1897] A. C. 575. See also *Pooley v. Driver*, 45 L. J. Ch. 466; 5 Ch. D. 458; and *Adam v. Newbigging*, 57 L. J. Ch. 1066, 1069, 1070; 13 App. Cas. 308, 315, 316.

Where, under the provisions of a partnership deed between A., B., and C., the defendants, the executors of a deceased partner, A., after his death

took the share in the business to which A. would have been entitled, if living, but did not interfere therein; it was held that they were not liable to third persons on contracts made with B. and C. after A.'s death. *Holme v. Hammond*, 41 L. J. Ex. 157; L. R. 7 Ex. 218. So, where a firm being indebted to a Rajah, it was agreed that the business of the firm should be carried on, subject to his control, that he should receive 20 per cent. commission on all profits made by the firm, till the debt due should be paid, and 12 per cent. interest on cash advances made by him to the firm; and he was accordingly afterwards credited with proceeds of the business in the books of the firm, though he never received the same, nor did he hold himself out as an ostensible partner in the firm; it was held that the primary object of the agreement being a security to the Rajah for the debt and advances, and there being no intention of creating a partnership between the parties, the Rajah was not liable to third persons on contracts made by the firm. *Mollwo v. Court of Wards*, L. R. 4 P. C. 419.

A contract to be within sect. 2 (3, d), must by the terms of the section be in writing and signed by or on behalf of the parties thereto. The advance must be by way of loan; see *Pooley v. Driver*, 45 L. J. Ch. 466; 5 Ch. D. 458; *Ex pte. Delhasse*, 7 Ch. D. 511; *Syers v. Syers*, 1 App. Cas. 174; and it must appear to be so, on the face of the contract. S. C. Where from the agreement it appears that the nominal lender is a partner, a declaration that the loan is made under the Act, and that the lender shall not be a partner, will not prevent his being a partner. *Ex pte. Delhasse, supra*. The Act applies only to a loan on the personal responsibility of the trader to whom it is made, and not to a loan made on the security of his business. S. C. See on sect. 3, which postpones, in the case of insolvency, the rights of the persons lending, or selling in consideration of a share of the profits. *Ex pte. Mills*, L. R. 8 Ch. 569; *Ex pte. Taylor*, 12 Ch. D. 366; *In re Stone*, 55 L. J. Ch. 795; 33 Ch. D. 541; *In re Vince*, 61 L. J. Q. B. 836; [1892] 2 Q. B. 478; *In re Hildesheim*, [1893] 2 Q. B. 357; *Badeley v. Consolidated Bank*, 57 L. J. Ch. 468; 38 Ch. D. 283.

Sect. 7. "Where one partner pledges the credit of the firm for a purpose apparently not connected with the firm's ordinary course of business, the firm is not bound, unless he is in fact specially authorized by the other partners: but this section does not affect any personal liability incurred by an individual partner."

Sect. 8. "If it has been agreed between the partners that any restriction shall be placed on the power of any one or more of them to bind the firm, no act done in contravention of the agreement is binding on the firm with respect to persons having notice of the agreement."

Sect. 16. "Notice to any partner who habitually acts in the partnership business of any matter relating to partnership affairs operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner."

Sect. 8 seems to alter the rule laid down in *Ex pte. Greenwood*, 3 D. M. & G. 459; 23 L. J. Ch. 966, and to harmonize the rule as to other simple contracts with that which governed negotiable instruments. The section does not, however, apply where there has been no agreement between the partners to restrict their power to bind the firm, and the question may therefore still arise how far the presumed agency of a partner to bind the firm can be determined, or excluded, by timely notice to the vendor or other creditor, from another member of the firm, disclaiming the act or order of his partner. The general question as to the effect of such notice has not, it is believed, been settled. See Story on Partnership, sect. 123; 3 Kent's Com. pp. 44, 45. In cases where the majority can bind the rest of the partnership, it is questionable whether such notice or disclaimer can have any operation at all. *Vide Id.*

Sect. 17. (1) "A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner."

This rule applies even though the partnership has been made retrospective by agreement between the new and old partners. *Vere v. Ashby*, 10 B. & C. 288; 8 L. J. (O. S.) K. B. 57.

Sect. 17. (2) "A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement."

(3) "A retiring partner may be discharged from any existing liabilities, by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted."

If a creditor, knowing of a dissolution of partnership, transfer his account from the old to the new firm, and continue to deal with the new firm, this is evidence of accepting that firm as his debtors, and will release a retiring partner. *Hart v. Alexander*, 2 M. & W. 484; 6 L. J. Ex. 129; *Rolfe v. Flower*, 35 L. J. P. C. 13; L. R. 1 P. C. 27. So, where the creditor receives interest from the new firm on the debt due from the old. *Bilborough v. Holmes*, 46 L. J. Ch. 446; 5 Ch. D. 255, distinguished *In re Head*, 63 L. J. Ch. 35; [1893] 3 Ch. 426. See also *Kirwan v. Kirwan*, 3 L. J. Ex. 187; 2 Cr. & M. 617; *Ex pte. Gibson*, 38 L. J. Ch. 673; L. R. 4 Ch. 662.

Sect. 36. (1) "Where a person deals with a firm after a change in its constitution he is entitled to treat all apparent members of the old firm as still being members of the firm until he has notice of the change." (2) "An advertisement in the *London Gazette* as to a firm whose principal place of business is in England or Wales, . . . shall be notice as to persons who had not dealings with the firm before the date of the dissolution or change so advertised." (3) "The estate of a partner who dies, or who becomes bankrupt, or of a partner who not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable for partnership debts contracted after the date of the death, bankruptcy, or retirement respectively."

In the case provided for by sub-sect. (3) the retiring partner is not liable from the mere fact of his having allowed the continuing partner to carry on the business under the firm-name. *Ex pte. Central Bank of London*, [1892] 2 Q. B. 633. As to persons who, knowing that the retiring partner was a partner, had dealings with the firm, there must be actual notice to them of his retirement, in order to free him from liability for the price of goods ordered subsequently to his retirement. *Farrar v. Desjanne*, 1 Car. & K. 580, *per* Cresswell, J. The sub-section does not apply to the case of an entire contract entered into by C. with the acting partner, during the partnership, C. not knowing that the defendant was a partner, or that he had retired. *Court v. Berlin*, 66 L. J. Q. B. 714; [1897] 2 Q. B. 396.

Of two partners A. and B., A. retired, and B. carried on business with C. as partner under the same style; a customer of the old firm who sold goods to the new firm after the change of partners, but without notice of it, is put to his election, whether he will sue A. and B. for the price on a liability by estoppel, or B. & C. on a liability in fact. *Scarff v. Jardine*, 51 L. J. Q. B. 612; 7 App. Cas. 345. If after notice of A.'s retirement he sue B. and C., or prove in their liquidation, he cannot afterwards sue A. S. C.; see *Morel Brothers & Co. v. Westmoreland (Earl)*, 73 L. J. K. B. 93; [1904] A. C. 11; *French v. Howie*, 75 L. J. K. B. 980; [1906] 2 K. B. 674. As to the liability of a new partner, see *British Homes Insur. Co. v. Paterson*, 71 L. J. Ch. 872; [1902] 2 Ch. 404.

Sect. 38. "After the dissolution of a partnership the authority of each partner to bind the firm, and the other rights and obligations of the partners, continue notwithstanding the dissolution so far as may be necessary to wind up the affairs of the partnership, and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. Provided that the firm is in no case bound by the acts of a partner who has become bankrupt; but this proviso does not affect the liability of any person who has

after the bankruptcy represented himself or knowingly suffered himself to be represented as a partner of the bankrupt."

Sect. 9. "Every partner in a firm is liable jointly with the other partners," . . . "for all debts and obligations of the firm incurred while he is a partner; and after his death his estate is also severally liable in a due course of administration for such debts and obligations, so far as they remain unsatisfied, but subject" . . . "to the prior payment of his separate debts."

Thus during the lifetime of partners, A. and B., a partnership debt due from them to C. is joint only, and a judgment recovered against B. bars the remedy against A., although C. was unaware when he sued B. that A. was jointly liable. *Kendall v. Hamilton*, 47 L. J. C. P. 665; 3 C. P. D. 403; 48 L. J. C. P. 705; 4 App. Cas. 504. On the death, however, of A., C. may, unless there has been such judgment in A.'s lifetime, prove his debt against A.'s estate; S. C.; *In re Hodgson*, 55 L. J. Ch. 241; 31 Ch. D. 177; but C. can be paid only after A.'s separate creditors have been paid in full. S. C. Hence the expression that the debt of a partnership is several as well as joint is inaccurate, for the debt does not lose its joint character. S. C. On B.'s death, C. may prove against his estate, notwithstanding his prior proof against A.'s estate. S. C. A regular judgment obtained by C. against B. by his consent, cannot be set aside also by his consent, so as to enable C. to sue A. *Hammond v. Schofield*, 60 L. J. Q. B. 539; [1891] 1 Q. B. 453. Such judgment may have been obtained in an action against A. and B. in which they both appeared. *M'Leod v. Power*, 67 L. J. Ch. 551; [1898] 2 Ch. 295. But an unsatisfied judgment against A. on a bill of exchange given for the joint debt of A. and B. is no bar to an action against B. on the original contract. *Drake v. Mitchell*, 3 East, 251. *Accord. Wegg Prosser v. Evans*, 64 L. J. Q. B. 1; [1895] 1 Q. B. 108. The above principles apply where one of the contractors is a married woman contracting in respect of her separate estate. *Hoare v. Niblett*, 60 L. J. Q. B. 565; [1891] 1 Q. B. 781. As to what are "debts and obligations," see *Friend v. Young*, 66 L. J. Ch. 737; [1897] 2 Ch. 421; *Bagel v. Miller*, 72 L. J. K. B. 495; [1903] 2 K. B. 212.

Limited Partnership.] By the Limited Partnerships Act, 1907 (7 Ed. 7, c. 24), the principle of limited liability has been introduced into the law of partnership. A limited partnership, which must be registered (sect. 5), consists of one or more persons called general partners, who are made liable for all debts and obligations of the firm, and one or more persons, called limited partners, who at the time of entering into such partnership contribute capital valued at a stated amount, and those limited partners are not liable for the debts or obligations of the firm beyond the amount so contributed (sect. 4 (2)), unless they draw out or receive back any part of their contribution, in which case they are made liable for the firm's debts and obligations up to the amount so drawn out or received back (sect. 4 (3)), or unless they in fact take part in the management of the partnership business (sect. 6). A judgment obtained against the firm will, it seems, have to be so framed as to give the limited partners the benefit of their limited liability.

Delivery to an unincorporated mining company.] Mines within the stannaries of Devon and Cornwall are often worked by unincorporated partnerships, with transferable shares, on what is termed the "cost-book" principle.

The shareholders in an ordinary mining company, conducted by managers or other agents, are personally liable on the contracts made for the supply of the mines, where such contracts are necessary or usual, or where the defendants can be shown to have authorized the contracts. *Tredwen v. Bourne*, 6 M. & W. 461; 9 L. J. Ex. 220; *Steigenberger v. Carr*, 3 M. & Gr. 191; 10 L. J. C. P. 253. And such shareholders are for this purpose partners, and therefore liable on all usual contracts for goods supplied, &c., made by their agents, though there may be an agreement *inter se* not to

deal on credit; unless the plaintiff knew of the restriction, and that the goods were ordered without the authority of the shareholder sued. *Hawken v. Bourne*, 8 M. & W. 703; 10 L. J. Ex. 361. The defendant may be charged as partner on proof of an admission of his interest either before or after the debt was incurred, without proving a deed of co-partnership or any strict legal interest in the mine; *Ralph v. Harvey*, 1 Q. B. 845; 10 L. J. Q. B. 337; or by proof that he acted as partner; *Owen v. Van Ulster*, 10 C. B. 318; 20 L. J. C. P. 61; unless the admission be shown to have been made under error. *Vice v. Anson*, 7 B. & C. 409, 411; 6 L. J. (O. S.) K. B. 24. The defendant's interest may be proved by his acceptance of the shares in a mine, written at the foot of a certificate of transfer by the seller, although it be not stamped as a transfer; but if the document do not itself convey any legal interest, the admission of the defendant is not *conclusive* proof. *Toll v. Lee*, 18 L. J. Ex. 364; 4 Ex. 230. As to evidence of transfer, see *Watson v. Spratley*, 10 Ex. 222; 24 L. J. Ex. 53. Attendance of the defendant at a meeting in the character of a shareholder is evidence that he is one. *Harrison v. Heathorn*, 12 L. J. C. P. 282; 6 M. & Gr. 81. Where the facts showed that the defendant became a shareholder on the terms that the directors should not proceed without a certain capital, and they proceeded (without the defendant's assent) before that capital was raised, the defendant was held not liable on his contract. *Pitchford v. Davis*, 8 L. J. Ex. 157; 5 M. & W. 2. But the non-performance of this condition by the directors will not prevent the liability of a shareholder from attaching, where he sanctions the contract either directly or by acquiescing in the working. *Steigenberger v. Carr*, 3 M. & Gr. 191; 10 L. J. C. P. 253.

Delivery to members of an inchoate company.] A joint-stock company is in the nature of a partnership; but the constitution of such companies generally distinguishes them from ordinary partnerships. When incorporated, the direct liability of individual members ceases. When inchoate, or not incorporated, the liability of a member depends on his being actually or constructively a party to the contract on which the plaintiff sues. In such cases the questions to be considered are:—Was the defendant directly a party to the contract? Was he a member of the body which contracted? Did he hold himself out as a partner by acting, or permitting others to act, in such a way as reasonably to induce the plaintiff to believe that he was a partner, and responsible as such? Had he legally withdrawn from the concern at the time of the contract? See *Wood v. Argyle (Duke)*, 6 M. & Gr. 928; 13 L. J. C. P. 96; *Lake v. Id.*, 6 Q. B. 477; *Fox v. Clifton*, 6 Bing. 776, 792; 8 L. J. (O. S.) C. P. 257, 260; *Bright v. Hutton*, 3 H. L. C. 341. The question that most frequently presents itself, is the liability of persons who have become subscribers to a company projected, but not finally established.

When the defendants consented to be directors of a water company and attended meetings, and were privy to an order given to the plaintiff (an engineer), though not actually present when the order was given, they were held liable, notwithstanding the subsequent failure of the project. *Doubleday v. Muskett*, 7 Bing. 110; 9 L. J. (O. S.) C. P. 35. See *Collingwood v. Berkeley*, 15 C. B. (N. S.) 145. But the mere consent of the defendant to become a member of the provisional committee of an intended company, and the insertion, with his authority, of his name in a prospectus accordingly, will not *per se*, and without further privity, make him liable on orders given by other members of the committee, or by the secretary, or the solicitor of the company. *Reynell v. Lewis*, 15 M. & W. 517; 16 L. J. Ex. 25; *Barker v. Stead*, 3 C. B. 946; *Cooke v. Tonkin*, 9 Q. B. 936; *Bailey v. Macaulay*, 13 Q. B. 815; 19 L. J. Q. B. 73; *Burbidge v. Morris*, 3 H. & C. 664; 34 L. J. Ex. 131. The facts of the case may, however, warrant a judge in leaving them to the jury, as evidence that the defendant had authorised the contract to be made, either by his co-provisional committeemen or by the managers of the concern, *i.e.*, by the managing

committee, if any; or the majority of them, or by the solicitor or other officer of the company; and the terms of the printed prospectus, if circulated with the defendant's privity and consent, and known, or presumably known, to the plaintiff, may be sufficient to justify such inference. *Semb. per cur.*, in *Reynell v. Lewis*, 15 M. & W. 517; 16 L. J. Ex. 25; *Maddick v. Marshall*, 16 C. B. (N. S.) 387; 17 C. B. (N. S.) 829; *Riley v. Packington*, 36 L. J. C. P. 204; L. R. 2 C. P. 536; and see *Bailey v. Macaulay*, 19 L. J. Q. B. 73; 13 Q. B. 815. But a managing committee, appointed by the provisional committee, are not *therefore* agents of the latter for the purpose of pledging their credit by contracts. *Williams v. Pigott*, 17 L. J. Ex. 196; 2 Ex. 201. Where the defendant, as one of an acting committee, assented to the contract with the plaintiff, it was held a proper question for the jury whether the contract was on the personal liability of the defendant, either alone or as a committeeman, or on the sole credit of the funds. If on the credit of the funds, the contract becomes absolute on receipt of funds, and may be enforced. *Higgins v. Hopkins*, 18 L. J. Ex. 113; 3 Ex. 163. A minute in the books of an incorporated railway company appointing the plaintiff their engineer, not authenticated by any signature, or by any proof *aliunde* that a board meeting was held on the day, or that the defendant, a provisional committeeman, had sanctioned the resolution, is not *per se* evidence to fix the defendant; nor is a letter of the secretary to the plaintiff, stating the minute, admissible against the defendant without some proof of his authority to write it. *Rennie v. Wynn*, 19 L. J. Ex. 2; 4 Ex. 691.

Where the defendants, as agents on behalf of a proposed company, entered into a written contract with the plaintiff for the supply of goods to the company, which was not then constituted, it was held that, as the defendants had no existing principal, they were personally liable, and that a subsequent ratification by the company, when formed, could not relieve them from this responsibility, as the company was a stranger to the contract. *Kelner v. Baxter*, 36 L. J. C. P. 94; L. R. 2 C. P. 174. See also *Scott v. Ebury (Lord)*, 36 L. J. C. P. 161; L. R. 2 C. P. 255; *Hopcroft v. Parker*, 16 L. T. 561; *Melhado v. Porto Alegre Ry. Co.*, 43 L. J. C. P. 253; L. R. 9 C. P. 503; *Natal Land, &c., Co., v. Pauline Colliery Syndicate*, 73 L. J. P. C. 22; [1904] A. C. 120.

A person who applied for shares in an unincorporated joint stock company, and paid a deposit on them, but had not otherwise interfered in the concern, was not *therefore* liable on contracts made by a board of directors, who have taken upon themselves to act before the necessary capital had been raised, agreeably to the prospectus, and after the shares had been declared forfeited by reason of non-payment of subsequent calls. *Fox v. Clifton*, 6 Bing. 776; 8 L. J. (O. S.) C. P. 257. See *Howbeach Coal Co. v. Teague*, 5 H. & N. 151; 29 L. J. Ex. 137, and *Ornamental Woodwork Co. v. Brown*, 2 H. & C. 63; 32 L. J. Ex. 190.

As to actions against incorporated or registered companies, *vide* Part III., *Actions by and against companies, post*.

Delivery to wife.] Where a husband gives his wife *express* authority to pledge his credit he is liable for the price of goods delivered on such credit, as in the case of any other agent. Under the present head is considered the authority of the wife to pledge her husband's credit, to be *implied* from the mutual relation of the parties in the absence of such express authority. Where a husband is living in the same house with his wife, he is liable for any goods which he permits her to receive there. If they are not cohabiting, then the husband is in general only liable for such necessaries as from his situation in life it is his duty to supply to her. *Waithman v. Wakefield*, 1 Camp. 121; *Atkins v. Curwood*, 7 C. & P. 756. The question of the husband's liability must therefore be considered separately in the cases where his wife is and is not living with him, and the latter cases must be further distinguished with reference to the cause of the wife's separation from her husband. These questions are fully discussed and the cases thereon

collected, in the notes to *Manby v. Scott*, and other cases in 2 Smith's L. Cases.

Where a husband and wife live together, and necessaries are delivered to the wife by her order, a jury may presume the husband's assent. *Bac. Abr. Baron and Feme (H.)*. As, however, the liability of the husband turns on the question of the wife's power as his agent, the plaintiff, who relies on this presumption of agency arising from cohabitation, must show that the goods he delivered to the wife were necessaries. *Phillipson v. Hayter*, 40 L. J. C. P. 14; L. R. 6 C. P. 38. The question, however, is one of authority for the jury, and not simply whether the articles supplied were necessaries or not. *Jolly v. Rees*, 15 C. B. (N. S.) 628; 33 L. J. C. P. 177; *Debenham v. Mellon*, 50 L. J. Q. B. 155; 6 App. Cas. 24. And the husband may rebut the presumption of agency by showing that he had forbidden his wife to pledge his credit, although the plaintiff had no notice of the prohibition. *S. C.*; *Morel Bros. & Co. v. Westmoreland (Earl)*, *infra*. The presumption of agency may also be rebutted by proof that the credit was given to the wife; *Bentley v. Griffin*, 5 Taunt. 356; *Metcalf v. Shaw*, 3 Camp. 22; or by proof of any other circumstances negating the husband's assent, as that the goods supplied are beyond the rank and station the husband maintains. *Montague v. Benedict*, 3 B. & C. 631. So in an action for the price of dresses delivered to his wife, the husband may show that his wife was already supplied with sufficient articles of dress, although the plaintiff did not know she was so supplied. *Reneaux v. Teakle*, 8 Ex. 680; 22 L. J. Ex. 241. Where the order is plainly an extravagant one, that fact may be considered by the jury as tending to rebut the presumed agency. *Lane v. Ironmonger*, 14 L. J. Ex. 35; 13 M. & W. 368. The fact that necessaries have been supplied for the household on the order of the wife, both she and her husband each having property, affords no evidence of a joint liability to pay for them. *Morel Bros. & Co. v. Westmoreland (Earl)*, 72 L. J. K. B. 66; 73 L. J. K. B. 93; [1903] 1 K. B. 64; [1904] A. C. 11. Judgment obtained against either of them for the price of the necessaries bars any remedy against the other; *S. C.*; *Moore v. Flanagan*, 89 L. J. K. B. 417; [1920] 1 K. B. 919. See also *French v. Howie*, 75 L. J. K. B. 980; [1906] 2 K. B. 674. Where a wife carried on business on her own account during the imprisonment of her husband, and after his return articles were furnished in the same business with his knowledge, he was held liable for these articles, though the invoices and receipts were made out in the wife's name. *Petty v. Anderson*, 3 Bing. 170.

While a husband is bound to provide his wife with necessary wearing apparel, he is not bound to give it to her; he may lend it to her. *Rondeau, Le Grand & Co. v. Marks*, 87 L. J. K. B. 215; [1918] 1 K. B. 75. An agreement between husband and wife, whereby as payment of a given sum by the former to the latter for maintenance the latter forgoes the right to pledge his credit, must be in express terms. *Balfour v. Balfour*, 88 L. J. K. B. 1054; [1919] 2 K. B. 571.

Where a wife is living separate it lies on the plaintiff to show that she does so under circumstances which imply an authority to pledge her husband's credit. *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341. The cause of the separation may have to be considered, this sometimes arising out of the nature of the husband's occupation. See *Travers v. Sen*, 33 T. L. R. 202. If the wife leave her husband without his consent, there is no implied authority to hind him. If with his assent, there is no necessary implication of authority, but it may be implied either by her destitution of adequate support *aliunde*, or inability to support herself. Thus, in the case of labouring people both equally able to maintain themselves, an authority to bind the husband is not to be implied in the case of mere non-cohabitation. In those cases in which the husband would ordinarily support the wife, and she has no resources of her own, and he do not make her an adequate allowance, an authority to the wife to pledge her husband's credit for necessaries may be implied. *S. C.*, *per Cur.*, explaining *Hodgkinson v.*

Fletcher, 4 Camp. 70. "And, as in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiries as to the terms of the separation, for in such cases he must trust her at his peril." *Ozard v. Darnford*, 1 Selw. N. P., 13th ed. 229. Where the husband and wife had lived separate for many years, and the wife had adequate resources of her own of which the plaintiff had notice, it was held that he could not sue the husband. *Liddlow v. Wilmot*, 2 Stark. 88; see *Thompson v. Hervey*, 4 Burr. 2177. So, even without a knowledge of her being provided for, the creditor, if he give credit to her, and she is, in fact, adequately provided for *aliunde*, cannot sue the husband. *Clifford v. Laton*, M. & M. 101. And, generally, it is now settled that if the wife be living apart from her husband, and he, in fact, allow her a sufficient maintenance, he is not bound by her contracts; and it is immaterial whether the tradespeople had notice of that allowance or not. *Mizen v. Pick*, 3 M. & W. 481; in which case, at p. 483, Alderson, B., says, "I do not see how notice to the tradesman can be material. The question in all these cases is one of authority. If a wife, living separate from her husband, is supplied by him with sufficient funds to support herself, with everything proper for her maintenance and support, then she is not his agent to pledge his credit, and he is not liable." This rule applies equally where the husband is insane, and he therefore lives apart from his wife in a lunatic asylum. *Richardson v. Du Bois*, 39 L. J. Q. B. 69; L. R. 5 Q. B. 51. And a wife, living apart from her husband with his consent, on the terms that she shall accept a certain allowance which is paid, has no authority to pledge his credit, though the allowance is inadequate. *Eastland v. Burchell*, 47 L. J. Q. B. 500; 3 Q. B. D. 432. See also *Biffin v. Bignell*, 7 H. & N. 877; 31 L. J. Ex. 189.

Where the separation is compulsory, and is the act of the husband, he is liable, although an implied authority, in the strict sense of the word, can hardly be the ground of obligation. Thus where a wife leaves her husband under a reasonable apprehension of personal violence, he continues liable for necessaries furnished to her; *Houlston v. Smyth*, 3 Bing. 127; and if living apart she obtain the custody of her infant child against her husband's will, by an order under 2 & 3 V. c. 54 (now replaced by 36 & 37 V. c. 12), the reasonable expenses of providing for it have been held to be part of the necessary expenses of the wife for which she had authority to pledge her husband's credit. *Bazeley v. Forder*, 37 L. J. Q. B. 237; L. R. 3 Q. B. 559. So, if he causelessly turn away his wife or shuts his door against her. *Lungworthy v. Hockmore*, cited 1 Ld. Raym. 444; see also *Rawlyns v. Vandyke*, 3 Esp. 251. In such cases, even a notice by him that he will not be answerable for her debts, will not relieve him from liability. *Boulton v. Prentice*, 1 Selw. N. P., 13th ed. 233; S. C., 2 Str. 1214; *Harris v. Morris*, 4 Esp. 42; *Harrison v. Grady*, 13 L. T. 369. A husband ill-treated his wife, and was indicted by her for the assault; a person who advanced money, for the purposes of the prosecution, to the attorney, without which he could not have gone on, could not recover it from the husband as money supplied to procure her necessaries. *Grindell v. Godmond (or Godmore)*, 6 L. J. K. B. 31; 5 Ad. & E. 755. But the husband is liable to the solicitor employed by the wife for legal expenses incidental to a suit brought by her for restitution of conjugal rights, and for obtaining legal advice as to her position. *Wilson v. Ford*, 37 L. J. Ex. 60; L. R. 3 Ex. 63. So for the wife's extra costs of obtaining a divorce. *Ottaway v. Hamilton*, 47 L. J. C. P. 725; 3 C. P. D. 393; see, further, *In re Wingfield and Blew*, 73 L. J. Ch. 797; [1904] 2 Ch. 665. It lies upon the plaintiff to show that, under the circumstances of the separation, or from the conduct of the husband, the wife had authority to bind him, and this even in an action for necessaries. *Mainwaring v. Leslie*, M. & M. 18; 2 C. & P. 507; *Clifford v. Laton*, M. & M. 101. And where the plaintiff caused a letter to be sent to the defendant, reminding him of his liability for necessaries supplied to his wife, that she was getting into debt, and stating the wish of his wife to return to him, which the defendant

received, but returned no answer, it was held some evidence, though slight, that the defendant had authorised his wife to pledge his credit for necessaries. *Edward v. Towels*, 12 L. J. C. P. 239; 5 M. & Gr. 624; see also *Travers v. Sen*, 33 T. L. R. 202. If the husband be a lunatic, and incapable of making contracts, then he is bound by the orders for necessaries given by his wife; for this is analogous to the case of an omission of the husband to supply necessaries, though the omission is involuntary. *Read v. Legard*, 6 Ex. 636; 20 L. J. Ex. 309.

A husband was liable for necessaries provided for his wife, pending a suit in the ecclesiastical court, and before alimony decreed, although a decree, afterwards made, directed the alimony to be paid from a date before the time when the necessaries were provided. *Keegan v. Smyth*, 5 B. & C. 375. A decree for alimony was, however, a bar to the husband's liability, if the alimony were duly paid, even though the decree had become inoperative through an appeal having been presented, it being shown that it might have been renewed on application to the Court of Appeal. *Wilson v. Smyth*, 1 B. & Ad. 801. But after a divorce *à mensâ et thoro* for adultery in the husband, and a decree of alimony, the husband has been held liable for necessaries supplied to the wife, if he omitted to pay the alimony. *Hunt v. De Blaquièrè*, 5 Bing, 550. After a decree of nullity, the liability of the husband for the debts of his pseudo-wife does not continue. *Anstey v. Manners*, Gow, 10. And after sentence of judicial separation (20 & 21 V. c. 85, s. 26), the wife is, whilst so separated, to be considered a *feme sole*, for the purposes of contract and wrong, and civil suits, and her husband is not liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant; but if he shall not have duly paid the alimony (if any) decreed, he shall be liable for necessaries supplied for her use. And a wife, deserted by her husband, and obtaining protection under sect. 21, is during the protection and desertion, deemed to be in like position, with regard to property and contracts and suits, as if she had obtained a decree of judicial separation. And see also 21 & 22 V. c. 108, s. 8. See on these sections, *Ewart v. Chubb*, 45 L. J. Ch. 108; L. R. 20 Eq. 454; *Hill v. Cooper*, 62 L. J. Q. B. 423; [1893] 2 Q. B. 85; *In re Wingfield and Blew*, *supra*; *Sheppard v. Sheppard*, 74 L. J. P. 102; [1905] P. 185. So an order given to a wife under 58 & 59 V. c. 39, s. 5 (a), or to a husband under 2 E. 7, c. 28, s. 5 (2), has the same effect as a judicial separation. But such order is avoided on a resumption of cohabitation, see *Haddon v. Haddon*, 56 L. J. M. C. 69; 18 Q. B. D. 778, decided on, 41 & 42 V. c. 19, s. 4.

Where the wife has separated from her husband, without cause and without his consent, the husband is not liable even for necessaries supplied to her. *Child v. Hardyman*, 2 Stra. 875; *Hindley v. Westmeath (Marquis)*, 6 B. & C. 213, *per* Bayley, J. See also *Johnston v. Sumner*, 3 H. & N. 261; 27 L. J. Ex. 341. So, *à fortiori*, where the wife elopes from her husband and lives in adultery. *Morris v. Martin*, Stra. 647. And, in such case, the wife is a competent witness to prove the adultery; *Cooper v. Lloyd*, 6 C. B. (N. S.) 519; but the adultery cannot be proved by giving evidence of the proceedings for divorce, in which the jury found that the wife had been guilty of adultery, unless a decree has been pronounced altering the *status* of the parties. *Needham v. Bremner*, 35 L. J. P. C. 33; L. R. 1 C. P. 583. Where the husband turns the wife out of doors on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her afterwards. *Ham v. Toovey*, 1 Selw. N. P., 13th ed. 228. See also *Govier v. Hancock*, 6 T. R. 603. It is, however, otherwise if he connived at the adultery. *Wilson v. Glossop*, 57 L. J. Q. B. 161; 20 Q. B. D. 354. So, if after an adulterous elopement, the husband take her back, he is liable for necessaries subsequently supplied. *Harris v. Morris*, 4 Esp. 41.

The plaintiff must prove, either that the defendant and the woman to whom the goods were delivered are married, of which it is sufficient *prima facie* evidence that they are living together; *Car v. King*, 12 Mod. 372; or

that she and the defendant cohabited, and that she passed as his wife with his assent, assumed his name, and lived in his house as part of his family; *Watson v. Threlkeld*, 2 Esp. 637; *Robinson v. Nahon*, 1 Camp. 245; for the presumed authority arising from cohabitation in the character and position of a wife applies to such cases as well as to legal marriages, and is not rebutted by proving that the plaintiff knew the real position of the parties. *Watson v. Threlkeld*, *supra*. But when the defendant has separated from a woman with whom he has lived, not being his wife, he is not liable for necessaries supplied afterwards. *Munro v. De Chemant*, 4 Camp. 215. If, however, the separation be unknown to the plaintiff, and the goods have been supplied under circumstances which justify him in supposing that the authority of the defendant continued—as where the defendant had authorised like orders before, and the woman continued to live in the same house where the former orders had been given—it is a mere question of agency for the jury, and it is immaterial that the plaintiff knew that the parties were unmarried. *Ryan v. Sams*, 17 L. J. Q. B. 271; 17 Q. B. 460.

Where the wife ordered goods to be delivered to *her mother*, saying her husband would pay for them, which he did, and she subsequently ordered other goods in like manner, it was held that there was evidence for the jury of the wife's authority to order the latter goods. *Filmer v. Lynn*, 4 Nev. & M. 559. The case is, in this respect, like that of a household servant.

An action is not competent at the instance of a husband against his wife for an injunction restraining her from pledging his credit. *Webster v. Webster*, 85 L. J. K. B. 691; [1916] 1 K. B. 714.

As to the liability of the wife under the Married Women's Property Acts for goods delivered on her order, *vide post*, *Actions by and against married women alone*.

As to liability of wife for necessaries supplied to her after her husband's death, see *Smout v. Ilbery*, 12 L. J. Ex. 357; 10 M. & W. 1, and the comments thereon in *Yonge v. Toynbee*, 79 L. J. K. B. 208; [1910] 1 K. B. 215.

Delivery to infant child.] The father of an infant to whom goods are supplied is only liable where an authority from him to his child is proved, or circumstances appear from which such an authority can be implied. *Baker v. Keen*, 2 Stark. 501; *Rolfe v. Abbott*, 6 C. & P. 286. *Quære*, whether a father, deserting his infant child of tender years, be liable to a person who supplies the child with necessaries, no further proof of contract being given? Such action, at all events, cannot be maintained if the father had reasonable ground to suppose that the child was provided for. *Urmston v. Newcomen*, 4 Ad. & E. 899; see *Bazeley v. Forder*, 37 L. J. Q. B. 237; L. R. 3 Q. B. 599. And the mere moral obligation arising from the relation of parent and child does not, *per se*, afford any legal inference of a promise on the part of a parent to pay a debt of the child, even for necessaries supplied to him, although he may, under certain circumstances, by proceedings under the 43 El. c. 2, s. 7, be compelled to support his children, under the age of 16, according to his ability. *Mortimore v. Wright*, 6 M. & W. 482; *Shelton v. Springett*, 11 C. B. 452. The mother T. of a bastard child C. is bound by the 4 & 5 W. 4, c. 76, s. 71, to maintain it till 16 years old, but this is a mere personal liability; and on T.'s death, leaving assets, her administrator cannot be sued for necessaries supplied to C. after the death. *Ruttinger v. Temple*, 4 B. & S. 491; 33 L. J. Q. B. 1. A contract between T. and another person P., for the transfer to P. of T.'s rights and liabilities in respect of C., is void. *Humphrys v. Polak*, 70 L. J. K. B. 752; [1901] 2 K. B. 385.

By the Children Act, 1908 (8 Ed. 7, c. 67), s. 12, any person over the age of 16 years, who having the custody of any child or young person wilfully neglects him in a manner likely to cause him unnecessary suffering or injury to his health, is guilty of a misdemeanor, and by sect. 38 (2) the parent is presumed to have the custody. Hence the parent's moral duty of providing

necessaries for his child is now an absolute one. See *R. v. Senior*, 68 L. J. Q. B. 175; [1899] 1 Q. B. 283, decided on sect. 1 of the Prevention of Cruelty to Children Act, 1894, which is to the same effect as sect. 12 of the Act of 1908. Therefore an express promise to pay for such necessities already supplied is sufficient, and the prior request will be implied. See note to *Wennall v. Adney*, 3 B. & P. 249, n.; *Flight v. Reed*, 1 H. & C. 703, 716; 32 L. J. Ex. 265, 269.

Delivery to overseer.] Where goods were supplied for the use of the poor of the parish on orders signed by some of the overseers separately, all of whom had, on different occasions, promised to pay, this was held evidence of a joint contract on which all the overseers were liable to be sued, including the assistant overseer who had signed. *Kirby v. Banister*, 5 B. & Ad. 1069; 3 L. J. M. C. 69; see *Eaden v. Titchmarsh*, 1 Ad. & E. 691. And an express promise will make them liable for medicines, &c., already supplied to a pauper on sudden illness without previous request. *Watson v. Turner*, B. N. P. 147; *Wing v. Mill*, 1 B. & A. 104. But overseers are not generally legally bound by the contract of one or more of them; it is a question for the jury whether the parties sued did in fact join in it. *Marsh v. Davies*, 17 L. J. Ex. 94; 1 Ex. 668.

Acceptance.] The acceptance necessary to render the buyer liable to pay for the goods is not the same as that required by the S. of G. Act, 1893, s. 4, to make an enforceable contract of sale.

As to the former kind of acceptance it is provided by sect. 34 (1), "Where goods are delivered to the buyer, which he has not previously examined, he is not deemed to have accepted them unless and until he has had a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. (2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract." Under a c.i.f. contract "terms net cash" the buyer is bound to pay for the goods upon presentation of the shipping documents, even where the goods have not arrived. *Clemens, Horst & Co. v. Biddell Bros.*, 81 L. J. K. B. 42; [1912] A. C. 18. The buyer's right to examine the goods and reject them if they are not in conformity with the contract remains, however, unimpaired. S. C. in C. A., 80 L. J. K. B. 584, 599; [1911] 1 K. B. 934, 960, *per Kennedy, L.J.*, whose judgment was affirmed in H. L.

By sect. 35, "the buyer is deemed to have accepted the goods when he intimates to the seller that he has accepted them, or when the goods have been delivered to him, and he does any act in relation to them which is inconsistent with the ownership of the seller, or when after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them." See *Varley v. Whipp*, 69 L. J. Q. B. 333; [1900] 1 Q. B. 513.

By sect. 36 the buyer who rejects goods need only intimate to the seller his refusal to accept them; he need not return the goods.

Where delivery is to be by instalments the fact that the buyer has accepted the first instalment may not preclude him from rejecting later instalments as unmerchantable. *Jackson v. Rotax Motor, &c., Co.*, 80 L. J. K. B. 38; [1910] 2 K. B. 937.

Value.] By sect. 8 (1), "The price in a contract of sale may be fixed by the contract, or may be left to be fixed in manner thereby agreed, or may be determined by the course of dealing between the parties. (2) Where the price is not determined in accordance with the foregoing provisions the buyer must pay a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case."

When, therefore, the goods have been sold without any agreement as to the price, the value must be proved. If the vendor of goods be only able to prove the delivery of a package, without any evidence of the contents, it will be presumed as against him that it was filled with the cheapest commodity in which he deals. *Clunnes v. Pezzey*, 1 Camp. 8. If a seller agree to sell a machine at a certain price, and put in materials superior to those contracted for, the purchaser is neither bound to pay a higher price, nor to return the machine. *Wilmot v. Smith*, 3 C. & P. 455. Where goods have been sold and delivered, to be paid for by bill at a certain date, if the bill be not given, the plaintiff may recover, as part of the stipulated price, interest from the time the bill would have become due; the special agreement should, however, be stated in the claim. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 10 L. J. Ex. 473; 8 M. & W. 399. See sect. 9 as to the effect of no valuation being made when the contract is for sale at a valuation.

Defence.

By Rules, 1883, O. xxi. r. 3, a defence in denial must deny the order or contract, the delivery, or the amount claimed. See also O. xix. rr. 15, 17, 20. Evidences of the various defences that may be set up to an action of this kind will be found under the general head of *Defences in actions on simple contract, post*.

Express term as to mode of packing.] Buyers who stipulate that goods should be made up in cases in a particular way are entitled to reject the whole consignment where a part of it is made up in cases in a different way. *Moore v. Landauer*, 90 L. J. K. B. 731; [1921] 2 K. B. 519.

Reduction of damages.] By sect. 53 (1), where there is a breach of warranty by the seller or the buyer treats a breach of a condition as a breach of warranty, the buyer "may (a) set up against the seller the breach of warranty in diminution or extinction of the price." Any further damages sustained by the defendant beyond the difference of value must be recovered in a cross-action; *Mondel v. Steel*, 10 L. J. Ex. 426; 8 M. & W. 858; or now by way of counter-claim. And it seems that the acceptance and non-return of the goods by the defendant will not preclude this defence. See *Wallis v. Pratt*, 80 L. J. K. B. 1058; [1911] A. C. 394. By sect. 53 (1, b) the buyer has the alternative course of suing the seller for the breach of warranty. "The defendant has the option, if he pleases, to divide the cause of action, and use it in diminution of damages, in which case he is concluded to the extent to which he obtained, or was capable of obtaining, a reduction; or he may" . . . "claim no reduction at all, and afterwards sue for his entire cause of action." *Davis v. Hedges*, 40 L. J. Q. B. 276; L. R. 6 Q. B. 687, 692. Where plaintiff sold to the defendant cyder, warranted good, which was bad and unsaleable, whereof defendant gave the plaintiff notice, and said he would continue to try it; to which plaintiff made no reply: held, that the defendant was not liable, though he used more than was necessary to try it, and that there was evidence that the plaintiff acquiesced in the further trial, and that defendant was not bound to send back the cask with the remaining cyder. *Lucy v. Mouffet*, 5 H. & N. 229; 29 L. J. Ex. 110. And by sect. 36 the buyer is not bound to return rejected goods. A defence, relying upon a warranty of title, must be specially pleaded in cases where it is a defence at all. Where a patented machine for printing in two colours was bought by the defendant after seeing it, and it turned out to be incapable of so printing, from a defect in the principle of it, it was held that he could not resist an action for the price; for the plaintiff complied with the order of the defendant, and sent him the very article which he bargained for, and (there being no fraud) the insufficiency of the alleged invention was no answer. *Ollivant v. Bayley*, 13 L. J.

Q. B. 34; 5 Q. B. 288. And in an action by the patentee of an alleged invention, against an assignee or vendee of the patent, the defendant cannot set up its invalidity for want of novelty, if there be no fraud or eviction; for there is no warranty on such sale. *Lawes v. Purser*, 6 E. & B. 930; 26 L. J. Q. B. 25; *Smith v. Neal*, 2 C. B. (N. S.) 67; 26 L. J. C. P. 143. Though it is otherwise where by the invalidity of the patent there has been a total failure of the consideration. *Chanter v. Leese*, 9 L. J. Ex. 327; 5 M. & W. 698. Where plaintiff sold to defendant by sample an article (e.g., alkali) not manufactured by himself, which proved unfit for defendant's use, this is no defence if the sample was fairly taken from the bulk, though much of the article did not correspond with it. *Sayers v. L. & Birmingham Glass Co.*, 27 L. J. Ex. 294. Where the contract contains a clause, releasing the plaintiff from all responsibility in respect of the goods supplied by him after a certain time of trial, the purchaser cannot, after the time is passed, prove a latent defect in them in reduction of the price, there being no fraud alleged. *Sharp v. Gt. W. Ry. Co.*, 11 L. J. Ex. 17; 9 M. & W. 7.

As to the defence on sales, see *Defences to actions on simple contracts—Fraud, post.*

[*Action brought before credit expired.*] In calculating the time of the credit, the day of the sale must be excluded; and, therefore, where goods were sold on the 5th of October, to be paid for in two calendar months, an action could not be commenced till after the expiration of the 5th of December, and a writ issued on that day was premature. *Webb v. Fairmaner*, 3 M. & W. 473. By sect. 10 (2), "in a contract of sale 'month' means *prima facie* calendar month."

Where goods are fraudulently bought on credit, the seller cannot sue for goods sold and delivered before the credit has expired, though he may maintain trover. *Ferguson v. Carrington*, 9 B. & C. 59; *Strutt v. Smith*, 1 C. M. & R. 312. If by the contract it is agreed that a bill at a certain date shall be given, it operates as a giving of credit; and although no bill should be given, the seller cannot sue the purchaser for goods sold and delivered before the period when the bill, if given, would have become due. Therefore where a person purchased goods, and agreed to pay for them in three months by a bill at two months, which bill he afterwards refused to give, an action for goods sold was held not to lie before the expiration of five months. *Mussen v. Price*, 4 East, 147; *Lee v. Risdon*, 2 Marsh. 495; *Rabe v. Otto*, 89 L. T. 562. The seller may, however, sue for damages, if he has sustained any, in respect of the buyer's failure to give the bill. S. CC. So when goods are sold at six months' credit, payment to be then made by a bill at two or three months at the purchaser's option, this is in effect a nine months' credit. *Helps v. Winterbottom*, 2 B. & Ad. 431; *Price v. Nixon*, 5 Taunt. 338. And where the goods are to be paid for partly in cash and partly by bills at three months, the payment of the money or delivery of bills does not constitute a condition to the credit, so as to enable the vendor to sue for goods sold before the expiration of the three months. *Paul v. Dod*, 15 L. J. C. P. 177; 2 C. B. 800. But where payment is to be "2½ per cent. or three months' bill," which is explained to mean cash, less discount, at the expiration of the month succeeding the current month, or at the buyer's option, a bill of three months from the same period, and the buyer refused to accept a bill at the end of the second month, the seller may sue at once for the price. *Rugg v. Weir*, 16 C. B. (N. S.) 471. Where the purchaser has such option, by paying part in cash he waives his right to pay by bill. *Schneider v. Foster*, 2 H. & N. 4. And if part only of the goods be supplied, and the defendant then refuses to take more, the plaintiff may immediately sue for the goods delivered. *Bartholomew v. Markwick*, 15 C. B. (N. S.) 711; 33 L. J. C. P. 145. So where goods were sold at three months' credit, the vendor agreeing to take the vendee's bills at three months' date, at the end of the first three months, if he wished for further time, and the vendee, at the end of the three months, did not give such

bill, *Ld. Ellenborough* held that the giving the bill was a condition to the further credit, and that the vendor might bring an action for goods sold and delivered immediately. *Nickson v. Jepson*, 2 Stark. 227.

Where bills, given for goods, are dishonoured, the vendor may sue for the price immediately; *Hickling v. Hardey*, 7 Taunt. 312; *Mussen v. Price*, 4 East, 151; provided the bills are in the hands of the seller; but if they are in the hands of third persons, that is a defence to the action; for the defendant may be called upon by those persons to pay the bills. *Burden v. Halton*, 4 Bing. 454, 455; and where the bills have been indorsed away for value it is not sufficient that they should have returned to the plaintiff's hands after writ, though before trial. *Davis v. Reilly*, 66 L. J. Q. B. 844; [1898] 1 Q. B. 1. But if the bills were delivered at the plaintiff's request to C. as a trustee for the plaintiff, and they are still in the hands of C. as such trustee, and are dishonoured, there is no defence. *National Savings Bank Association v. Tranah*, 36 L. J. C. P. 260; L. R. 2 C. P. 566. When the buyer gives a promissory note of another person without indorsing it, the vendor may, on its dishonour, sue for the price of the goods without proving presentment to the maker, the note being produced by himself. *Goodwin v. Coates*, 1 M. & Rob. 221. So where the seller takes a bill, indorsed by the defendant, on a wrong stamp, in suing for the price of the goods he need not prove due notice of dishonour of the bill. *Cundy v. Marriott*, 1 B. & Ad. 696. But if he make a bill his own by laches, it operates in satisfaction of the preceding debt; so if he make it his own by altering it in a material part. *Alderson v. Langdale*, 3 B. & Ad. 660.

ACTION ON SALES OF STOCK, SHARES, AND SECURITIES.

Shares in the public funds, in commercial partnerships and companies, and like interests, are choses in action, and were not assignable at common law, so as to pass a legal interest in them except by statute, as in the case of stock, railway shares, &c.; or by ancient custom, as in the case of promissory notes and bills of exchange; *Crouch v. Crédit Foncier of England*, 42 L. J. Q. B. 183; L. R. 8 Q. B. 374; or by modern usage, as in the case of bonds "to bearer" issued by companies. *Bechuanaland Exploration Co. v. L. Trading Co.*, 67 L. J. Q. B. 986; [1898] 2 Q. B. 658; *Eidelstein v. Schuler*, 71 L. J. K. B. 572; [1902] 2 K. B. 144. Such interests, however, are saleable, whether they be legal or equitable interests, and are the subject of contract which the law will recognise and enforce. *Humble v. Mitchell*, 9 L. J. Q. B. 29; 11 Ad. & E. 205; *Tempest v. Kilner*, 2 C. B. 300. And the legal right therein is now assignable under J. Act, 1873, s. 25 (6). Such shares are not "goods" within the Sale of Goods Act, 1893, ss. 4, 62 (1), though they are "goods and chattels" within the meaning of a claim by the seller for the price of them.

A sale of such securities, which pass by delivery only, is not like a sale of specific goods; it passes no property till delivery, and, in effect, it means only a contract to deliver some stock. *Heseltine v. Siggers*, 18 L. J. Ex. 166; 1 Ex. 856. The same held good in the case of all contracts for the sale and purchase of shares; for the sellers' contract was only to procure a transfer of some shares to the buyer; *Rudge v. Bowman*, 37 L. J. Q. B. 193; L. R. 3 Q. B. 689; but contracts for the sale of shares in joint stock banking companies in the United Kingdom are now for the sale of specific shares, as such contracts are regulated by 30 & 31 V. c. 29, s. 1, which provides that all contracts for sale and purchase, made for the sale or transfer of any shares, stock, or other interest in any joint stock banking company in the United Kingdom (except the Bank of England or of Ireland, sect. 3), issuing shares or stock, transferable by any deed, &c., shall be null and void

to all intents and purposes whatsoever, unless such contract shall designate in writing such shares, &c., by the respective numbers by which the same are distinguished on the register or books of such banking company, or where there is no such register of shares, &c., by distinguishing numbers, then, unless such contract shall set forth the person in whose name such shares shall, at the time of making such contract, stand as the registered proprietor thereof in the books of such banking company. See on this section *N. Mitchell's Case*, Ct. Sess. Cas. 4th ser. vi. 420; affirm. on another ground, 4 App. Cas. 624.

Where a broker, on behalf of A., entered into a contract for the sale of bank shares to B., without specifying therein the particulars required by this section, and the bank having stopped payment, and the shares became worthless, B. refused to accept them, the broker was held to be liable to A. in damages, at any rate equal to the contract price of the shares. *Neilson v. James*, 51 L. J. Q. B. 369; 9 Q. B. D. 546. A custom of the Stock Exchange to disregard the statute is unreasonable as against a person ignorant of the custom. *S. C.*; *Perry v. Barnett*, 54 L. J. Q. B. 466; 15 Q. B. D. 388. *Secus*, as against a person who had notice of the custom. *Seymour v. Bridge*, 54 L. J. Q. B. 347; 14 Q. B. D. 460. And the buyer of shares bought under a contract void under the statute must repudiate it, or he will be bound thereby. *Loring v. Davis*, 55 L. J. Ch. 725; 32 Ch. D. 625.

A contract for the sale of shares in a company is not rescinded by the Companies Act, 1862, s. 153 [now Companies (Consolidated) Act, s. 205 (2)], if the company has commenced to be wound up under that Act, after the contract was made and before the transfer was executed. *Chapman v. Shepherd*, and *Whitehead v. Izod*, 36 L. J. C. P. 113; L. R. 2 C. P. 228. Nor is a contract for the sale of shares, entered into after the commencement of the winding-up, made illegal by that section; *Rudge v. Bowman*, *supra*; see, however, *In re Onward Building Soc.*, 60 L. J. Q. B. 752; [1891] 2 Q. B. 463; nor where the winding-up is voluntary, see sect. 131 [now sect. 205 (1) of 1908 Act]. *Biederman v. Stone*, 36 L. J. C. P. 198; L. R. 2 C. P. 504.

As to an agreement with a broker, B., to buy shares in order fraudulently to inflate the price, &c., see *Scott v. Brown*; *Slaughter v. Brown*, 61 L. J. Q. B. 738; [1892] 2 Q. B. 724.

A dividend declared after the contract of sale of shares (which is silent as to dividends) and before completion belongs to the purchaser. *Black v. Homersham*, 48 L. J. Ex. 79; 4 Ex. D. 24.

Sales on the Stock Exchange.] Shares, stock, and other securities are usually bought and sold on the London or some local Stock Exchange, and the transactions are consequently regulated by the usage of that Exchange. *Grissell v. Bristowe*, 38 L. J. C. P. 10; L. R. 4 C. P. 36; *Macted v. Paine*, 40 L. J. Ex. 57; L. R. 6 Ex. 132; *Nickalls v. Merry*, 45 L. J. Ch. 575; L. R. 7 H. L. 530. The usage of the London Stock Exchange is to be found fully set out in those cases, and the rules then in force will be found at L. R. 4 C. P. 53, n. See also the evidence in *Ex pte. Grant*, 13 Ch. D. 667. As, however, these rules have undergone some modifications, and are very frequently referred to, it will be useful here briefly to describe how the transactions are carried out, and to state the most important of the printed "Rules and Regulations" which now govern them.

The Stock Exchange only recognises dealings with its own members, and consequently all members, whether dealers on their own account, called "jobbers," or brokers acting for a principal, contract with each other as principals (r. 69). Hence the term member, hereafter employed, will include both jobbers and brokers. Every calendar month is divided into two nearly equal periods, each called "the ordinary account," and, when no time is specified, it is with reference to one or other of these accounts that contracts for sale or purchase of stocks and shares, other than new securities for which

a special settlement has not been appointed, are in general made (r. 91). The last four days of each account are called the ordinary settlement, and are known respectively as—1st, the mining contango or making-up day; 2nd, the general contango or making-up day; 3rd, the ticket or name-day; 4th, the account or pay-day. The account-days are fixed by the Committee of the Stock Exchange (r. 89), at about the middle and end of each month.

Taking first the case of shares, &c., transferable by deed of transfer. The buying member, to whom the shares have been sold, is at liberty by the name-day to substitute, if he be able to do so, another person as buyer, and so relieve himself from further liability on the contract, provided that to such person the seller cannot reasonably except, and that such person accept the transfer of the shares, and pay the price agreed on between the seller and the buyer; in other words, become the buyer of the shares at the price originally agreed on. *Grissell v. Bristowe*, 38 L. J. C. P. 10; L. R. 4 C. P. 36; *Coles v. Bristowe*, 38 L. J. Ch. 81; L. R. 4 Ch. 3; *Torrington (Viscount) v. Lowe*, 38 L. J. C. P. 121; L. R. 4 C. P. 26; *Maxted v. Paine*, 40 L. J. Ex. 57; L. R. 6 Ex. 132; and *Maxted v. Morris*, 21 L. T. 535. When the seller has accepted the nominee of the original buyer, the contract with the latter and his liability is at an end; the seller by transferring the shares to the nominee, and so putting it out of his power to transfer the shares to the original buyer, irrevocably declares his acceptance of the nominee. S. CC. This, of course, assumes that the nominee is a person legally capable of entering into the contract with the seller; where this is not so, as where he is an infant, the original buyer remains liable. *Nickalls v. Merry*, 45 L. J. Ch. 575; L. R. 7 H. L. 530.

This process of substituting another name for that of the original buyer is carried on by means of tickets, in the following manner: the buyer, B., who takes up securities deliverable by deed of transfer, before noon on the ticket-day (or, in the case of securities dealt in in the mining markets, before 2 p.m. on the day before the ticket-day), issues a ticket with his own name, as payer of the purchase-money, which ticket contains—the amount and denomination of the security to be transferred, the name, address, and description of the ultimate transferee, A., in full, the price, the date, and the name of the member to whom the ticket is issued. This ticket is passed through the hands of all the intermediate sellers, C., D., E., . . . W., in succession, each of them indorsing thereon the name of his immediate seller, D. E., F., . . . X. till it ultimately reaches the member Y., who is actually to procure the transfer of the security; the result is that Y. is brought into contact with B. Y. is then bound within ten days to deliver to B. an instrument of transfer of the security to A. executed by Z., the ultimate seller, the person in whose name they are registered, together with the coupons or certificates showing Z.'s title to the security, or a certificate on the transfer deed that they have been deposited with the Secretary of the Stock Exchange, or with the company whose security is being transferred.* B., on receiving the transfers and certificates from Y., pays him the price named on the ticket and the stamp duty on the transfer. Where B. and Y. are acting as brokers for A. and Z. respectively, the delivery of the ticket to Y., which was issued by B., establishes privity of contract between A. and Z. See judgment of Blackburn, J., in *Maxted v. Paine*, 40 L. J. Ex. 57; L. R. 6 Ex. 132; also *Nickalls v. Merry*, 45 L. J. Ch. 575; L. R. 7 H. L. 530.

Members set off their transactions as much as possible between each other, and deliver tickets for the balance of the security, and of this only they require to take delivery at the account. When the amount of the security on the ticket delivered to a member is greater than that which he wishes

*The entry of this certificate is known as "certification." As to its effect, see *Bishop v. Balkis Consolidated Co.*, 59 L. J. Q. B. 563; 25 Q. B. D. 512, and *George Whitechurch v. Cavanagh*, 71 L. J. K. B. 400; [1902] A. C. 117.

to pass on to one single member, he may "split" the ticket or divide the security between other similar tickets, which he passes on, retaining the original ticket.

It is the duty of the seller to deliver genuine transfers and certificates, and it is the duty of the purchaser thereupon to execute those transfers, and to procure their registration at the office of the company; *Wynne v. Price*, 3 De G. & Sm. 310; *Biederman v. Stone*, 36 L. J. C. P. 198; L. R. 2 C. P. 504; *Stray v. Russell*, 1 E. & E. 888; 28 L. J. Q. B. 279; 1 E. & E. 916; 29 L. J. Q. B. 115; the seller does not contract to obtain the consent of the directors to the transfer; S. C.; *L. Founders' Assoc. v. Clarke*, 57 L. J. Q. B. 291; 20 Q. B. D. 576; but he must not interfere with the registration. *Hooper v. Herts*, 75 L. J. Ch. 253; [1906] 1 Ch. 549. A special action lies at the suit of the seller against the buyer of an implied indemnity, if by reason of the buyer allowing the seller's name to remain on the register of shareholders, the latter is obliged to pay subsequent calls; *Walker v. Bartlett*, 18 C. B. 845; 25 L. J. C. P. 263; and in such case the transferor may also sue the transferee for not registering the transfer of the shares to him. See judgment in *Grissell v. Bristowe*, 37 L. J. C. P. 89; L. R. 3 C. P. 112; not affected on this point by judgment of Ex. Ch. So, when the seller S. has adopted the nominee N. as the buyer, and the price has been paid by the one, and the property transferred by the other, a contract, and the relation of vendor and vendee, immediately arises between them (see judgment of Ex. Ch., in *Grissell v. Bristowe*, 38 L. J. C. P. 10; L. R. 4 C. P. 36, 51), and this brings the case within the principle of *Walker v. Bartlett*, *supra*, so that N. is liable to indemnify S. for loss if N. do not register the shares in his name; *Bowring v. Shepherd*, 40 L. J. Q. B. 129; L. R. 6 Q. B. 309; *Hawkins v. Maltby*, 37 L. J. Ch. 58; 38 L. J. Ch. 313; L. R. 6 Eq. 505; L. R. 4 Ch. 200. And where the name of N. has been given by H., the real buyer of the shares, and they are held by N. as trustee for H., H. is liable to indemnify S. *Castellan v. Hobson*, 39 L. J. Ch. 490; L. R. 10 Eq. 47. See *Hardoon v. Belilios*, 70 L. J. P. C. 9; [1901] A. C. 118. This right to indemnity is not affected by the transferee not having executed the transfer to himself. *Coles v. Bristowe*, 38 L. J. Ch. 81; L. R. 4 Ch. 3; *Loring v. Davis*, 55 L. J. Ch. 725; 32 Ch. D. 625.

Until the delivery by the member X., who entered into the contract with the broker Y. of the seller Z. of the shares, of the name of a proper nominee, X. remains liable to carry out his contract. *Maxted v. Paine*, 38 L. J. Ex. 41; L. R. 4 Ex. 81; *Nickalls v. Merry*, 45 L. J. Ch. 575; L. R. 7 H. L. 530. And where the contract is made "with registration guaranteed," X. is liable to indemnify Z. if the nominee do not register the transfer executed to him by Z. *Cruse v. Paine*, 37 L. J. Ch. 711; 38 L. J. Ch. 225; L. R. 6 Eq. 641; L. R. 4 Ch. 441.

The nominee must have agreed to buy the shares, and where he agreed to buy for one account, and his broker, without his consent, carried over the sale to the next account, the original buyer was held to remain liable to carry out his contract, and to indemnify the seller; *Maxted v. Paine* (1st action), 38 L. J. Ex. 41; L. R. 4 Ex. 81; *Maxted v. Morris*, 21 L. T. 535; so the buyer was held liable to indemnify the seller where the former passed the name of an infant, L., as the transferee, L. being incapable of entering into a valid contract. *Nickalls v. Merry*, 45 L. J. Ch. 575; L. R. 7 H. L. 530. In this case a transfer had been executed by the seller to L., and objection was not taken to L. within ten days under the rule below mentioned, as neither the seller nor buyer knew of L.'s infancy. Where, however, the infant transferee sued the vendor to set aside the contract on the ground of fraud, and the vendor compromised the action by repaying the purchase-money, it was held that he was bound by this compromise, and could not afterwards sue the real purchaser. *Maynard v. Eaton*, 43 L. J. Ch. 641; L. R. 9 Ch. 414.

The nominee must, in any case, at least, in which there is any existing liability on the shares to be transferred, be a person open to no reasonable

objection, and, by the usage of the Stock Exchange, the seller has ten days from the account-day during which he may object to him. If an objection be made, it is referred to the Committee of the Stock Exchange, and admitted or overruled by them, according to the merits of the case, and, if admitted, the member P., who entered into the contract, is bound to find another nominee free from objection, or to perform the contract himself. *Masted v. Paine*, 38 L. J. Ex. 129; L. R. 4 Ex. 203, *per Kelly*, C.B.; *Nickalls v. Merry*, *supra*. The seller is not bound to accept the name of a foreigner resident abroad. *Goldschmidt v. Jones*, 22 L. T. 220; *Allen v. Graves*, L. R. 5 Q. B. 478. Nor that of an infant, *vide supra*.

Where K., the holder of shares, transferred them to E., who transferred them to M., who was registered in respect of them, and the company was wound up and K. and E. were settled on the list of contributories as part members; E. was held liable to indemnify K. against calls. *Kellock v. Enthoven*, 43 L. J. Q. B. 90; L. R. 9 Q. B. 241.

Where a member who has agreed to buy or sell shares does not desire to take up or deliver them at the account for which they were bought, the contract is frequently "carried over" or "continued" to the next account; this is arranged on the making-up day, and on the morning of the account-day all unsettled bargains are brought down, and temporarily adjusted at the making-up price of the ticket-day, except bargains in securities subject to arrangement by the settlement department of the Stock Exchange, which are adjusted at the making-up price of the contango day. Continuations are "effected at the making-up price, or at the then existing market price." The "difference" payable on such "continuation" is paid on that, and each subsequent account-day, until the closing of the transaction. The Clerk of the Stock Exchange fixes the making-up prices of all securities by taking the actual price on each of the two days preceding the account-day, and in the case of securities dealt in in the mining markets of the mining contango day. In other words, the shares are resold to the vendor, at the making-up price, and bought back from him at the same price, the difference between that price and the contract price, being paid on the account-day of that account. If this continuation be arranged for the accommodation of the buyer, as is usually the case on a "bull"* account, he pays the seller "contango" †; if for the accommodation of the seller, as is usually the case on a "bear"* account, he pays the buyer "backwardation." † The contango or backwardation is paid on the settling-day of the next account. The carrying over is often effected by means of similar contracts of sale and re-purchase made for this purpose with a person other than the original vendor. *Bongiovanni v. Société General*, 54 L. T. 320. In law a "continuation" is a sale and re-purchase and not a loan. *S. C. Accord. Bentinck v. L. Joint Stock Bank*, 62 L. J. Ch. 358; [1893] 2 Ch. 120. Where carrying over is at "net" rate, this includes the broker's commission with the jobber's contango. *Stubbs v. Slater*, 79 L. J. Ch. 420; [1910] 1 Ch. 632. See also *Aston v. Kelsey*, 82 L. J. K. B. 817; [1913] 3 K. B. 314, and *Blaker v. Hawes*, 109 L. T. 320.

When the member buying securities does not carry out his contract, and the securities have not been carried over as above mentioned, they may be sold out against him. The seller not receiving a ticket in due course on the

* A person who buys shares on speculation for the mere purpose of resale on a rise is called a "bull," as he tosses up the market. So, one who sells shares he has not got, and therefore seeks to lower the price that he may purchase them at a profit, and so fulfil his contract by delivery, is called a "bear," as he hugs down the market.

† It thus appears that "contango" is, in effect, though not strictly in law, a sum paid for the loan of money, and "backwardation" for the loan of stock, and the rate of continuation, therefore, depends on the relative scarcity of money and stock in the market. Occasionally the rate is "even," *i.e.*, neither contango nor backwardation is payable.

ticket-day may, within a limited time, sell out the securities and charge the loss on the member who was in default, where the ticket has been passed, the seller having transferred the stock has a right to demand payment from the member who passed him the ticket; so also where the seller has applied to the issuer of the ticket and failed to obtain payment, or has received a cheque which has been dishonoured. Where a selling member does not deliver the securities he has agreed to sell, they may within a limited time be bought in against him by the issuer of the ticket. Buying-in or selling-out is effected publicly by the officials of the Stock Exchange, who will trace the transaction to the responsible party and claim the difference thereon.

In the case of bargains in securities passing to bearer without deed of transfer, the transactions are carried on in a similar manner with some modifications arising from the difference in the mode of transfer. The tickets are passed on the ticket-day between ten and one o'clock at the making-up price of the day before; the tickets must bear distinctive numbers and be of certain amounts specified in the rules and may not be split, except in the settlement department of the Stock Exchange; smaller amounts are settled without tickets. On account-days unsettled bargains are brought down and temporarily adjusted at the making-up price of the ticket-day. These securities, if not taken up by 2.30 p.m. (noon on Saturdays) on the day for which they are sold, may be sold out by the seller, and the buyer charged with the loss; so if not delivered by 2.30 p.m. (noon on Saturdays), they may within a limited time be brought in by the buyer, and the seller charged with the loss. Buyers are to pay for such portions of securities as may be delivered within the prescribed time. The deliverer is responsible for the genuineness of securities (r. 112) delivered. English and Indian Government and Corporation securities to bearer must be delivered before 3 p.m. or noon on Saturdays.

The Consols settlement is monthly only, and consists of contango, making-up and account-days; the latter is usually about the third or fourth day of each calendar month. This settlement, however, relates chiefly to speculative dealing in government and corporation inscribed or registered stocks, &c.; *bonâ fide* sales and purchases are made for any specified day in such securities. The buyer for the ordinary account must issue tickets before 2 p.m. on the ticket-day. Stock receipts (which are evidence that the stock has been transferred in the bank books) for stock bought for a specified day must be delivered before 3.30 p.m. or 12.30 p.m. on Saturdays. If the member selling stock does not receive a transfer-ticket before 1.30 p.m. (12.15 p.m. on Saturdays) on the day upon which it was contracted to deliver the stock, he may sell out the same, and claim of the person who at 1.30 p.m. held the ticket any loss hereby occasioned. Stock bought for a specified day, and not then delivered, may be bought in on the following day at 11 a.m., and the member causing the default shall pay any loss incurred.

A rule of the Stock Exchange empowering the Committee, subject to certain conditions, to "dispense with the strict enforcement of any of the rules or regulations," does not authorise the passing of a resolution postponing the date for the completion of a contract for the purchase of shares. *Barnard v. Foster*, 84 L. J. K. B. 1244; [1915] 2 K. B. 288 (affirmed in C. A. and H. L., but this point not there dealt with).

When no time is specified, bargains in new securities, for which a special settlement has not been appointed, are for that settlement. Where the appointment of such settling-day has been obtained by the fraud of persons not parties to the bargain, the bargain is good. *Ex pte. Ward*, 51 L. J. Ch. 752; 20 Ch. D. 356. Where shares were bought for special settlement, *Bray, J., in Consolidated Goldfields of South Africa v. Spiegel*, 14 Com. Cas. 61, refused to imply a condition that the special settlement should take place within a reasonable time from the date of the contract.

A member of the Stock Exchange unable to fulfil his engagements is publicly declared a defaulter [otherwise "is hammered"], and he then ceases

to be a member. In every case of failure the official assignees "shall publicly fix the prices current in the market immediately before the declaration, at which prices" [known as "the hammer prices"] "all members having accounts open with the defaulter shall close their transactions by buying of or selling to him such securities as he may have contracted to take or deliver, the differences arising from the defaulter's transactions being paid to or claimed from the official assignees" (r. 164); this rule affects the relations of members of the Stock Exchange only *inter se*; *Ponsolle v. Webber*, 77 L. J. Ch. 253; [1908] 1 Ch. 254; the assignees shall collect the assets and distribute them as soon as possible (r. 165). No claim not arising from a Stock Exchange transaction can be proved against a defaulter's estate (r. 169), but non-members may be admitted to participate in the estate on certain conditions (r. 174).

Time bargains for the sale of stock or shares of which the seller is not possessed at the time, but which are to be transferred at a future time, may be void under stat. 8 & 9 V. c. 109, s. 18, as a wager, e.g., where the real bargain is that differences only shall be paid at the time of completion. *Grizewood v. Blaine*, 11 C. B. 538; 24 L. J. C. P. 46; *Cooper v. Neil*, W. N., 1878, p. 128; *Universal Stock Exchange v. Strachan*, 65 L. J. Q. B. 429; [1896] A. C. 166. And money paid for the defendant in respect of such a contract cannot now be recovered; see 55 & 56 V. c. 9, s. 1. A contract of this nature is, however, unusual on the Stock Exchange, and the general course of speculation is as follows (see *Ex pte. Grant*, 13 Ch. D. 667, 670 *et seq.*): A. employs B., a broker, to speculate for him; B. to carry out the speculation enters into contracts to buy or sell stock or shares for A., and in order to protect himself B. subsequently enters into contracts to sell or buy respectively similar amounts of stocks or shares as A. knows that B. must. A. never intends to take delivery of or deliver the stock bought or sold for him, as B. knows, but is content to run the risk of having to accept or deliver, in the hope B. will be able to arrange matters so that differences only shall be payable, and B. knows A. could not pay for stock bought or deliver that sold for him. In such a case B. having entered into real contracts on behalf of A., the transactions between them are not of a wagering nature, and B. is entitled to be indemnified by A. and to recover commission on the sales or purchases. *Thacker v. Hardy*, 48 L. J. Q. B. 289; 4 Q. B. D. 685; *Knight v. Fitch*, 15 C. B. 566; 24 L. J. C. P. 122; *Franklin v. Dawson*, 29 T. L. R. 479; see also *Forget v. Ostigny*, 64 L. J. P. C. 62; [1895] A. C. 318. In such cases B. can recover from A. differences he has paid for A., although he has not entered into separate contracts on A.'s behalf, but has appropriated to A. parts of larger amounts of stocks which he has bought as principal, in view of dividing them among A. and other clients. *Ex pte. Rogers*, 15 Ch. D. 207. By so doing, B., at any rate by the usage of the Stock Exchange, creates privity of contract between C., from whom he bought the shares, and A.; *Scott & Horton v. Godfrey*, 70 L. J. K. B. 954; [1901] 2 K. B. 726; see also *Consolidated Goldfields of S. Africa v. Spiegel*, 14 Com. Cas. 61; C. can therefore, on B. being declared a defaulter, and his accounts closed, sue A. for not accepting the stock; for the contract between A. and C. is not affected by the domestic procedure of the Stock Exchange under those rules. *Levitt v. Hamblett*, *infra*; *Anderson v. Beard*, 69 L. J. Q. B. 610; [1900] 2 Q. B. 260. So A. may take up the shares in accordance with the contract, although B. has become a defaulter, or he may appoint another broker in the place of B. to carry on the transaction. *Id.* But A. has no right to close his purchase at the "hammer price," as against C. *Levitt v. Hamblett*, 70 L. J. K. B. 520; [1901] 2 K. B. 53. If A., after B. has become a defaulter, repudiate the contract with C., before the account-day, C. may at once sell the shares and sue A. for the difference. *Anderson v. Beard*, and *Scott & Horton v. Godfrey*, *supra*. See further as to the usage of the Stock Exchange in the event of a member becoming a defaulter, *Ex pte. Grant*, 13 Ch. D. 673 *et seq.* As to B.'s rights of indemnity against A., see *Ex pte. Rogers*, *supra*.

Where a member D. of the Stock Exchange becomes a defaulter, and the official assignee O. collects D.'s assets, this creates an assignment of all D.'s assets to O. *Richardson v. Stormont, Todd & Co.*, 69 L. J. Q. B. 369; [1900] 1 Q. B. 701; *Lomas v. Graves*, 73 L. J. K. B. 803; [1904] 2 K. B. 557. This assignment, unless invalidated in bankruptcy proceedings against D., is valid even against non-members of the Stock Exchange. S. CC. The assignment and distribution of the assets are not, however, an accord and satisfaction of the defaulter's debts, and his creditors may sue him for the balance due after deducting the dividends received by them. *Mendelsohn v. Ratcliffe*, 73 L. J. K. B. 1027; [1904] A. C. 456. See further as to the effect of such liquidation by the official assignees, *Tomkins v. Saffery*, 47 L. J. Bk. 11; 3 App. Cas. 213; *King v. Hutton*, 69 L. J. Q. B. 786; [1900] 2 Q. B. 504.

As to the right of a broker to close the account on the death of his client, see *In re Finlay*, 82 L. J. Ch. 295; [1913] 1 Ch. 565.

As to the ostensible authority of the clerk of a broker B. to bind B. by accepting orders for him, see *Spooner v. Browning*, 67 L. J. Q. B. 339; [1898] 1 Q. B. 528.

If pretending to execute a mandate to buy shares, the broker sells his own property, the sale may be rescinded notwithstanding that the value of the shares has decreased between the date of the sale and the date of the action for rescission. *Armstrong v. Jackson*, 86 L. J. K. B. 1375; [1917] 2 K. B. 822.

The actions of ordinary occurrence are—for not accepting stock or shares; for not delivering or replacing them; and for not paying for them when transferred.

Action for not accepting.] The plaintiff in order to prove his alleged tender of or readiness to transfer stock, if denied, must show his attendance at the time or latest office hour of the day fixed for transfer, and the non-attendance of the defendant; or an actual tender and refusal to accept by the defendant; or that defendant in some way dispensed with such tender or attendance of the plaintiff; *Bordenave v. Gregory*, 5 East, 107; and the facts proved may warrant a finding of readiness to transfer, though no transfer be actually tendered. *Humble v. Langston*, 7 M. & W. 517; see *Shaw v. Rowley*, 16 L. J. Ex. 180; 16 M. & W. 810. Although the court gave no decision on the point, it was intimated in *Hibblewhite v. M'Morine*, 9 L. J. Ex. 217; 6 M. & W. 200, that such readiness was disproved by showing that the plaintiff had no stock or shares to transfer at the time for completion. As, however, it was decided in *Rudge v. Bowman*, 37 L. J. Q. B. 193; L. R. 3 Q. B. 689, that the seller does not contract that he will himself transfer the shares, for the contract is merely to procure a transfer of shares into the defendant's name, it seems immaterial whether the plaintiff have the stock standing in his own name or not, provided he has the requisite amount of shares under his control. In a contract to deliver shares on a certain day, time is of the essence of the contract both at law; *Fletcher v. Marshall*, 15 M. & W. 755; and in equity; *Doloret v. Rothschild*, 1 Sim. & St. 590; 2 L. J. (O. S.) Ch. 125. Where no time is named the delivery must be within a reasonable time. *De Waal v. Adler*, 56 L. J. P. C. 25; 12 App. Cas. 141. The reasonableness of the time is not affected by circumstances unknown to the buyer, and not disclosed to him by the seller. S. C.

The plaintiff must of course be prepared to prove the title, if in issue, but the title to shares in commercial companies, in which no documentary evidence of title is provided, does not stand on the same footing as the title to land, and requires no such strict proof. On the sale of a share in a cost-book mine, proof of the existence of the mine and of the authorized entry of the plaintiff's name in the cost-book of the mine as an adventurer will be evidence of title. The contract of sale in such adventures seems indeed to amount to nothing more than an agreement to substitute the defendant for

the plaintiff in the possession of such interest as the plaintiff, in common with the other shareholders, can lawfully claim in the subject of the adventure. See *Curling v. Flight*, 17 L. J. Ch. 79, 359; 6 Harc. 41; 2 Phill. 613. Where the question was whether there was a proper conveyance by deed, a written transfer by a foreigner of a foreign mine is evidence of it, though not under seal; it not appearing by any evidence that a seal was necessary abroad. *Steigenberger v. Carr*, 10 L. J. C. P. 253; 3 M. & Gr. 191. See further as to the proof of the title to shares, Part III., *Actions by and against companies, post*.

It was held that, in the absence of usage to the contrary, where the assent of directors was necessary for a transfer, the vendor must procure and show such assent; *Wilkinson v. Lloyd*, 14 L. J. Q. B. 165; 7 Q. B. 27; (but see *London Founders' Association v. Clarke*, 57 L. J. Q. B. 291; 20 Q. B. D. 576); and that it was the business of the purchaser to prepare and tender the written transfer to the seller for his execution. *Stephens v. De Medina*, 12 L. J. Q. B. 120; 4 Q. B. 422. But where the sale takes place on the Stock Exchange, the contract is regulated by the usage of that market; by that usage, it is the duty of the vendee to pass the name of a person to whom the vendor is to transfer the shares, and the latter is to tender certificates and transfers of them, duly executed, to the vendee, and it is thereupon the duty of the vendee to execute those transfers, and to register them at the offices of the Company. By the Companies Clauses Consolidation Act, 1845, s. 12, the want of the certificate of shares in a company constituted under that Act shall not prevent the holder from disposing of the shares.

Where the company is not completely constituted, a contract for the sale of shares will be satisfied by the tender of the letter of allotment made out to the seller; for that is all which could have been contemplated by the parties. *Tempest v. Kilner*, 3 C. B. 249.

Where bought and sold notes for the sale of mining shares named the time for payment, but were silent, as to the time of delivery, oral evidence was held admissible to show that, by custom, the shares were not deliverable till the time named for payment. *Field v. Lelean*, 6 H. & N. 617; 30 L. J. Ex. 168.

Damages.] The measure of damages for not accepting stock sold is the difference between the contract price and the market price on the day of the breach of contract. *Boorman v. Nash*, 9 B. & C. 145; 7 L. J. (O. S.) K. B. 150. *Pott v. Flather*, 16 L. J. Q. B. 366; with an obligation on the part of the seller to mitigate the damages by getting the best price he can on that date. *Jamal v. Moolla Dawood*, 85 L. J. P. C. 29; [1916] 1 A. C. 175. If the seller chooses to retain the shares after the breach and afterwards sells them at a price higher than the market price at the date of the breach, the purchaser is not entitled to the benefit of that higher price in mitigation of damages. S. C.

Action for not delivering or replacing.] The vendee, in the absence of usage or express agreement on the point, must show a tender to the defendant of a written transfer for execution by him, in cases where such formal instrument is necessary, as in railway shares; *Stephens v. De Medina*, 12 L. J. Q. B. 120; 4 Q. B. 422; unless the defendant has, by his conduct, dispensed with such tender. In a sale on the Stock Exchange the tender is unnecessary, as it is there the duty of the transferor to deliver a transfer to the transferee, together with certificates of the shares, but he must show that the name of the transferee was duly passed. A tender of payment by the plaintiff is not necessary. *Stephens v. De Medina, supra*. It is only necessary that he should be ready and willing and able to pay. A contract to deliver shares in a company does not require the actual delivery of the scrip certificates, but it is sufficiently performed when the vendor has put the vendee in the position of legal owner of the shares. *Hunt v. Gunn*, 13 C. B. (N. S.) 226. Where, after the contract for the sale of shares, and before transfer, new shares are allotted to the vendor in right of the shares

he has sold, the purchaser is entitled to these shares. *Stewart v. Lupton*, (1874) W. N. 171; *Id.* 178, L.J.J. In a contract to deliver shares on a certain day, time is of the essence of the contract.

Damages.] When the action is for non-delivery, and the plaintiff had not paid the price, the measure of damage is the difference between the contract price and the market value on or about the day of breach; for the plaintiff might have bought other stock immediately; and the same rule applies to shares in a company. *Shaw v. Holland*, 15 L. J. Ex. 87; 15 M. & W. 136; *Tempest v. Kilner*, 3 C. B. 253.

In an action for not replacing stock or shares, lent by the plaintiff to the defendant, a different measure is adopted. There the plaintiff may have been prevented from replacing them himself, for he may not have had, and is not bound to have, funds in his hands to do so. He is therefore entitled to damages sufficient to enable him to buy other stock or shares, at the current price at the time of the trial, if that be larger than the price at the time fixed for replacing. *Shepherd v. Johnson*, 2 East, 211; *M'Arthur v. Seaforth, Ltd.*, 2 Taunt. 257; *Owen v. Routh*, 14 C. B. 327; 23 L. J. C. P. 105. Any other special damage arising from the breach of contract, such as the loss of dividends, &c., must be alleged in the claim if sought to be recovered.

Action for price of shares, &c., sold.] In a sale on the Stock Exchange the transferor must prove a tender of the transfer and of the certificates of the shares to the buyer, or his broker, unless such tender has been waived. Where shares in a company are not legally saleable for want of registration of the company under an Act of Parliament, this may be pleaded as a defence. *Semb.*, *Lawton v. Hickman*, 16 L. J. Q. B. 20; 9 Q. B. 563.

In the sale of shares or securities there is generally no implied warranty; but it is implied that they are really what they purport to be, and what the buyer means to purchase. Where, for instance, scrip is known in the market as "Kentish Railway Scrip," though informally issued by a railway company, the buyer cannot treat the sale as a nullity on that ground, if the jury find that it was what he contracted to buy. *Lambert v. Heath*, 15 L. J. Ex. 297; 15 M. & W. 486.

Where R., a member of the Stock Exchange, has become a defaulter, and thereupon, by the direction of the official assignees, sells shares standing in his name in order to realise the estate the buyer who knows all the circumstances cannot set off against the price a debt due to him from R. *Richardson v. Stormont, Todd & Co.*, 69 L. J. Q. B. 369; [1900] 1 Q. B. 701. See *Lomas v. Graves*, 73 L. J. K. B. 803; [1904] 20 K. B. 557. See further as to the effect of R.'s failure as to purchases made by him as H.'s broker, *Beckhusen v. Hamblet*, 69 L. J. Q. B. 431; [1900] 2 Q. B. 18; *Levitt v. Hamblet*, 70 L. J. K. B. 520; [1901] 2 K. B. 53; and *Anderson v. Beard*, 69 L. J. Q. B. 610; [1900] 2 Q. B. 260.

ACTION FOR WORK AND MATERIALS.

In an action for work done, the plaintiff's proofs are, 1. The contract, express or implied; 2. The performance of the work and supply of materials if any; and 3. The value, if the remuneration be not ascertained by the contract.

The contract.] Where there was a special agreement, the terms of which had been performed, it raised a duty for which an *indebitatus assumpsit* of the common counts lay. B. N. P. 139; cited by Holroyd, J., in *Studdy v. Sanders*, 5 B. & C. 638; *Robson v. Godfrey*, Holt, N. P. 236. And this

principle still holds good although the Rules, 1883, O. xix. rr. 4, 5, 6, 15, require a more specific statement of the plaintiff's claim.

If the contract have not been executed, but the plaintiff have been prevented from executing it by the absolute refusal of the defendant to perform his part of it, or by an act done by the defendant which has incapacitated the plaintiff from performing it, the plaintiff may rescind the contract, and sue on a *quantum meruit* for past services. *Planché v. Colburn*, 8 Bing. 14; 1 L. J. K. B. 7; *Lodder v. Slowey*, 73 L. J. P. C. 82; [1904] A. C. 442; *Smith's Lead. Cas.*, notes to *Cutter v. Powell*. So, where the plaintiff was to have certain goods for his own services, and the defendant sold them, or caused them to be sold, by his own default, this action lies for the money value. *Keys v. Harwood*, 15 L. J. C. P. 207; 2 C. B. 905. Where the plaintiff agreed to print a work, but refused to print a libellous dedication to it, and the author thereupon refused to accept or pay for the rest, he was held liable to pay for printing the body of the work. *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237.

Where A. agrees to build a house on B.'s land for a lump sum, and after doing part of the work abandons the contract and B. completes the house, A. cannot recover for the work done on a *quantum meruit*, there being no evidence of a fresh contract. *Sumpter v. Hedges*, 67 L. J. Q. B. 545; [1898] 1 Q. B. 673. So where the house was built but it deviated materially from the special contract. *Ellis v. Hamlen*, 3 Taunt. 52. In *Dakin v. Lee*, 84 L. J. K. B. 894, 2031; [1916] 1 K. B. 566, the law on the subject was stated thus by Sankey, J.: "Where a builder has supplied work and labour for the erection or repair of a house under a lump sum contract, but has departed from the terms of the contract, he is entitled to recover for his services, unless (1) the work that he has done has been of no benefit to the owner; (2) the work he has done is entirely different from the work he has contracted to do; or (3) he has abandoned the work and left it unfinished." In the C. A. the decision proceeded upon different grounds, but it is submitted that the passage just quoted accurately states the law. Certain variations from the specifications were there held to amount, not to an abandonment of, or failure to complete, the contract, but to a negligent performance of it, and that the contractors could recover the lump sum stipulated for less an amount necessary to make the work correspond with that contracted to be done. See also *Vigers v. Cook*, 35 T. L. R. 605. Where the work has been done and been adopted by B., though not strictly pursuant to the contract, the plaintiff may recover upon a *quantum meruit*. B. N. P. 139; *Burn v. Miller*, 4 Taunt. 745. So where the plaintiff having contracted to build cottages by Oct. 10, did not finish them until Oct. 15, and the defendant accepted them. *Lucas v. Godwin*, 3 Bing. N. C. 737; 6 L. J. C. P. 205. See *Gray v. Hill*, Ry. & M. 420; and *Savage v. Canning*, 1 R. 1 C. L. 434. In *Forman v. "Liddesdale"*, 69 L. J. P. C. 44; [1900] A. C. 190, where work entirely different from that contracted for was done to a ship, the fact that the owner sold it at a price enhanced by the unauthorised labour expended upon it, was held not to amount to acquiescence on his part or acceptance of liability for the work done. See also *Wheeler v. Stratton*, 105 L. T. 786.

An implied promise to pay for work done *extra*, and not under the contract, can only arise in cases where the defendant is competent to contract by parol. *Lamprell v. Billericay Union*, 18 L. J. Ex. 282; 3 Ex. 283. As to the liability of a corporation for work done, see Part III., *Actions by Companies*—*Contracts by Corporations*, *post*.

To fix a defendant with extras, the acceptance and adoption ought to be under circumstances which imply approval and waiver of the deviation, and make it practicable to repudiate; for a defendant cannot be expected to refuse a house built on his own land, or to repudiate materials and labour worked into the *corpus* of his own property. In such cases the decisions in *Sinclair v. Bowles*, 9 B. & C. 92, and *Ellis v. Hamlen*, 3 Taunt. 52, seem to apply. In *Lucas v. Godwin*, 6 L. J. C. P. 205; 3 Bing. N. C. 737, the

stipulation as to time was held not to be a condition precedent; and there was also extra work done. The rule with regard to additions or alterations, in the case of a special contract, must be taken with this limitation, that the workman cannot charge for them unless his employer is expressly informed, or must necessarily from the nature of the work be aware, that they will increase the expense. *Lovelock v. King*, 1 M. & Rob. 60. Where the special contract is so entirely abandoned by consent that it is impossible to trace it, the workman will be permitted to charge by measure and value, as if no contract had ever been made; but if not wholly abandoned, the contract will operate as far as it can be traced, and the excess only shall be paid for according to the usual rate of charging. *Pepper v. Burland*, Peake, 103. Where there is a written contract it must be produced, although the plaintiff seeks only to recover for *extras* not included in it; *Vincent v. Cole*, M. & M. 257; for the contract is the proper evidence to show what are *extras*; *Jones v. Howell*, 4 Dowl. 176; *Buxton v. Cornish*, 13 L. J. Ex. 91; 12 M. & W. 426; and, if unstamped, the judge cannot look at it to see whether it extends to the work claimed as *extras*. S. CC.; and see *Edie v. Kingsford*, 14 C. B. 759; 23 L. J. C. P. 123. In *Vincent v. Cole*, *supra*, it was held that even a distinct promise by the defendant to pay for the work would not supersede the production of the contract; but it was not held (though so stated in the marginal note) that an admission by the defendant that it was *extra* the contract, was insufficient to fix him without producing it. Yet, *semble*, as a building contract usually contains general provisions as to extra works, even this admission may not dispense with the production, unless the defendant has also admitted that it contains no such provisions. Where a man is employed to do work under a written contract, and a separate order for other work is afterwards given orally during the continuance of the first employment, the written contract need not be produced in an action for the second work. *Reid v. Batte*, M. & M. 413. As to the effect of an award in an arbitration under a clause in the contract that certain items are *extras*, to be paid for as such, notwithstanding the absence of orders in writing by the engineer, see *Brodie v. Cardiff Cor.*, 88 L. J. K. B. 609; [1919] A. C. 337.

Where A. contracts with B. to do work for A. which involves B.'s individual responsibility or skill, personal performance by B. is of the essence of the contract. *Robson v. Drummond*, 2 B. & Ad. 303. Where, however, that is not involved, B. may assign his interest in the contract to C., and performance by C. is sufficient. *British Waggon Co. v. Lea*, 49 L. J. Q. B. 321; 5 Q. B. D. 149. As to the effect of the death of a partner in the firm with whom the plaintiffs had contracted personally to do work, see *Phillips v. Hull Alhambra Palace Co.*, 70 L. J. K. B. 26; [1901] 1 K. B. 59.

An action will lie against the employer for preventing work being done under a contract, *e.g.*, by not supplying plans and setting out the work; *Roberts v. Bury Commissioners*, 39 L. J. C. P. 129; L. R. 5 C. P. 310; or not giving the contractor possession of the site for the work. *Lawson v. Wallasey Local Board*, 52 L. J. Q. B. 302; 11 Q. B. D. 229; *affirm.* in C. A. on other grounds; 48 L. T. 507. But a warranty does not necessarily arise from the contract that the contractor shall be at liberty to work upon the land without interruption from anyone. *Porter v. Tottenham Urban District Council*, 84 L. J. K. B. 1041; [1915] 1 K. B. 776. Where a contract for the execution of certain works by a named day provided for the payment, by the contractor D., of liquidated damages for non-completion by that day, and also that additional work might be ordered; additional work was ordered which necessarily delayed the completion of the contract, it was held that in the absence of agreement that the additional work should not extend the time for completion, D. was exonerated from paying the damages. *Dodd v. Churton*, 66 L. J. Q. B. 477; [1897] 1 Q. B. 562.

Conditions precedent—Architect's certificate.] In *Morgan v. Birnie*, 9 Bing. 672, the surveyor's certificate, required by the contract, was held a

condition precedent to the plaintiff's right to sue in respect of work done under it; and a letter inclosing the bills, with an approval of the charges, is not equivalent to a certificate of approval of the work done. *S. C. A* clause by which the architect's certificate is made a condition precedent to the contractor's right of action, is unaffected by the fact that the contract contains another clause making the architect sole arbitrator between employer and contractor, and his decision on any dispute arising between the parties out of the contract conclusive, if there has been no application for arbitration and no improper dealing between employer and architect shown. *Eaglesham v. McMaster*, 89 L. J. K. B. 805; [1920] 2 K. B. 169. The certificate is not, however, a condition precedent to the right to recover if it is wrongly withheld on account of the submission of the architect's judgment to the judgment of the building owners, and the latter prevent the issue of the document. *Hickman v. Roberts*, 82 L. J. K. B. 678; [1913] A. C. 229. Apart from improper conduct the wrongful withholding of the certificate affords no ground of action. *Clarke v. Watson*, 34 L. J. C. P. 148; 18 C. B. (N. S.) 278; *Eaglesham v. McMaster*, *supra*. Where the surveyor is to give certificates and fix the price of extras and additions, his certificate conclusively determines what are extras and additions. *Richards v. May*, 52 L. J. Q. B. 272; 10 Q. B. D. 400. See, however, *Brodie v. Cardiff Corporation*, 88 L. J. K. B. 609; [1919] A. C. 337. In that case there was a dispute regarding certain items, the contractors contending they were extras and the engineer, contending they were not, refusing to give written orders for them. The dispute was submitted to arbitration in accordance with the contract, and the arbitrator having found that the items were extras, the contractors were held entitled to recover notwithstanding the absence of orders in writing by the engineer. The surveyor or architect need not certify in writing, unless expressly required by the contract. *Roberts v. Watkins*, 14 C. B. (N. S.) 592; 32 L. J. C. P. 291. Where the contract required the work to be done to the satisfaction of the other party, his approval was held not to be a condition precedent. *Dallman v. King*, 7 L. J. C. P. 6; 4 Bing N. C. 106. But if the parties have clearly left it to the employer to decide as to the sufficiency of the compliance with the contract, his decision is conclusive as long as he acts *bonâ fide*. *Stadhard v. Lee*, 3 B. & S. 364; 32 L. J. Q. B. 75. In building contracts, payments on architect's certificates during the work are considered as payments on account of the sum eventually found due; and the time of completion is not generally of the essence of the contract. *Lamprell v. Billericay Union*, 18 L. J. Ex. 282; 3 Ex. 283. An alteration made by the defendant in the written conditions will not enable the plaintiff to dispense with them, and sue on a *quantum meruit*. *Pattinson v. Luckley*, 44 L. J. Ex. 180; L. R. 10 Ex. 330. As to the effect of such certificate under a contract in the R. I. B. A. form, see *Robins v. Goddard*, 74 L. J. K. B. 167; [1905] 1 K. B. 294.

An architect's certificate for work done does not dispense with the necessity for a previous written order where required by the contract. *Tharsis Sulphur and Copper Co. v. M'Elroy*, 3 App. Cas. 1040. In this case there was no arbitration clause such as was in *Brodie v. Cardiff Corporation*, *supra*.

It may be here noticed that, in the absence of fraud, no action will lie against an architect, either by the builder for refusing to certify; *Stevenson v. Watson*, 48 L. J. C. P. 318; 4 C. P. D. 148; or by the building owner for improperly certifying; *Chambers v. Goldthorpe*, 70 L. J. K. B. 482; [1901] 1 K. B. 624.

Liability of defendant.] Where the defendant had contributed to the funds of a building society, and had been party to a resolution that certain houses should be built, it was held that this made him liable to an action for work done in building those houses, without proof of his interest in them, or in the land. *Braithwaite v. Skofield*, 9 B. & C. 401; 7 L. J. (O. S.)

K. B. 274. So a subscriber, who is one of a committee for managing the affairs of a hospital, is personally liable to the creditors of the hospital, for goods supplied with the sanction of the committee. *Burls v. Smith*, 7 Bing-705.

As to the liability of a company after its incorporation for preliminary expenses incurred by the promoters in its establishment, see *Actions by and against Companies*, post.

Where orders are given by a public officer, acting on behalf of a public body, or of a known department of the State, and in discharge of his duty as such, it is to be presumed that personal credit is not given to him, and he is not liable. *Macbeath v. Haldimand*, 1 T. R. 172; *Gidley v. Palmerston*, 3 B. & B. 275, 286; *Goodwin v. Robarts*, 44 L. J. Ex. 157, 161, 162; L. R. 10 Ex. 337, 344, 345; *Hosier v. Derby (Earl)*, 87 L. J. K. B. 1009; [1918] 2 K. B. 671, where it was further laid down that an action can no more be brought against a servant of the Crown for a declaration as to what a contract means than it can be brought for a substantive remedy on the contract itself. Cf., however, *China Mutual Steam Navigation Co. v. MacLay*, 87 L. J. K. B. 95; [1918] 1 K. B. 33. See *Dunn v. Macdonald*, 66 L. J. Q. B. 420; [1897] 1 Q. B. 555. The rule applies to such officers as a colonial governor, commissary, commanding officer of a regiment or of a king's ship, justices contracting to build a county bridge, &c. *Allen v. Waldegrave*, 2 B. Moore, 621; *Myrtle v. Beaver*, 1 East, 135; *Unwin v. Wolseley*, 1 T. R. 674; *Palmer v. Hutchinson*, 50 L. J. P. C. 62; 6 App. Cas. 619. This principle is applied by the Public Health Act, 1875 (38 & 39 V. c. 55), s. 265, to contracts entered into by the local authority, &c., for carrying out the Act. But where navigation commissioners employed the plaintiff to do certain of the works, all the acting commissioners were held personally liable. *Horsley v. Bell*, Ambler, 770. So, where the defendant, the clerk of a county court, ordered the plaintiff to fit up the court, and the bill was allowed by the county court judge, it is for the jury to say whether the work was not done on the clerk's personal credit; for it was no part of his official duty to give such an order, nor did the facts exclude the presumption of personal credit. *Auty v. Hutchinson*, 17 L. J. C. P. 304; 6 C. B. 266. An action will lie against H. M. Comrs. of Public Works and Buildings for damages for breach of a contract between them and a builder for the erection of a public building. *Graham v. Public Works Comrs.*, 70 L. J. K. B. 860; [1901] 2 K. B. 781.

The defendant requested the plaintiff to take care of and show his (the defendant's) house, and promised to make him a "handsome present"; it was held that this was evidence on which the plaintiff might recover a reasonable recompense for work and labour. *Jeury v. Busk*, 5 Taunt. 302. But where a person performed work for a committee, under a resolution entered into by them, "that any service rendered by him should be taken into consideration, and such remuneration be made as should be deemed right," it was held that an action would not lie to recover a recompense. *Taylor v. Brewer*, 1 M. & S. 290; see *Roberts v. Smith*, 4 H. & N. 315; 28 L. J. Ex. 164. It was held by Ld. Kenyon, C.J., that there is no implied promise to pay an arbitrator for his trouble. *Virany v. Warne*, 4 Esp. 47; *sed secus Swinford v. Burn*, Gow, 8, cor. Dallas, C.J.; *Crampton v. Ridley*, 20 Q. B. D. 48, per Smith, J.; and *Macintyre v. Smith*, [1913] S. C. 129. See also *In re Coombs*, 4 Ex. 839; *Hoggins v. Gordon*, 11 L. J. Q. B. 286; 3 Q. B. 466. A master may sue for the work and labour of his apprentice, against a person who harbours him after his desertion; for he may waive the tort. *Foster v. Stewart*, 3 M. & S. 191. A barrister cannot recover, even on an express contract to remunerate him for professional services rendered as a harrister; *Kennedy v. Broun*, 13 C. B. (N. S.) 677; 32 L. J. C. P. 137; *In re Le Brasseur*, 65 L. J. Ch. 763; [1896] 2 Ch. 487; see also *Broun v. Kennedy*, 33 Beav. 133; 33 L. J. Ch. 71; but he may recover on an express contract for services rendered to the guardians of a union as returning officer. *Egan v. Kensington Union*, 3 Q. B. 935, n.,

Ld. Denman, C.J. Where A., who was employed by the defendant to transport goods to a foreign market, delegated the entire employment to the plaintiff, who performed it, it was held that the plaintiff could not recover from the defendant a compensation for such services; for there was no privity between them. *Schmaling v. Thomlinson*, 9 Taunt. 147. Where the plaintiff, having a contract jointly with A. to do certain work for a company, assigned the contract to A. with the company's consent, on a promise by A. to pay plaintiff a certain sum when the contract was completed, and the contract was afterwards abandoned as between A. and the company, and replaced by another; held that the plaintiff could not sue A. for the money upon the completion of the substituted contract. *Humphreys v. Jones*, 20 L. J. Ex. 88; 5 Ex. 952.

The sheriff's officer cannot, but the sheriff can, sue the execution creditor, B., for fees payable by B. under the Sheriffs Act, 1887, s. 20 (2), and the table of fees made thereunder dated August 31st, 1888 (see W. N. (1888) Part II. p. 441); *Smith v. Broadbent*, 61 L. J. Q. B. 490; [1892] 1 Q. B. 551; *Glasbrook v. David*, 74 L. J. K. B. 492; [1905] 1 K. B. 615. The fees are meant, however, only to cover the sheriff's out-of-pocket expenses, and where he has recovered possession money from one creditor, he cannot recover a second 5s. a day from another creditor in respect of the same possession. S. C. The earlier cases are no longer applicable.

Where an architect is employed by the owner to draw plans, and obtain tenders for the execution of works, it is usual for him to employ a surveyor to take out the quantities, who is to be paid by the builder whose tender is accepted; *North v. Bassett*, 61 L. J. Q. B. 177; [1892] 1 Q. B. 333; *Moon v. Witney Union*, 6 L. J. C. P. 305; 3 Bing. N. C. 814; if, however, by the act of the owner the work does not proceed, the latter is bound to pay the surveyor for taking out the quantities. S. C. When the architect has completed his work and been paid, the plans are the property of the owner. *Gibbon v. Pease*, 74 L. J. K. B. 502; [1905] 1 K. B. 810.

Where there are sub-contracts in connection with a building operation the question has arisen as to the right of the sub-contractor or "specialist" for the supply of specific parts of the work to sue the builders or building owners. In *Ramsden v. Chessum*, 110 L. T. 274, it was held that specialists were entitled to sue the builders, as in the circumstances the fact that the goods supplied had been used by them raised an implied promise by them to pay for them. The specialists' right to sue the building owner was considered in *Crittall Manufacturing Co. v. L. C. C.*, 75 J. P. 203; and in *Young v. White*, 76 J. P. 14, where it was held that they could sue the building owner; but those decisions were not approved in *Hampton v. Glamorgan County Council*, 86 L. J. K. B. 106; [1917] A. C. 13, where it was decided that there is no presumption in the case of prime cost or provisional items that the building owner is liable upon the contract upon which the things in question are ultimately supplied and that the builder is his agent. In that case the specialists were held not entitled to sue the building owner. Each contract must be looked at to ascertain whether privity is created between the sub-contractor and the building owner.

As to when a claim for work and labour, and when one for goods sold and delivered is applicable, the rule is thus laid down: "If you employ a man to build a house on your land, or to make a chattel with your materials, the party who does the work has no power to appropriate the produce of his labour and your materials to any other person. Having bestowed his labour at your request on your materials he may maintain an action against you for work and labour. But if you employ another to work up his own materials in making a chattel, then he may appropriate the produce of that labour and materials to any other person. No right to maintain any action vests in him during the progress of the work; but when the chattel has assumed the character bargained for, and the employer accepted it, the party employed may maintain an action for goods sold and delivered, or (if the employer refuses to accept) a special action on the case for such refusal; but he cannot

maintain an action for work and labour." *Per* Bayley, J., in *Atkinson v. Bell*, 8 B. & C. 227, 283. See also *Cotterell v. Apsey*, 6 Taunt. 322; *Heath v. Freeland*, 1 M. & W. 543; 5 L. J. Ex. 253. The power of amendment renders these distinctions less material than they were formerly; it must, however, be remembered that if the claim is not properly made for work and materials, but for not accepting a chattel, it may be defeated by a defence under the Sale of Goods Act, 1893, s. 4.

A contract for work and materials supplied in and about the work is not within that section. It may be within the Stat. of Frauds, sect. 4, if it must continue beyond a year; but not if it will not necessarily continue beyond the year.

Liability of defendant—Repairs of ships.] The owner is liable for necessary repairs done, or supplies provided for a ship by the master's order; *Webster v. Seekamp*, 4 B. & A. 352; those are necessary which the owner, as a prudent man, would have himself ordered, although not absolutely necessary. S. C.; *The Riga*, 41 L. J. Adm. 39; L. R. 3 Adm. 516. The plaintiff must prove that the goods supplied are necessities; *Mackintosh v. Mitcheson*, 18 L. J. Ex. 385; 4 Ex. 175; *Gunn v. Roberts*, 43 L. J. C. P. 233; L. R. 9 C. P. 331; and that neither the owner nor his recognised agent, able to obtain supplies, was present at the port. S. C. Where the master dies during the voyage the mate becomes master, and is consequently invested with the incidents of the post. *Hanson v. Royden*, 37 L. J. C. P. 66; L. R. 3 C. P. 47. Registered ownership, that is, proof of registration (see 57 & 58 V. c. 60, ss. 14, 64 (2)) is *prima facie* evidence of the liability of those parties for the repairs of the ship. *Cox v. Reid*, Ry. & M. 199; and see *Hibbs v. Ross*, 35 L. J. Q. B. 193; L. R. 1 Q. B. 534, where the earlier cases are considered. Such evidence may be rebutted by proof of the beneficial interest having been parted with, and of the legal owner having ceased to interfere with the management of the ship. *Young v. Brander*, 8 East, 10; *Jennings v. Griffiths*, Ry. & M. 42. The true question in cases of this description is "Upon whose credit was the work done?" S. C., *Id.* 43, *per* Abbott, C.J. Even although the order was given by a person who without the defendant's knowledge or authority was registered under 57 & 58 V. c. 60, s. 59, as managing owner. *Frazer v. Cuthbertson*, 50 L. J. Q. B. 277; 6 Q. B. D. 93. See also *Baumwoll Manufactur, &c., v. Furness*, 62 L. J. Q. B. 201; [1893] A. C. 8, and *Von Freeden v. Hull*, 76 L. J. K. B. 715. But where a managing owner is such with the consent of his co-owners, he has authority to give orders for the necessary repair, fitting, and outfit of the vessel. *The Huntsman*, [1894] P. 214. Where the owner, A., agreed to sell to B., who appointed T. to be master, and he was registered as such, and plaintiff did repairs on the order of T., A. was held not liable, he not having done anything to sanction T. appearing as his master. *Mitcheson v. Oliver*, 5 E. & B. 419; 25 L. J. Q. B. 39. See *Frost v. Oliver*, 2 E. & B. 301; 22 L. J. Q. B. 353; *Preston v. Tamplin*, 2 H. & N. 684; 27 L. J. Ex. 192; *The Gt. Eastern*, L. R. 2 Adm. 88; *Burdick v. Lordan*, W. N. 1878, p. 129; and *Baumwoll Manufactur, &c., v. Furness*, *supra*. A person who takes a share in a ship under a void conveyance is not liable for articles furnished to the ship, unless credit be given to him individually, or he holds himself out as (that is, by acts or words assumes the character of) owner. *Harrington v. Fry*, 2 Bing. 179. An undertaking by the defendant's solicitor "to appear for Messrs. T. & M., joint owners of the sloop A.," is evidence against the defendants of the joint ownership. *Marshall v. Cliff*, 4 Camp. 133. A part owner of a ship is not necessarily a partner; and if, as ship's husband, he have fitted her out, he may sue the other part owners separately for their shares of the expense. *Helme v. Smith*, 9 L. J. (O. S.) C. P. 206; 7 Bing. 709.

Whether a mortgagee of a ship, before possession, was liable to repairs was formerly much doubted; *Briggs v. Wilkinson*, 7 B. & C. 33; but now when a transfer is made only by way of mortgage in the manner specified

in stat. 57 & 58 V. c. 60, ss. 31 *et seq.*, the mortgagor continues owner except so far as may be necessary for making the ship available as a security for the mortgage debt. And when a mortgagor has been allowed by the mortgagee to continue in possession and to use and navigate the ship, and the mortgagor orders necessary repairs to be done, the shipwright has a lien as against the mortgagee for his work and labour. *Williams v. Allsup*, 10 C. B. (N. S.) 417; 30 L. J. C. P. 353; see *Johnson v. R. Mail S. Packet Co.*, 37 L. J. C. P. 33; L. R. 3 C. P. 38.

Where the repairs were done by F., under a contract with C., on behalf of the owner, M., but without his authority, it was held that M. did not, by taking the ship as repaired, and selling her, ratify the contract or become liable for the repairs. *Forman v. "Liddesdale,"* 69 L. J. P. C. 44; [1900] A. C. 190.

Work as agents.] Generally a commission to sell may be revoked, and the death of the principal is a revocation; *Campanari v. Woodburn*, 15 C. B. 400; 24 L. J. C. P. 13; and the agent is not necessarily entitled to any remuneration, unless he can show that he has been put to expense or trouble before the revocation, from which a contract to pay on a *quantum meruit* may be implied; and a private sale by the principal without his agent's instrumentality, will not entitle him to his commission on the price. *Simpson v. Lamb*, 17 C. B. 603; 25 L. J. C. P. 113; *Brinson v. Davies*, 105 L. T. 134. And where an estate agent is to receive a certain percentage for finding a purchaser, he is entitled to nothing if he fail to find one before his authority is revoked; but if he find one, and the seller is unable or unwilling to complete the sale, the agent may recover on a *quantum meruit* at least for his labour, if not the whole stipulated percentage; *Prickett v. Badger*, 1 C. B. (N. S.) 296; 26 L. J. C. P. 33; and in such a case the title to remuneration is not a question for the jury, but of law. S. C. But where the defendant contracted with the plaintiff to sell tickets for the defendant at a certain percentage, and the defendant afterwards revoked the plaintiff's authority before any were sold, but after some trouble had been taken and expense incurred by him, and the plaintiff acquiesced in the revocation, it may be left to the jury whether there was a rescission by consent, and a new contract to pay for past labour on a *quantum meruit*. *De Bernardy v. Harding*, 8 Ex. 822; 22 L. J. Ex. 340. As to the right of an auctioneer to remuneration where his authority has been revoked before the auction, see *Rainy v. Vernon*, 9 C. & P. 559. The plaintiff was to place the shares of the defendant's company for £100 down and £400 when they had been allotted; before they were all allotted the directors caused the company to be wound up; held, that the plaintiff was entitled to remuneration for the work he had done, he having been prevented completing it by the act of the defendants, and the Court, acting as a jury, awarded him £250. *Inchbald v. W. Neilgherry Coffee, &c., Co.*, 17 C. B. (N. S.) 733; 34 L. J. C. P. 15. See further *Moffat v. Laurie*, 15 C. B. 583; 24 L. J. C. P. 56.

Where a broker is employed to find a buyer, he is entitled to his commission if he introduced the parties, though the principals eventually settled the terms; and, *semble*, if several brokers are employed separately, the one who first introduces the parties is entitled. *Cunard v. Van Oppen*, 1 F. & F. 716. The above was a case of shipbrokers, and was perhaps governed by the proof of custom at the trial; but in the absence of express stipulation, or of fraud, the rule seems reasonable in other like cases. A broker or other agent finds a buyer if he introduce a buyer to the seller or to the premises for sale, or call the premises to the notice of a buyer; introduction to the agent of the buyer is sufficient. *Wilkinson v. Alston*, 48 L. J. Q. B. 733. The proper test in an action by a house agent to recover commission is, was the introduction an efficient cause in bringing about the letting or sale? *Nightingale v. Parsons*, 83 L. J. K. B. 742; [1914] 2 K. B. 621. The plaintiff was employed by the defendant to sell an estate for him, upon the terms of being paid commission if the estate were sold, and a fixed sum if

not sold. The estate was sold by the defendant himself to a person who had first heard of the estate being in the market from the plaintiff's advertisement. It was held that the plaintiff was entitled to the commission, the relation of buyer and seller having been brought about by what the plaintiff had done. *Green v. Bartlett*, 14 C. B. (N. S.) 681; 32 L. J. C. P. 261. See also *Bayley v. Chadwick*, 39 L. T. 429; *Burchell v. Gowrie, &c., Collieries*, 80 L. J. P. C. 41; [1910] A. C. 614; and *Mansell v. Clements*, L. R. 9 C. P. 139. It seems that the purchaser may be asked "whether, but for the plaintiff's intervention, he would have bought the property?" S. C. See further *Tribe v. Taylor*, 1 C. P. D. 505.

Where A. employed B. to procure a loan on mortgage of A.'s property, for a certain commission, and B. has procured a person, C., willing to make the advance, B. is entitled to the whole of the commission, although the advance was not made, because A. was either unable to give a good security; *Green v. Lucas*, 33 L. T. 584; or refused to give it; *Fisher v. Drewitt*, 48 L. J. Ex. 32; for agents "who bargain to receive commission on introduction, have a right to their commission as soon as they have completed their portion of the bargain, irrespective of what may take place subsequently between the parties introduced." *Id.* 33, 34, per Bramwell, L.J.; *Lockwood v. Levick*, 8 C. B. (N. S.) 603; 29 L. J. C. P. 340.

As to the effect in a contract of agency of the determination or transfer of the business of the principal, thereby determining the agency, see *Ogdens v. Nelson*, 74 L. J. K. B. 433; [1905] A. C. 109.

Whether an agent is entitled to the continuance of payment of commission under a contract of agency after determination of the contract depends entirely upon the terms of the particular contract. To entitle him to such continuance there must be words in the contract indicating the intention of the parties to that effect. *Marshall v. Granville*, 86 L. J. K. B. 767; [1917] 2 K. B. 87; *Cramb v. Goodwin*, 35 T. L. R. 477. In *Levy v. Goldhill*, 86 L. J. Ch. 693; [1917] 2 Ch. 297, Peterson, J., found words in the contract justifying the plaintiff's claim to a continuance of commission on repeat orders after the determination of the contract; on the other hand, the C. A. found no justification for the claim in the contract in *Cramb v. Goodwin*, *supra*.

Performance.] The plaintiff must prove a performance of the work and labour according to the terms of the contract; or if there be a deviation from those terms, an assent of the defendant to the deviation. Thus in an action to recover the value of a riding habit, for which the defendant's wife had been measured, but which was returned to the plaintiff on the day on which it was delivered, it was ruled to be incumbent on the plaintiff to prove that the habit was made agreeably to the order. *Hayden v. Hayward*, 1 Camp. 180. So, a herald who sues for making out a pedigree, is bound to give some general evidence of the truth of the pedigree. *Townsend v. Neale*, 2 Camp. 191.

Where an agent, A., has, without the knowledge of his principal, B., agreed to receive from C. £3,000 as profit to himself, out of a purchase by A. on behalf of B. from C.; B. on knowing of the agreement, before A. has received the £3,000, may adopt A.'s agreement and sue C. for the £3,000. *Whaley Bridge, &c., Co. v. Green*, 49 L. J. Q. B. 326; 5 Q. B. D. 109.

Value.] Where a tradesman finishes work differing from the specification agreed on, he is not entitled to recover the actual value of the work done; but (if anything) only the stipulated price, minus the sum necessary to complete the work according to the specification. *Thornton v. Place*, 1 M. & Rob. 218; *Chapel v. Hickes*, 2 Cr. & M. 214; *Dakin v. Lee*, 84 L. J. K. B. 894, 2031; [1916] 1 K. B. 566. In an action for work and labour as a surveyor or architect, in the absence of express agreement, it is a question for the jury whether the commission charged is, under the circumstances, a reasonable or unreasonable charge. *Chapman v. De Tastet*, 2 Stark. 294; *Upsdell v. Stewart*, Peake, 193.

Defence.

By Rules, 1883, O. xxi. r. 3, "a defence in denial must deny such matters of fact from which the liability of the defendant is alleged to arise, as are disputed." See also O. xix. r. 17. By r. 15, the defendant must plead specially all facts, not previously stated, on which he relies, and must raise all such grounds of defence as if not pleaded would be likely to take the plaintiff by surprise. And by r. 20, a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law. It is a good defence that the work was done under a special contract not executed. *Jones v. Nanney*, 1 M. & W. 333. Or, that the defendants, being a corporation, did not contract under seal, or with the formalities required by the act of incorporation. *Cope v. Thames Haven Ry. Co.*, 18 L. J. Ex. 345; 3 Ex. 841. So, that the defendants, guardians of a union, are charged for work done by a surveyor, which it was no part of their duty to order. *Paine v. Strand Union*, 15 L. J. M. C. 89; 8 Q. B. 326. If the defendant have received no benefit from the work, it having been improperly executed by the plaintiff, the latter cannot recover anything. *Farnsworth v. Garrard*, 1 Camp. 38; *Montrou v. Jefferys*, Ry. & M. 317. Thus an auctioneer, through whose gross negligence the sale becomes nugatory, can recover nothing for his services. *Denew v. Daverell*, 3 Camp. 451. Where the plaintiff had contracted to repair completely some chandeliers for £10, and returned them incompletely repaired, in an action for work and labour it was held that the plaintiff could not recover anything, at least in this form of action, though the jury found that the repairs were worth £5. *Sinclair v. Bowles*, 9 B. & C. 92. So, where A. contracts to do work and supply materials, to the ship, or upon the land of B. for a specific sum, to be paid on the completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it is shown that the performance of the contract was prevented by the default of B., or there are facts from which it may be inferred that the parties have entered into a fresh contract; *Forman v. "Liddesdale"*, 69 L. J. P. C. 44; [1900] A. C. 190; *Appleby v. Myers*, 36 L. J. C. P. 331; L. R. 2 C. P. 651. In the last case the completion of the work on the defendant's premises was prevented by a fire there, and the court held that by the contract the work to be done was entire, and that the defendant did not warrant that his premises should continue in such a state as to enable the plaintiff to do the work, and that both parties were therefore excused from the further performance of the contract. For other instances see *O'Neil v. Armstrong*, 64 L. J. Q. B. 552; 66 L. J. Q. B. 7; [1895] 2 Q. B. 70, 418; and *Austin Friars S.S. Co. v. Strack*, 74 L. J. K. B. 683; [1905] 2 K. B. 315. See further as to the completion of a contract being rendered impossible by unforeseen accident, *Taylor v. Caldwell*, 3 B. & S. 326; 32 L. J. C. P. 104; *Knight v. Ashton, Edridge & Co.*, 70 L. J. K. B. 600; [1901] 2 K. B. 126; *Herne Bay S. Boat Co. v. Hulton*, [1903] 2 K. B. 683; *Krell v. Henry*, 72 L. J. K. B. 794; [1903] 2 K. B. 740, and *Chandler v. Webster*, 73 L. J. K. B. 401; [1904] 1 K. B. 493; *Civil Service Co-op. Soc. v. Gen. S. Nav. Co.*, 72 L. J. K. B. 933; [1903] 2 K. B. 756; *Horlock v. Beal*, 85 L. J. K. B. 602; [1916] 1 A. C. 486; *Metropolitan Board of Works v. Dick, Kerr & Co.*, 87 L. J. K. B. 370; [1918] A. C. 119. A mere increase in price of raw material or an increased cost in transporting it does not render a contract impossible of performance. *Tennants v. Wilson*, 86 L. J. K. B. 1191; [1917] A. C. 495; *Bolckow, Vaughan & Co. v. Co. Minera de Sierra Menera*, 86 L. J. K. B. 439; *Blackburn Bobbin Co. v. Allen*, 87 L. J. K. B. 1085; [1918] 2 K. B. 467. But a short supply due to war conditions may amount to a "hindrance" to delivery within the meaning of the contract. *Tennants v. Wilson*, *supra*; *Dixon v. Henderson, Craig & Co.*, 87 L. J. K. B. 683; [1919] 2 K. B. 778. War conditions may "affect" production. *Ebbw Vale Steel &c. Co. v. Macleod*, 86 L. J. K. B. 689. In *Elliott v. Crutchley*, 75 L. J. K. B. 147; [1906] A. C. 7, the contract contained a special provision in case

of the occurrence of the accident. Where the contract is not entire, the defendant must pay *pro tanto* for the work done by the plaintiff. As where a shipwright undertook to put a ship into thorough repair, and, before the work was finished, required payment for the portion done, without which he refused to proceed, and the ship thereby lost her voyage, it was held that he was nevertheless entitled to recover for the work done. *Roberts v. Havelock*, 3 B. & Ad. 404. So, where the ship was burnt in the plaintiff's dockyard before the repairs were completed, the plaintiff was held entitled to recover for the work done. *Menetone v. Athawes*, 3 Burr. 1592. And the same principle applies where the work has been badly done. *Farnsworth v. Garrard*, *supra*.

Where A. engaged with defendant's landlord to build a house on land occupied by the defendant, and A. made a sub-contract with the plaintiff to do part of the work, and defendant separately agreed to pay over to the plaintiff directly all money due for such part of the work upon a discharge from A., it was held that the defendant's agreement did not make him liable to the plaintiff for work and labour, but only on the special agreement. *Sweeting v. Asplin*, 10 L. J. Ex. 3; 7 M. & W. 165. Where the plaintiff agrees to do work for a certain sum on a false representation by defendant of the quantity of work to be done, he may repudiate the contract; but if he perform it, he can only recover the stipulated sum in this action. *Selway v. Fogg*, 5 M. & W. 38.

An agent entrusted to sell land for his principal on commission is disentitled to any remuneration if he became himself the purchaser. *Salomons v. Pender*, 3 H. & C. 639; 34 L. J. Ex. 95, citing *Story on Agency*, § 210. Or if he have received a secret profit from the purchaser. *Andrews v. Ramsay*, 72 L. J. K. B. 865; [1903] 2 K. B. 635. But the agent's transactions, some of which are honest and others dishonest, may be severable, and if so, he will be entitled to commission on those in which he has acted honestly. *Nitedals Tændstikfabrick v. Bruster*, 75 L. J. Ch. 798; [1906] 2 Ch. 671. A merely collateral profit received without fraud or dishonesty will not so disentitle him. *Hippisley v. Knee Bros.*, 74 L. J. K. B. 68; [1905] 1 K. B. 1; *Stubbs v. Slater*, 79 L. J. Ch. 420; [1910] 1 Ch. 632.

An agent cannot recover a bribe promised to induce him to enter into a contract on behalf of his principal, even though the promise did not affect his mind, and his principal was not prejudiced. *Harrington v. Victoria Graving Dock Co.*, 47 L. J. Q. B. 594; 3 Q. B. D. 549.

ACTION FOR MONEY PAID.

The plaintiff, in an action for money paid, must prove, if denied by the defendant, 1. The payment of money by the plaintiff; 2. That it was paid at the request of the defendant, and to his use.

The payment of money.] The payment must be proved as a *fact*; the admission of the payee is not admissible against the defendant. To prove, as against C., payment by A. to B. for work done by B. for A., for which C. is ultimately liable, it is sufficient to show that A. received from B. an invoice of the work done, that on Feb. 25 he sent B. a cheque for the amount, and on the next day received back the invoice from B. with a receipt, and that B. received the cheque on the 26, at 9 a.m., and sent the receipt: the receipt is then admissible as a link in the evidence. This was held to be evidence of payment at 9 a.m. on the 26, without producing the cheque or showing that it was honoured. *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.*, 42 L. J. C. P. 262; L. R. 8 C. P. 685.

The plaintiff must prove that *money* was paid; giving a security, as a bond or warrant of attorney, is not sufficient; *Taylor v. Higgins*, 3 East, 169;

Maxwell v. Jameson, 2 B. & A. 51; unless, perhaps, where a bill or note is taken from the plaintiff by a creditor as payment of the defendant's debt. *Barclay v. Gooch*, 2 Esp. 571. So, stock cannot be considered as money: *Nightingale v. Devisme*, 5 Burr. 2589; unless it be so treated by the parties, as where it was transferred to the defendant with the view to sale for defendant's use. *Howard v. Danbury*, 2 C. B. 803.

The plaintiff must prove that the money paid was *his* money. Thus, an under-tenant, whose goods had been distrained and sold to strangers by the original landlord for rent due from his immediate tenant, cannot maintain an action for money paid to the use of the latter; for immediately on the sale under the distress, the money paid by the purchaser vested in the landlord in satisfaction of the rent, and never was the money of the under-tenant; *Moore v. Pyrke*, 11 East, 52; but it is otherwise where the under-tenant, or a stranger, redeems his goods with his own money. *Exall v. Partridge*, 8 T. R. 308.

Defendant's request.] The plaintiff must prove a request by the defendant, express or implied. *Alexander v. Vane*, 1 M. & W. 511. Thus, where the lessee is to pay the lessor's expenses of granting a lease, and the lease has been granted, the lessor may recover his own solicitor's bill as money paid to the use of the lessee. *Grissell v. Robinson*, 3 Bing. N. C. 10. A subsequent assent to the payment will be evidence of a previous request; 1 Wms. Saund. 264, b, (2); and if there be a request to pay, the plaintiff may recover the money, though paid on a contract that could not be enforced. Thus, where a broker, C., bought for D. on his order bank shares on the Stock Exchange according to the custom there, under a contract void by 30 & 31 V. c. 29, s. 1, C. is entitled to recover the price from D., provided D. knew of the custom; *Seymour v. Bridge*, 14 Q. B. D. 460; but not otherwise; *Perry v. Barnett*, *Id.* 467; 15 Q. B. D. 388. So formerly the plaintiff might recover the money paid on a time bargain which, as a wager, is void by the Gaming Act, 1845 (8 & 9 V. c. 109), s. 18. Now, however, by the Gaming Act, 1892 (55 & 56 V. c. 9), s. 1, "Any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by the " Gaming Act, 1845, "or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." A betting agent who has lost bets made on behalf of his principal, and who has not paid them, cannot maintain an action against his principal to recover his unpaid losses or to indemnify him against his liability to pay them. *Levy v. Warburton*, 70 L. J. K. B. 708. Where a principal gives a cheque to his agent to indemnify him in respect of bets made and lost by the agent for the principal, the latter cannot recover the amount of the cheque from the agent under the Gaming Act, 1835. *Maskell v. Hill*, [1921] 3 K. B. 157.

The defendant, R., asked the plaintiff, T., to pay to various persons debts due from R. to them: the debts were, as T. knew, bets lost by R.; T. paid the debts: it was held that the above section prevented T. recovering from R. the amount he had so paid. *Tatam v. Reeve*, 62 L. J. Q. B. 30; [1893] 1 Q. B. 44. So where V. advanced money to M. for the purpose of making bets on their joint account, and it was lost on such bets, V. cannot sue M. for half the amount. *Saffery v. Mayer*, 70 L. J. K. B. 145; [1901] 1 K. B. 11. But where L. guaranteed an overdraft of the debtor O. at his bank for the purpose of meeting O.'s betting liabilities, L. was held entitled to prove for the debt in O.'s bankruptcy. *In re O'Shea*, 81 L. J. K. B. 70; [1911] 2 K. B. 981.

If there be no request, plaintiff cannot recover, though he has paid a legal debt of the defendant. *Stokes v. Lewis*, 1 T. R. 20. Costs and expenses, incurred by the mortgagee, in relation to the mortgaged property, cannot be

recovered from the mortgagor, as money paid. *Ex pte. Fewings*, 25 Ch. D. 338.

* Where, in the absence of usage, a broker purchases stock to fulfil a contract entered into by him for his principal, but which his principal refuses to make good, he cannot sue his principal in this action. *Child v. Morley*, 8 T. R. 614. So where the party to whom the stock was contracted to be sold, on the defendant's refusal to transfer, bought the stock himself, and sued for money paid, to recover the difference in the price of the stock, it was held that this action could not be sustained. *Lightfoot v. Creed*, 8 Taunt. 268. The broker can only recover money paid for his principal where he has carried out his mandate. *Johnson v. Kearley*, 77 L. J. K. B. 904; [1908] 2 K. B. 514. The mere fact, however, that there is the statement of a "net" price in a bought note does not in law deprive the broker of his right to an indemnity if he has acted in pursuance of his mandate. *Aston v. Kelsey*, 82 L. J. K. B. 817; [1913] 3 K. B. 314. Where there is a usage of the Stock Exchange that brokers should be responsible to each other on their contracts, and the seller's broker is obliged to pay money in consequence of his principal's default, he may reimburse himself in this form of action. *Sutton v. Tatham*, 10 Ad. & E. 27; 8 L. J. Q. B. 210; *Bayliffe v. Butterworth*, 17 L. J. Ex. 78; 1 Ex. 425; *Pollock v. Stables*, 17 L. J. Q. B. 352; 12 Q. B. 765; *Smith v. Lindo*, 4 C. B. (N. S.) 395; 27 L. J. C. P. 196; 5 C. B. (N. S.) 587; 27 L. J. C. P. 335. See *Westropp v. Solomon*, 19 L. J. C. P. 1; 8 C. B. 345. In such cases it is immaterial whether or not the principal knew of the usage. S. C.C.; *Grissell v. Bristow*, L. R. 4 C. P. 36; 38 L. J. C. P. 10. It makes no difference to the broker's right to recover, that the company, in which the shares had been bought, is being wound up, and therefore the shares cannot be transferred to his principal. *Taylor v. Stray*, 2 C. B. (N. S.) 175, 197; 26 L. J. C. P. 185, 287; *Chapman v. Shepherd*, and *Whitehead v. Ized*, 36 L. J. C. P. 113; L. R. 2 C. P. 228. Where the broker, who had been authorized to buy shares at a certain price, was called upon by the seller to repay him a call due after the sale, and paid by the seller in order to enable him to transfer the shares; the principal was held liable over to the broker in this action. *Bayley v. Wilkins*, 18 L. J. C. P. 273; 7 C. B. 886. Where the principal, P., has instructed his broker, B., to carry over stock to the next settlement, B. may, by the usage of the Stock Exchange, close P.'s account, if the balance of differences, due from P. to B., have not been paid on the account-day of the current settlement, provided B. gave P. notice of the amount due to him before that day, and P. have not paid or secured the amount, and B. may sue P. for any balance due. *Davis v. Howard*, 59 L. J. Q. B. 133; 24 Q. B. D. 691. The account may be closed by the sale by B. of the stock bought to S., and a re-purchase thereof by B. from J., for the next account at fair market prices, and B. may sue P. for the difference and commission. *Macoun v. Erskine & Co.*, 70 L. J. K. B. 973; [1901] 2 K. B. 493. If, however, the sale and re-purchase be part of the same transaction, B. must credit P. with any profit resulting therefrom. *Erskine & Co. v. Sachs*, 70 L. J. K. B. 978; [1901] 2 K. B. 504. In the event of the death, bankruptcy, or insolvency of the principal, P., whereby he will be unable to take up the stock, which the broker has bought for him on his own credit, the broker, B., is justified in immediately selling the stock, and claiming the difference against the bankrupt's estate, subject to a set-off for any loss arising to the estate from such sale being made before the account-day, the customary time for selling out stock, on default of P. to take it up. *Scrimgeour's Claim*, 42 L. J. Ch. 657; L. R. 8 Ch. 921; see also *Crowley's Claim*, 42 L. J. Ch. 86; L. R. 18 Eq. 182; *In re Finlay*, 82 L. J. Ch. 295; [1913] 1 Ch. 565. If in any other case B. sell the stock before the account-day without P.'s consent, B. cannot claim indemnity against P. for any loss he may thereby sustain. *Ellis v. Pond*, 67 L. J. Q. B. 345; [1898] 1 Q. B. 426. And if on P.'s death, B., of his own authority, carry over stock he bought for P. on a continuation account, and

ultimately sell it at a loss, he is liable for such loss. *In re Overweg*, 69 L. J. Ch. 255; [1900] 1 Ch. 209. Where the broker is, otherwise than through the fault of his principal, P., unable to meet his engagements, and thereby becomes a defaulter under the Stock Exchange rules, and his contracts are closed in accordance with those rules, P. is not bound to indemnify him against the loss thereby occasioned to him. *Duncan v. Hill*, 42 L. J. Ex. 179; L. R. 8 Ex. 242. *Secus*, where P. has assented to the closing of the contract made for him, and has declined to exercise his right of taking it up himself, or of having it transferred to another broker. *Hartas v. Ribbons*, 58 L. J. Q. B. 187; 22 Q. B. D. 254. Where a broker, B., holds stock for his principal, P., which he has taken up with his own money, and has agreed not to sell before a certain day, if B. sell before that day he may sue P. for money paid, subject to P.'s right to counterclaim for damages occasioned by the premature sale. *Ellis v. Pond*, 67 L. J. Q. B. 345; [1898] 1 Q. B. 426. As to the measure of such damages see *Michael v. Hart*, 70 L. J. K. B. 1000; 71 L. J. K. B. 265; [1901] 2 K. B. 867; [1902] 1 K. B. 482. Where B. being *sui juris* is the beneficial owner of shares, which he cannot disclaim, registered in the name of H., he must in equity indemnify H. against calls made on them. *Hardoon v. Belilios*, 70 L. J. P. C. 9; [1901] A. C. 118.

There is an implied agreement between the original lessee and each successive assignee of a term, that the latter shall indemnify the former from liability on breaches of the covenants of the lease during the possession of the assignee; such agreement is implied, although each assignee expressly covenants to indemnify his immediate assignor against all subsequent breaches; the lessee is in the position of a surety to the lessor for the assignee. *Moule v. Garrett*, 41 L. J. Ex. 62; L. R. 7 Ex. 101; and see *Roberts v. Crowe*, 41 L. J. C. P. 198; L. R. 7 C. P. 629 (*per Willes, J.*); and *Crouch v. Tregonning*, 41 L. J. Ex. 97; L. R. 7 Ex. 88. The damages recoverable are the actual loss sustained. *In re Russell*, 29 Ch. D. 254. As to recovery by lessee against the assignee under this indemnity, of costs, to which he has been put by the action against him by the lessor for breaches of covenant, see *Howard v. Lovegrove*, 40 L. J. Ex. 13; L. R. 6 Ex. 43. In equity the surety whose liability to pay has become absolute may before payment sue the principal debtor and obtain an order that he should pay off the creditor and relieve the surety. *In re Richardson*, 80 L. J. K. B. 1232, 1236; [1911] 2 K. B. 705, 709. The mortgagee, T., by sub-demise of an assignee, P., is not bound to indemnify the original lessee although T. had covenanted with P. to apply the rent he received in paying the rent due under the original lease. *Bonner v. Tottenham, &c. Building Soc.*, 68 L. J. Q. B. 114; [1899] 1 Q. B. 161. Trustees of a club who are lessees of the club premises, are not, in the absence of a club rule to that effect, entitled to indemnity from the club members against their liability as such lessees. *Wise v. Perpetual Trustee Co.*, 72 L. J. P. C. 9; [1903] A. C. 139.

A legal obligation to pay for another's benefit will be equivalent to a previous request; as where one person is surety for another and is called on to pay, the money paid may be recovered, though not paid by the desire of the principal. *Per* Ld. Kenyon, *Exall v. Partridge*, 9 T. R. 310. See also *Johnston v. R. Mail S. Packet Co.*, 37 L. J. C. P. 33; L. R. 3 C. P. 38. So if one co-hail pay the whole debt. *Beldon v. Tankard*, 1 Marsh. 6. The measure of the liability of an indemnifier is not the capacity but the liability of the indemnified to pay. *British Union & National Insurance Co. v. Rawson*, 85 L. J. Ch. 769; [1916] 2 Ch. 476. So if an accommodation acceptor be sued on default of the drawer to pay, the acceptor may recover in this action; and he may sue alone though the loan was in fact advanced on account of the plaintiff and his partner, and paid out of their joint funds. *Driver v. Burton*, 17 Q. B. 989; 21 L. J. Q. B. 157. So the indorser of a bill who has been sued by the holder and paid him part of the amount of the bill, may recover that amount in an action for money paid against the acceptor. *Pownall v. Ferrand*, 6 B. & C. 439; 5 L. J. (O. S.)

K. B. 176. See also *Ex pte. Bishop*, 50 L. J. Ch. 18; 15 Ch. D. 400, whence it appears that the indorser may also recover the interest which he has been compelled to pay. But if the *drawer* voluntarily pay the holder of a bill which he had drawn and indorsed for the accommodation of the acceptor without having received any notice of dishonour or any request from the acceptor to pay it, he cannot sue the latter for money paid; for there must be either legal obligation or request. *Sleigh v. Sleigh*, 19 L. J. Ex. 345; 5 Ex. 514. A person who pays a bill for the honour of one of the parties to it may sue him for money paid. But he must prove noting or protest before the payment. *Vandewall v. Tyrrell*, M. & M. 87, as explained in *Geralopulo v. Wieler*, 20 L. J. C. P. 105; 10 C. B. 690. When an executor has paid legacies in full and is afterwards obliged to pay the legacy duty, it was held, in *Foster v. Ley*, 5 L. J. C. P. 17; 2 Bing. N. C. 269, that he might recover the amount paid for duty in an action for money paid against the legatee. See *Bate v. Payne*, 18 L. J. Q. B. 273; 13 Q. B. 900.

"Where there is a contract of indemnity (it matters not whether it is a marine policy, or a policy against fire on land or any other contract of indemnity), and a loss has happened, anything which tends to reduce or diminish that loss reduces or diminishes the amount which the indemnifier is bound to pay; and if the indemnifier has already paid it, then, if anything which tends to reduce or diminish the loss comes into the hands of the person to whom he has paid it, it becomes an equity that the person who has already paid the full indemnity is entitled to be recouped by having that amount back." *Burnard v. Rodocanachi*, 51 L. J. Q. B. 548, 552; 7 App. Cas. 333, 339. *British Dominions General Insurance Co. v. Duder*, 84 L. J. K. B. 1401; [1915] 2 K. B. 394. Shipowners sued an insurance company claiming in respect of a constructive total loss; the insurance company were reinsured by D. The claim was compromised by the insurance company paying the shipowners 66 per cent. only of the loss. In an action by the insurance company on the reinsurance policy against D., held, that D.'s contract was one of indemnity, and that the insurance company could only recover from him 66 per cent. of the loss plus the costs incurred in obtaining the compromise. S. C.

Where several are sureties, and one is compelled to pay the whole, he may recover in this action from each of his co-sureties a rateable proportion of the money so paid. *Cowell v. Edwards*, 2 B. & P. 268; *Deering v. Winchelsea (Earl)*, *Id.* 270. A co-surety might sue as soon as he had paid more than his rateable share, but not at law till then. *Davies v. Humphreys*, 6 M. & W. 153, 168, 169; *Ex pte. Snowden*, 50 L. J. Ch. 540; 17 Ch. D. 44; *Stirling v. Burdett*, 81 L. J. Ch. 49; [1911] 2 Ch. 418. He may pay the debt when due without waiting for a demand or an action, and may then sue for contribution. *Pitt v. Purssord*, 8 M. & W. 538. But a surety, W., against whom judgment has been obtained by the principal creditor, B., for the full amount of the guarantee, may sue his co-surety, G., for contribution, before making any payment, and obtain a prospective order under which, when W. shall have paid his own share, G. shall indemnify him from further liability, or if B. be a party to the action, W. may obtain an order on G. to pay his proportion to B. *Wolmershausen v. Gullick*, 62 L. J. Ch. 773; [1893] 2 Ch. 514. The allowance of a claim by B. in an action for the administration of the estate of a deceased co-surety, D., is equivalent to a judgment against D. S. C. See further *In re Parker*, 64 L. J. Ch. 6; [1894] 3 Ch. 400. The amount recoverable from each co-surety is ascertained by reference not to the number of principals but to the number of sureties; *Kemp v. Finden*, 13 L. J. Ex. 137; 12 M. & W. 421; who are solvent only. *Peter v. Rich*, 1 Ch. Rep. 19; *Hole v. Harrison*, 1 Ch. Cas. 246; *Dallas v. Walls*, 29 L. T. 599; see notes to *Deering v. Winchelsea (Earl)*, *supra*, and in 2 White and Tudor's L. C. in Equity. See *Lowe v. Dixon*, 16 Q. B. D. 455. Where A., B. and C. became sureties for D. by three separate bonds, and one of them was compelled to pay D.'s debt, each

of the others must contribute in proportion to the amount in their respective bonds. *Deering v. Winchelsea (Earl)*, *supra*; *Ellesmere Brewery Co. v. Cooper*, 65 L. J. Q. B. 173; [1896] 1 Q. B. 75. And even although A. did not know when he became surety that B. and C. were also sureties. *Craythorne v. Swinburne*, 14 Ves. 160, 165. It seems that the right is not affected by the plaintiff surety having given time to the principal debtor. *Greenwood v. Francis*, 68 L. J. Q. B. 228; [1899] 1 Q. B. 312, *per* A. L. Smith, L.J. A surety, A., is entitled to the benefit of any security his co-surety, B., has taken from the principal debtor, C., although B. consented to be surety only on the terms of having the security, and A. when he became surety did not know of the agreement for security. *Steel v. Dixon*, 50 L. J. Ch. 591; 17 Ch. D. 825. See also *In re Arcedekne*, 53 L. J. Ch. 102; 24 Ch. D. 709. The division of the security is to be continued until it is exhausted or the co-sureties have been repaid. *Berridge v. Berridge*, 59 L. J. Ch. 533; 44 Ch. D. 168. In these cases the true nature of the transaction itself is to be considered without regard to the form of the instrument by which the relation is created. *Reynolds v. Wheeler*, 10 C. B. (N. S.) 561, 566; 30 L. J. C. P. 350, 351, *per* Williams, J. Thus, where the plaintiff had drawn a bill which C. accepted, and the defendant indorsed (both plaintiff and defendant putting their names for C.'s accommodation), the plaintiff having been obliged to pay the bill, was held entitled to recover contribution against the defendant as co-surety. S. C. So where the defendant and plaintiff both indorsed a promissory note of C. as sureties for him, the defendant signing first. *Macdonald v. Whitfield*, 8 App. Cas. 733. Where two are jointly liable for the expenses incurred for their common benefit, and one dies, the survivor who pays the whole may sue the executor of the deceased for money paid for the defendant as executor. *Prior v. Hembrow*, 8 M. & W. 873; *semb. accord.* *Botard v. Hawes*, 2 E. & B. 287; 22 L. J. Q. B. 443. See also *Ramskill v. Edwards*, 55 L. J. Ch. 81; 31 Ch. D. 100. If premises are let to several persons for the use of a company or partnership of which the lessees are members, and one of them is called upon to pay rent, he may sue the co-lessees for contribution. *Boulter v. Peplow*, 9 C. B. 493; 19 L. J. C. P. 190. So if one of a managing committee is obliged to repay a loan borrowed for a club by authority of the committee, he may recover contributions from each of the others. *Mountcashel (Earl) v. Barber*, 14 C. B. 53; 23 L. J. C. P. 43. If one partner advance to another the capital which the latter is to contribute to the joint capital, he may sue for the amount. *French v. Styrring*, 2 C. B. (N. S.) 357; 26 L. J. C. P. 181. A partner who pays a note in which he has joined some of the other partners, may sue them for contribution in this action, though the money raised on it was for partnership purposes. *Sedgwick v. Daniell*, 2 H. & N. 319; 27 L. J. Ex. 116. And see the Partnership Act, 1890 (53 & 54 V. c. 39), s. 24 (2). In calculating the amount of contribution the number of solvent partners only is to be considered. *Lowe v. Dixon*, 16 Q. B. D. 455. One partner cannot, however, in general sue another in this form of action for contribution to a joint partnership liability. *Brown v. Tapscott*, 9 L. J. Ex. 139; 6 M. & W. 119, 123; *Worrall v. Grayson*, 5 L. J. Ex. 101; 1 M. & W. 166. The partnership account must first be taken. "There is no principle of law which requires that a person should contribute to an outlay merely because he has derived a material benefit from it"; *Ruabon S.S. Co. v. L. Assur.*, 69 L. J. Q. B. 86, 91; [1900] A. C. 6, 15; *The Acanthus*, 71 L. J. P. 14; [1902] P. 17. Thus one tenant in common of a house, who expends money on repairs thereon, cannot sue his co-tenant for contribution. *Leigh v. Dickeson*, 54 L. J. Q. B. 18; 15 Q. B. D. 60.

As a general rule this action does not lie on an implied contract for contribution or indemnity against a person jointly engaged with the plaintiff in doing a wrongful or criminal act by which the plaintiff is put to expense or has had to pay a fine; *Merryweather v. Nixan*, 8 T. R. 186; *Smith v. Clinton*, 99 L. T. 840; *Leslie v. Reliable Advertising, &c., Agency*, 84 L. J.

K. B. 719; [1915] 1 K. B. 652. Cf. *Tinline v. White Cross Insurance Co.*, 37 T. L. R. 733; or where money is paid in furtherance of an illegal transaction. *Mitchell v. Cockburne*, 2 H. Bl. 379; *Aubert v. Maze*, 2 B. & P. 371. But where the plaintiff was not aware that the transaction was illegal, or where its nature is doubtful, he may sue on the implied contract to indemnify. *Betts v. Gibbins*, 2 Ad. & E. 57; *Pearson v. Skelton*, 1 M. & W. 504; and see *Dixon v. Fawcus*, 30 L. J. Q. B. 137; *Burrows v. Rhodes*, 68 L. J. Q. B. 545; [1899] 1 Q. B. 816; 1 Smith's Lead. Cas., notes to *Lampleigh v. Braithwait* and *Weld-Blundell v. Stephens*, 89 L. J. K. B. 705; [1920] A. C. 956. In the last cited case the plaintiff employed the defendant, an accountant, to look into the affairs of a certain company and in his letter of instructions he made libellous statements concerning certain former officials. Owing to negligence on the part of the defendant's partner the letter was communicated to the two persons defamed who sued the plaintiff for libel and recovered damages. The plaintiff then sued the defendant for breach of an implied duty to keep secret the letter of instructions. He was held entitled to recover nominal damages only, any further damages being in the nature of an indemnity for the consequences of his own wrong. A trustee, A., is entitled to contribution from his co-trustee, B., in respect of liability arising from a joint breach of trust in making an unauthorized investment; *Ramskill v. Edwards*, 55 L. J. Ch. 81; 31 Ch. D. 100; *Jackson v. Dickinson*, 72 L. J. Ch. 761; [1903] 1 Ch. 947; and in the event of B.'s death his executors are liable. S. CC. See further *Chillingworth v. Chambers*, 65 L. J. Ch. 343; [1896] 1 Ch. 685, and *Fletcher v. Collis*, 75 L. J. Ch. 542; [1905] 2 Ch. 211. So directors of a company who have been compelled to replace its capital illegally distributed by them among the shareholders, with notice to the latter that the distribution was of capital, may recover from each shareholder the amount returned to him. *Moxham v. Grant*, 69 L. J. Q. B. 97; [1900] 1 Q. B. 88. And a director liable under the Director's Liability Act, 1890, s. 3, is entitled, under sect. 5, to contribution from his co-directors. See as to indemnity to executors or trustees properly carrying on a trust business, against liability arising in contract, *Dowse v. Gorton*, [1891] A. C. 191; *Matthews v. Ruggles-Brise*, 80 L. J. Ch. 42; [1911] 1 Ch. 194; or tort, *Benett v. Wyndham*, 4 D. G. & J. 259; *In re Raybould*, [1900] 1 Ch. 199. The right to the indemnity may be subrogated to the person injured by the tort. S. C. Costs of litigation embarked upon by trustees *mero motu* are not necessarily costs properly incurred in the due execution of the trust. *In re England*, 87 L. J. Ch. 73; [1918] 1 Ch. 24. An agent is entitled to indemnity for losses incurred in the performance of duty including costs taxed as between solicitor and client of action properly brought by him. *Williams v. Lister*, 109 L. T. 699; *In re Famatina Development Corporation*, 84 L. J. Ch. 48; [1914] 2 Ch. 271.

A notice to the party by whom an indemnity is given is not necessary before defending an action; but if such notice be given, and he refuse to defend the action, he is estopped from saying that the person indemnified was not bound to pay the money. *Duffield v. Scott*, 3 T. R. 374; and see *Jones v. Williams*, 7 M. & W. 493. The only effect of want of such notice is to let in proof that the course pursued was not justified under the circumstances, but the onus lies on the person indemnifying. *Smith v. Compton*, 3 B. & Ad. 408. And if knowledge of an action be brought home to the party indemnifying, and he leave the defence to the party indemnified, the latter is not bound to defend, but may compromise the action to the best of his judgment, and sue for money paid, though the action might perhaps have been defended with success. *Pettman v. Keble*, 9 C. B. 701; 19 L. J. C. P. 325. A *cestui que trust* cannot, however, recover against his trustee what he alleges he has been compelled to pay through a breach of trust by the trustee, without showing that the loss was in fact occasioned by such breach of trust. *Parker v. Lewis*, L. R. 8 Ch. 1035, 1056; 43 L. J. Ch. 281. Where an action is brought against a surety who lets judgment go

by default, there being no good defence, he cannot recover the costs, unless the writ was the first notice of default, in which case the costs of the writ can be recovered. *Pierce v. Williams*, 23 L. J. Ex. 322. But where A., who is indemnified by B., reasonably defends an action, he may recover against B. the costs of such action. *Hornby v. Cardwell*, 51 L. J. Q. B. 89; 8 Q. B. D. 329, *per Brett and Cotton, L.JJ.*; *Williams v. Lister*, *supra*.

Under a promise by the defendant to insure a tug against damage, and to "indemnify the plaintiffs in respect of all such damage to the extent of all moneys received by him under such insurance," the defendant having effected the insurance, is not bound to sue the underwriters thereon without an indemnity from the plaintiff. *The Lord of the Isles*, 64 L. J. P. 15; [1894] P. 342.

To support this action, it must appear either that the defendant was primarily liable to the third party to pay the money, or that it was paid, or the liability incurred, by the plaintiff at his express or implied request, or on his guarantee. See *Brittain v. Lloyd*, 15 L. J. Ex. 43; 14 M. & W. 762; *Lewis v. Campbell*, 19 L. J. C. P. 130; 8 C. B. 541, and 1 Smith's L. C. 12 ed. 159 *et seq.* "Where a person's goods are lawfully seized for another's debt, the owner of the goods is entitled to redeem them and to be reimbursed by the debtor against the money paid to redeem them, and in the event of the goods being sold to satisfy the debt, the owner is entitled to recover the value of them from the debtor." *Edmunds v. Wallingford*, 54 L. J. Q. B. 305, 306; 14 Q. B. D. 811, 814. See *The Orchis*, 59 L. J. P. 31; 15 P. D. 38. Therefore where the goods of A. on the premises of B. are distrained for rent, and A. is obliged to pay the rent to redeem them, B. is liable to A. in this form of action, for the sum so paid; *Exall v. Partidge*, 8 T. R. 308; so where the tenant is compelled to pay landlord's tax by distress, the action lies. *Dawson v. Linton*, 5 B. & A. 521. So, too, when the tenant of land, liable by prescription to repair a public bridge, is fined for non-repair on indictment, he may reimburse himself by this action against his landlord; *Baker v. Greenhill*, 11 L. J. Q. B. 161, 163; 3 Q. B. 148, 163. So in cases of rates levied on the lessee in respect of such liability, if he has not covenanted to pay them. *Id.*

But where, before the Tithe Act, 1891, A.'s goods were seized on the land of B. for a tithe rent-charge, B. was not liable to indemnify A., for the rent-charge issued only out of the land, and was not a personal charge on B. *Griffinhoofe v. Daubuz*, 5 E. & B. 746; 25 L. J. Q. B. 237, explained in *Edmunds v. Wallingford*, 54 L. J. Q. B. 305; 14 Q. B. D. 811. So where A. and B. were under-tenants of adjoining houses which were held of the freeholder under one lease, and A. was compelled to pay the whole rent reserved by that lease, he could not sue B. at law for a contribution as money paid to his use. *Hunter v. Hunt*, 1 C. B. 300. Tindal, C.J., suggested that A. might have a remedy in equity. *Id.* 305. Where, however, A. let land to B., who assigned the lease as to part thereof to C. at an apportioned rent, and under-let the residue to D., and C., under threat of distress from A., paid him the whole rent reserved by the lease: it was held that C. had no right of contribution against D., as they were under no common obligation. *Johnson v. Wild*, 59 L. J. Ch. 322; 44 Ch. D. 146. In *England v. Marsden*, 35 L. J. C. P. 259; L. R. 1 C. P. 529, it was held that if the plaintiff allowed his goods to remain on the defendant's premises with his knowledge, but without his express request, until rent became due, and the landlord distrained, he could not recover from the defendant the rent and expenses he so paid; this decision was, however, virtually overruled by the C. A. in *Edmunds v. Wallingford*, *supra*.

Where A. paid the funeral expenses of his deceased daughter during her husband's absence, the husband was held liable to A. *Jenkins v. Tucker*, 1 H. Bl. 90; *accord. Ambrose v. Kerrison*, 10 C. B. 776; 20 L. J. C. P. 135. So where the wife was living apart from her husband, and the plaintiff, in whose house she died, knew where he was and did not

apply to him before burying her. *Bradshaw v. Beard*, 12 C. B. (N. S.) 344; 31 L. J. C. P. 273.

But it is not sufficient that the defendant has agreed with the plaintiff to pay the money to the third party. Thus where the landlord is called upon to pay the taxes to which a landlord is primarily liable, but which his tenant is by special agreement bound to pay, he cannot sue the tenant for money paid. *Spencer v. Parry*, 3 Ad. & E. 331; and see *Lubbock v. Tribe*, 3 M. & W. 607. So where the transferee of shares in a company omits to register the transfer, and the transferor is consequently obliged to pay calls subsequently to the sale, he cannot recover the amount from the transferee as money paid; but a special action for not registering is the proper remedy; *Sayles v. Blane*, 19 L. J. Q. B. 19; 14 Q. B. 205; *aliter*, if the defendant have requested the plaintiff to pay.

An accommodation acceptor, who has defended an action on the bill at the request of the drawer, may recover the costs of such action as money paid. *Howes v. Martin*, 1 Esp. 162; *accord. Garrard v. Cottrell*, 10 Q. B. 679. And such request is, it seems, implied. See *Stratton v. Mathews*, 18 L. J. Ex. 5; 3 Ex. 48, following *Jones v. Brooke*, 4 Taunt. 464. But the indorser of a bill who has been sued by the holder and paid the amount, cannot recover the costs of the former action; for the custom of merchants does not make an acceptor liable for the costs of actions against subsequent holders. *Dawson v. Morgan*, 9 B. & C. 618; 7 L. J. (O. S.) K. B. 301. Bail may recover, as money paid, the expenses incurred by them in taking their principal; but not the costs of an action against them to recover these expenses unadvisedly defended. *Fisher v. Fallows*, 5 Esp. 171. If one of two parties to an award take it up and pay the whole expense of it, the award directing each party to pay only one half, he cannot, unless the amount due has been ascertained by the award or by taxation, recover half from the other as money paid. *Bates v. Townley*, 19 L. J. Ex. 399; 2 Ex. 152. *Secus* when it has been so ascertained. *Semble*, S. C. Even though the submission is silent as to costs. 2 Chitty, 157, n.; 2 Tidd, 9th ed. 831; *Grove v. Cox*, 1 Taunt. 165.

Money paid lies against a shipowner for money supplied to the captain, either in a foreign or English port, for the necessary repairs or use of the ship. *Robinson v. Lyall*, 7 Price, 592. But only where the necessity is so pressing that the owner himself cannot be consulted without prejudice and delay. *Johns v. Simons*, 2 Q. B. 425.

Where a carrier, by mistake, delivered to B. goods consigned to C., and B. appropriated them, and the carrier on demand without action paid C. the value, it was held that the carrier might recover from B. the sum so paid, as money paid to his use. *Brown v. Hodgson*, 4 Taunt. 189. See *Sills v. Laing*, 4 Camp. 81; *Spencer v. Parry*, 3 Ad. & E. 331, 338; and *Coles v. Bulman*, 17 L. J. C. P. 302; 6 C. B. 184.

Generally, if a party be compelled to pay money in consequence of his own neglect; *Capp v. Topham*, 6 East, 392; or breach of duty; *Pitcher v. Bailey*, 8 East, 171; though for the benefit of another, the law implies no promise on the part of the other to repay him.

ACTION FOR MONEY LENT.

Evidence of loan.] In an action for money lent, the plaintiff will have to prove the loan of his money. Of this a promissory note given by the defendant to the plaintiff is not alone evidence. *Cary v. Gerrish*, *infra*. It is not sufficient merely to prove the payment of money to the defendant, for in such case the presumption is that the money is paid in liquidation of an antecedent debt. *Welch v. Seaborn*, 1 Stark. 474. But if the plaintiff can show any money transactions between the defendant and himself from which a loan may be inferred, or any application by the defendant to borrow

money at the time, this, coupled with the payment, will be evidence of a loan. *Cary v. Gerrish*, 4 Esp. 9. When a parent advances money to a child, it is presumed to be by way of gift. *Per Bayley, J., Hick v. Keats*, 4 B. & C. 71. Where money is advanced by A. to B. as a gift, B.'s assent will be assumed, but if B. decline to accept the money except as a loan, the advance becomes one of loan. *Hill v. Wilson*, 42 L. J. Ch. 817; L. R. 8 Ch. 888. A transfer of stock may be evidence of a loan of money. *Howard v. Danbury*, 2 C. B. 803. Where the only evidence was that the defendant asked for a loan, and the plaintiff handed him a banknote, of which the amount was not shown, the plaintiff could not recover more than £5 as principal, for that was the smallest note in circulation. *Lawton v. Sweeney*, 8 Jur. 964. An I O U is not evidence of money lent. *Semble per Cur. in Fesenmayer v. Adcock*, 16 M. & W. 449. *Contra, Douglas v. Holme*, 12 Ad. & E. 641, but *quære*, see 10 L. J. Q. B. 43. If A. lend money to B., who contracts "to repay on demand or to execute a mortgage," A. may recover for money lent on B.'s refusal to execute. *Bristowe v. Needham*, 9 M. & W. 729. Where the plaintiff advances money to the defendant, for which the defendant deposits a security which is to be returned "upon repayment," a return, or offer to return, is not a condition precedent to the right of recovery for money lent. *Scott v. Parker*, 1 Q. B. 809; *Lawton v. Newland*, 2 Stark. 73. Where A., at the request of B., agreed to lend C. money on D.'s guarantee, and did so, receiving the following memorandum signed by C. & D.: "We jointly and severally owe you £60;" it was held that there was evidence of a loan to C. and D. jointly, or of an account stated with them. *Buck v. Hurst*, L. R. 1 C. P. 297. On a declaration containing special counts on debentures, and counts for money lent, and interest, the debentures were rejected as evidence on the special counts for want of proper stamps, but were held admissible to show that they were void as debentures; and the plaintiff was therefore entitled to recover, on the common counts, the loan with interest, for which the debentures had been given as collateral securities. *Enthoven v. Hoyle*, 13 C. B. 373; 21 L. J. C. P. 100. A promissory note, stamped as a receipt only, is inadmissible to prove the loan of money. *Ashling v. Boon*, 60 L. J. Ch. 306; [1891] 1 Ch. 568. See as to interest, *Action for interest, post*.

Where a married woman is entitled to pledge her husband's credit for necessaries, money advanced her to procure such necessaries may, on equitable principles, be recovered from her husband by the person who advanced it. *Jenner v. Morris*, 3 D. F. & J. 45; 30 L. J. Ch. 361; *Davidson v. Wood*, 1 D. J. & S. 465; 32 L. J. Ch. 400. So, money lent to an infant to buy necessaries, or to pay a debt incurred for them, and so applied by him, is recoverable. *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197. *Marlow v. Pitfield*, 1 P. Wms. 558, cited in *Ex pte. Williamson*, L. R. 5 Ch. 309, 313. So where H. was carrying on M.'s business as his agent, and borrowed money of B. for the business, B. erroneously believing that H. had M.'s authority to borrow, M. was held liable for so much of the loan as had been applied in payment of M.'s debts. *Bannatyne v. MacIver*, 75 L. J. K. B. 120; [1906] 1 K. B. 103; and the result is the same where B. knows that H. had no authority from M. to borrow. *Reversion Fund and Insurance Co. v. Maison Cosway*, 82 L. J. K. B. 512; [1913] 1 K. B. 364. In these cases, the person lending the money is entitled in equity to stand in the same position as if the defendants had originally borrowed the money from them. S. CC.

In ordinary trading partnerships, one partner is presumed to have authority to bind the rest, by borrowing money for partnership purposes, and the other partners will be liable to pay. *Fisher v. Tayler*, 2 Hare, 218; *Rothwell v. Humphreys*, 1 Esp. 406; *Story on Partnership*, p. 102. But, if one partner open a banking account on behalf of the firm in his own name, this presumption will not extend so as to bind the other partners. *Alliance Bank v. Kearsley*, 40 L. J. C. P. 249; L. R. 6 C. P. 433. In the case of a mining concern, carried on by a company, no such authority to

borrow is to be presumed; the power must be given by the original settlement, or by the consent of every shareholder. *Ricketts v. Bennett*, 17 L. J. C. P. 17; 4 C. B. 686; *Brown v. Byers*, 16 L. J. Ex. 112; 16 M. & W. 252; *Burmester v. Norris*, 6 Ex. 796; 21 L. J. Ex. 43; nor does it apply in the case of a firm of cinematograph theatre proprietors, such a firm not being a trading firm for this purpose. *Higgins v. Beauchamp*, 84 L. J. K. B. 631; [1914] 3 K. B. 1192. If, however, mining be carried on as a trade by an ordinary private partnership under a deed of partnership, the ordinary authority to bind each other exists. *Brown v. Kidger*, 3 H. & N. 853; 28 L. J. Ex. 66. As to authority of agent to borrow, see *Montaignac v. Shitta*, 15 App. Cas. 357.

A loan of money secured by a mortgage is recoverable as money lent, if there be no covenant to pay the amount. *Yates v. Aston*, 12 L. J. Q. B. 160; 4 Q. B. 182. But where a simple loan of money is secured by a covenant to repay the money, the creditor's only remedy is on the covenant. *Edwards v. Bates*, 13 L. J. C. P. 156; 7 M. & Gr. 590; *Baber v. Harris*, 9 Ad. & E. 532; *Mathew v. Blackmore*, 1 H. & N. 762; 26 L. J. Ex. 150. And a mere acknowledgment, in a deed, of a debt being due will amount to a covenant to pay it, if such an intention to enter into a covenant appear on the deed; *Saunders v. Milsome*, L. R. 2 Eq. 573; *Courtney v. Taylor*, 6 M. & Gr. 851; but this is not the case where the acknowledgment is made for a collateral purpose. S. C.; *Marryat v. Marryat*, 28 Beav. 224; 29 L. J. Ch. 665. *Holland v. Holland*, 38 L. J. Ch. 398; L. R. 4 Ch. 449; and *Jackson v. N. E. Ry.*, 47 L. J. Ch. 303; 7 Ch. D. 573. It is a defence that a simple contract has been subsequently merged by a security of a higher nature. In each of the above cases an amendment would now, no doubt, be readily allowed, and these decisions are, therefore, of much less importance than they formerly were. The defendant authorized S., his solicitor, to borrow £100 on mortgage, giving him the title-deeds for the purpose. S. borrowed £400 of the plaintiff, forging the defendant's signature to a mortgage deed for that amount, and appropriated the money to his own use, but afterwards advanced £190 to the defendant, taking from him a mortgage to a third person; and it was held that the plaintiff had no cause of action against the defendant, even to the extent of £100. *Painter v. Abel*, 2 H. & C. 113; 33 L. J. Ex. 60. The common law right of a pawnbroker to recover the balance due to him after the sale of a pledge is not affected by a special pawn-ticket given under the *Pawnbrokers Act*, 1872 (35 & 36 V. c. 93), s. 24. *Jones v. Marshall*, 59 L. J. Q. B. 123; 24 Q. B. D. 269.

Money of a customer at a banker's on an ordinary banking account is money lent, and if left for six years without acknowledgment the right to recover it may be barred. *Pott v. Clegg*, 16 L. J. Ex. 210; 16 M. & W. 321; see *Pollard v. Ogden*, 2 E. & B. 459; 22 L. J. Q. B. 439. As to a deposit account, see *Atkinson v. Bradford, &c.*, *Building Soc.*, 59 L. J. Q. B. 360; 25 Q. B. D. 377. If notes be left by the customer, and the banker give a receipt for the amount as cash, and the notes turn out to be worthless, the customer cannot claim credit for the amount as money lent, or had and received, unless the banker has bought the notes or committed laches. *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J. Q. B. 403. But where C., the agent of a banker, B., to whom B. sent the bills of his customer, A., for collection, received the amount, but failed before he remitted the proceeds to B., B. was held liable for the amount to A. *Mackersy v. Ramsays*, 9 Cl. & F. 818.

For the breach of a contract to lend money, damages only, and not the sum agreed to be advanced, are recoverable. *S. African Territories v. Wallington*, 67 L. J. Q. B. 470; [1898] A. C. 309.

As to a loan made in respect of a wagering contract, see *Carney v. Plimmer*, 66 L. J. Q. B. 415; [1897] 1 Q. B. 634.

As to loans under the Money-Lenders Act, 1900, 63 & 64 V. c. 51. See: *post*, *Defences in Actions on Simple Contracts: Illegality—Money-Lenders Act*.

ACTION FOR MONEY HAD AND RECEIVED.

In an action for money had and received, the plaintiff may be compelled by a proper defence to prove the receipt of the money by the defendant, and his own title to recover it as received for him.

This action has always been regarded as an equitable action, and was formerly held to lie whenever the defendant was "obliged by the ties of natural justice and equity to refund the money." *Moses v. Macferlan*, 2 Burr. 1012, *per* Ld. Mansfield; see *Rogers v. Ingham*, 46 L. J. Ch. 322; 3 Ch. D. 351. This definition was, however, found too vague, and the following cases will show the conditions necessary to sustain a claim for money had and received.

Receipt of money.] The plaintiff must prove that *money* has been received; and therefore an action for money had and received will not lie to recover *stock*. *Nightingal v. Devisme*, 5 Burr. 2589. And it has been held that it will not lie against a *finder* of bank-notes to recover their value; *Noyes v. Price*, MS. Select Ca. 242; Chitty on Bills, 11th ed. 368, 369; unless it can be shown that they have been cashed, or circumstances justify the presumption. Chitty, *ubi sup.*, citing *Longchamp v. Kenny*, 1 Doug. 138. And the value even of provincial notes, *if received as money*, may be recovered in this action. *Pickard v. Bankes*, 13 East, 90; *Fox v. Cutworth*, cited 4 Bing. 179. The principle of the cases is, that if a thing be received as money it may be treated and recovered as such. *Per* Best, C.J., *Spratt v. Hobhouse*, 4 Bing. 179. So the action is maintainable where the defendant has received foreign money for the plaintiff's use. See *Ehrensperger v. Anderson*, 18 L. J. Ex. 132; 3 Ex. 148. Where a sheriff seized goods in execution at the suit and by order of A., who took by bill of sale for £256, and the debtor's assignees afterwards recovered their value from the sheriff, it was held that though no money passed as between the sheriff and A., the sheriff might recover from A., £256 as money had and received, and that the return of *feri feci* was no estoppel against setting up the right of the assignees. *Standish v. Ross*, 19 L. J. Ex. 185; 3 Ex. 527. And money allowed in account, under circumstances which would have entitled the party allowing it to recover it back if he had actually paid it, may be treated as paid, and may be recovered in this form of action. *Gingell v. Purkins*, 19 L. J. Ex. 129; 4 Ex. 720. The last two cases, however, seem to be at variance with *Lee v. Merrett*, 15 L. J. Q. B. 289; 8 Q. B. 820. The vendee of an estate agreed with the vendor, after conveyance, to give up his claim to a moiety of the expenses in consideration of the vendor paying some other charges. Held, that the vendee's attorney, who had agreed to charge the vendee nothing if the vendor refused to pay his share, might recover the amount set off, as money had and received by the vendee to his use. *Noy v. Reynolds*, 1 Ad. & E. 159. If an agent refuse to account for goods delivered to him for sale, it shall be presumed, after a reasonable time, that he has sold them and received the proceeds in money. *Hunter v. Welsh*, 1 Stark. 224. Where goods are given to an agent for a particular purpose, as to sell them, there is an implied promise to account for the proceeds, in respect of which this action lies. *Wilkin v. Wilkin*, 1 Salk. 9. Where a banker, A., at whose bank a bill of exchange is accepted payable, by mistake cancels the acceptance, this does not give the holder a right to sue A. for the amount of the bill as money had and received. *Warwick v. Rogers*, 12 L. J. C. P. 113; 5 M. & Gr. 340; *Prince v. Oriental Bank Corporation*, 47 L. J. P. C. 42; 3 App. Cas. 325.

It seems that the plaintiff must give evidence of some particular sum, otherwise he will fail. *Harvey v. Archbold*, 3 B. & C. 626; *Bernasconi v. Anderson*, M. & M. 183; see *Baxendale v. G. W. Rail. Co.*, 14 C. B. (N. S.) 1, 42, 44; 32 L. J. C. P. 225, 239.

Receipt by the defendant for the plaintiff.] The plaintiff must prove that it was *his* money which the defendant received. *Scarfe v. Halifax*, 7 M. & W. 288; 10 L. J. Ex. 332. Or that the money had been received to *his* (the plaintiff's) use by the defendant. *Kelly v. Curzon*, 4 Ad. & E. 622. In *Société Coloniale Anversoise v. London and Brazilian Bank*, 16 Com. Cas. 158, Scrutton, J., held that a principal who places money in a bank on the terms that a known agent shall draw upon it, retains the power, if he rightly determines the agency, to require the bank to return to him the undrawn balance. In the C. A. (17 Com. Cas. 1) this point was not dealt with. The mere bearer of money from one person to another cannot be sued. *Coles v. Wright*, 4 Taunt. 198. And a mere agent who has paid money over, pursuant to the directions of the party depositing it with him, and without notice of the plaintiff's title, cannot be sued; *Horsfall v. Handley*, 8 Taunt. 136; but merely passing it in account, without new credit given, is not such a payment; *Buller v. Harrison*, Cowp. 565; and until there has been a change of circumstances by his having paid over the money to his principal, or done something equivalent to it, he remains liable to the true owner. *Cox v. Prentice*, 3 M. & S. 344. If the deposit money be paid to D. the solicitor of the vendor E. as his agent, D. must on demand hand it over to E., although the question as to the title has not been settled; and if he do not, interest may be recovered from the demand. *Edgell v. Day*, 35 L. J. C. P. 7; L. R. 1 C. P. 80. Where money in litigation between two parties has by consent been paid over to a stakeholder, in trust for the party entitled, it can only be recovered from the stakeholder, and not from the original debtor. *Ker v. Osborne*, 9 East, 378. And where money has been paid to a stakeholder, A., to abide the decision of B. as to a certain event, the amount is not recoverable until the decision of B. has been communicated to A. *Wilkinson v. Godefroy*, 9 Ad. & E. 536. The decision of the umpire of a race, as to the winner, is conclusive. *Parr v. Winteringham*, 1 E. & E. 394; 28 L. J. Q. B. 123; see *Dines v. Wolfe*, L. R. 2 P. C. 280. But the jurisdiction of the umpire does not arise until the race has been run. *Carr v. Martinson*, 1 E. & E. 456; 28 L. J. Q. B. 126; *Sadler v. Smith*, 38 L. J. Q. B. 91; 39 L. J. Q. B. 17; L. R. 4 Q. B. 214; L. R. 5 Q. B. 40. Where money is paid to a sheriff L., by a claimant D. under an interpleader order, to abide the order of a County Court, to which the proceedings had been transferred, in which D. is successful; D. cannot recover the money from L. without an order of the County Court. *Discount Banking Co. v. Lambarde*, 63 L. J. Q. B. 21; [1893] 2 Q. B. 329. A mere contract between A. and B., to which C. is not a party, that B. shall pay C. a sum of money, does not enable C. to sue B. therefor. *In re Empress Engineering Co.*, 16 Ch. D. 125.

In general, an agent must account to his principal, and cannot set up the *ius tertii* to an action brought by the principal. *Nickolson v. Knowles*, 5 Mad. 47; *Crosskey v. Mills*, 1 C. M. & R. 298; *White v. Bartlett*, 9 Bing. 378. Thus, if the master of a ship employ B. to sell a ship on an occasion that justifies the sale (as in case of irreparable damage on a voyage), the owner of the ship cannot sue B. for the proceeds after he has paid them over to the master; nor even *ut semble*, before such payment over. *Ireland v. Thomson*, 17 L. J. C. P. 241; 4 C. B. 149, 171.

All secret profits, commissions or bonuses made by an agent, A., in the course of his employment, when received by him, belong absolutely to his principal, P., who may maintain this action against A. for their recovery; *Morison v. Thompson*, 43 L. J. Q. B. 215; L. R. 9 Q. B. 480; *De Bussche v. Alt*, 47 L. J. Ch. 381; 8 Ch. D. 286; *Williamson v. Hine*, 60 L. J. Ch. 123; [1891] 1 Ch. 390; with interest from the time of their receipt by A.; *Boston Deep Sea, &c., Co. v. Ansell*, 39 Ch. D. 339; and P. may recover, although he was not entitled to recover the bonuses from the person who paid A. S. C. See also *Whaley Bridge Calico Printing Co. v. Green*, 49 L. J. Q. B. 326; 5 Q. B. D. 109; and *Salford, Mayor, &c., of, v. Lever*, 60 L. J. Q. B. 39; [1891] 1 Q. B. 168. And P. is also entitled to a declara-

tion that A. shall be indebted to him in any such further profits, &c., when received. *Powell v. Evan Jones*, 74 L. J. K. B. 115; [1905] 1 K. B. 11. The profits, if secret, must be paid over to P. although received without fraud. *Hippisley v. Knee Brothers*, 74 L. J. K. B. 68; [1905] 1 K. B. 1. So the promoter of a company is liable to the company for all profits made by him in the formation of the company, which he did not disclose to the company. *Erlanger v. New Sombrero Phosphate Co.*, 48 L. J. Ch. 73; 3 App. Cas. 1218; *Bagnall v. Carlton*, 47 L. J. Ch. 30; 6 Ch. D. 371; *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918; *Id. v. Lewis*, 48 L. J. C. P. 257; 4 C. P. D. 396; *Lydney, &c., Iron Ore Co. v. Bird*, 55 L. J. Ch. 875; 33 Ch. D. 85; *Gluckstein v. Barnes*, 69 L. J. Ch. 385; [1900] A. C. 240. See also *In re Leeds & Hanley Theatres, &c.*, 72 L. J. Ch. 1; [1902] 2 Ch. 809. And a director is liable to the company for any consideration he received from the promoter to induce him to become a director; *Nant-y-glo, &c., Ironworks Co. v. Grave*, 12 Ch. D. 738; or received subsequently, if any question be then open between the promoter and the company. *Eden v. Ridsdale's Ry. Lamp, &c., Co.*, 58 L. J. Q. B. 579; 23 Q. B. D. 368. See *Archer's Case*, [1892] 1 Ch. 322. But the liability is one of debtor and creditor, and the principal cannot follow the money which the agent has invested. *Lister v. Stubbs*, 59 L. J. Ch. 570; 45 Ch. D. 1; *Powell v. Evan Jones, supra*. A director is not liable for profit made by the sale by him of his property to the company. *Ladywell Mining Co. v. Brookes*, 56 L. J. Ch. 25, 684; 34 Ch. D. 398; 35 Ch. D. 400, following *In re Cape Breton Co.*, 54 L. J. Ch. 822; 29 Ch. D. 795, affirmed *sub. nom. Cavendish Bentinck v. Fenn*, 57 L. J. Ch. 552; 12 App. Cas. 652, on the ground of insufficient evidence. See also *In re Lady Forrest, &c., Gold Mines*, 70 L. J. Ch. 275; [1901] 1 Ch. 582. As to the exoneration of a director of a company, under its articles of association, from liability, on the ground of interest conflicting with his duty to the company, to account for profits made by him, see *Costa Rica Ry. Co. v. Forwood*, 70 L. J. Ch. 385; [1901] 1 Ch. 746. As to damages recoverable by the company from a director who has improperly received or obtained its shares, see *Eden v. Ridsdale's Ry. Lamp, &c., Co.*, 58 L. J. Q. B. 579; 23 Q. B. D. 368; and *Shaw v. Holland*, 69 L. J. Ch. 621; [1900] 2 Ch. 305. As to the liability of a partner to account to the firm for any benefit derived by him, see the Partnership Act, 1890, 53 & 54 V. c. 39, s. 29.

An agent is in general estopped from denying the accuracy of accounts rendered by him to his principal, except in the case of an error arising by mistake. *Skyring v. Greenwood*, 4 B. & C. 281; *Shore v. Picton, Id.* 715; *Cave v. Mills*, 7 H. & N. 913; 31 L. J. Ex. 265. Where an agent receives money to pay over to a third person, although he assent to hold it for that purpose, he continues to be accountable to his principal alone, until he has entered into some binding engagement with that third person to hold the money to his use; and not until then will he be liable to the third person in an action for money had and received. *Baron v. Husband*, 4 B. & Ad. 611; *Williams v. Everett*, 14 East, 582; *Wedlake v. Hurley*, 1 C. & J. 83; *Scott v. Porcher*, 3 Mer. 652; *Brind v. Hampshire*, 1 M. & W. 365. Where money is *bonâ fide* received from an agent under a binding contract, it cannot in general be recovered by the principal. *Foster v. Green*, 7 H. & N. 881; 31 L. J. Ex. 158. But if A., the clerk of B., without B.'s authority, pay money into the bank of C., having previously made an arrangement with D., the clerk of C., for some application of that money which neither A. nor D. had authority from their masters to make, C. must refund to B. *British and American Telegraph Co. v. Albion Bank*, 41 L. J. Ex. 67; L. R. 7 Ex. 119. Where money, paid by A. to an agent B., is to be remitted to C., is by mistake remitted to D., it may, if D. have not in the meantime changed his position, be recovered by B. from D. *Colonial Bank v. Exchange Bank of Yarmouth, Nova Scotia*, 55 L. J. P. C. 14; 11 App. Cas. 84. The respondents paid to X., the native official of the appellant bank, money for telegraphic transmission. To the respondents' knowledge, X., had no authority

from the bank to enter into such a contract without first consulting the manager. X., who did not communicate with the manager, misappropriated the money. It was held that the appellant bank was not liable. *Russo-Chinese Bank v. Li Yau Sam*, 79 L. J. P. C. 60; [1910] A. C. 174.

The holder of a bill cannot sue the acceptor's bank for money had and received, though the acceptor has put funds into his hands for payment of the bill. *Moore v. Bushell*, 27 L. J. Ex. 3; *Hill v. Royds*, 38 L. J. Ch. 538; L. R. 8 Eq. 290. But if A. send money to B. to discharge a debt owing from A. to C., and B. assent to hold the money for that purpose, and allows C. to be told this, C. can maintain an action against B. for money had and received. *Lilly v. Hays*, 5 Ad. & E. 548. See *Noble v. National Discount Co.*, 5 H. & N. 225; 29 L. J. Ex. 210.

A receipt signed by an agent for his principal is not *per se* evidence to support an action for money had and received against the agent. *Edden v. Read*, 3 Camp. 339; *Stephens v. Badcock*, 3 B. & Ad. 354. But where the defendant is a wrongdoer, as where he took money of the plaintiff found in the house of a deceased person, by direction of the executor, to whom he paid it over, he is liable, and such payment is no defence. *Tugman v. Hopkins*, 11 L. J. C. P. 309; 4 M. & Gr. 389. So, where the defendants *bonâ fide* received money from the plaintiff's wife, but without his assent, to keep for her infant child, the plaintiff can recover it. *Calland v. Loyd*, 9 L. J. Ex. 56; 6 M. & W. 26. In *Stead v. Thornton*, 3 B. & Ad. 357, n., the defendant received money on behalf of the assignee of a bankrupt, who was, however, insane at the time, and on his being afterwards removed, and the plaintiff appointed assignee in his stead, it was held that the plaintiff could maintain money had and received against the defendant, for he was a mere stranger, as he could not be the agent of an insane person. See further, *Ex pte. Edwards*, 13 Q. B. D. 747; and *Sharland v. Mildon*, 15 L. J. Ch. 434; 5 Hare, 469. The directors of a company stand in the relation of agents to the company, but there is no such relation between them and persons contracting with the company. *Wilson v. Ld. Bury*, 50 L. J. Q. B. 90; 5 Q. B. D. 518.

Money received by a sub-agent for an agent is not in general received for the use of the principal. See *Prince v. Oriental Bank Cor.*, 47 L. J. P. C. 42; 3 App. Cas. 325, 334, following *Mackersy v. Ramsays*, 9 Cl. & F. 818. Thus, there is no such privity between the client of a country solicitor and his London agent, as will support an action by the client for money had and received against the agent, for the proceeds of a judgment recovered in the ordinary course of business. *Robbins v. Fennell*, 17 L. J. Q. B. 77; 11 Q. B. 248; *Robbins v. Heath*, 11 Q. B. 257, n.; *Cobbe v. Becke*, 14 L. J. Q. B. 108; 6 Q. B. 930. See also *Peatfield v. Barlow*, 38 L. J. Ch. 310; L. R. 8 Eq. 61. But the circumstances of the agency may be such, that it involves an authority to the agent to appoint a sub-agent or substitute, who shall be in direct privity with the principal. *De Bussche v. Alt*, 47 L. J. Ch. 381; 8 Ch. D. 286. Thus, where B. the agent for sale of A. has employed, in his own name, a broker, C., to sell A.'s goods, and after C. had sold the goods for B. and before delivery or payment B. died, and after the sale, but before receiving the proceeds, C. had notice that A. claimed the proceeds, it was held that A. might recover them from C., either on the ground of privity of contract, or of property. *Kaltenbach v. Lewis*, 55 L. J. Ch. 58; 10 App. Cas. 617; explaining *New Zealand Land Co. v. Watson*, 50 L. J. Q. B. 433; 7 Q. B. D. 374. So where B. as agent for A. consigned goods to C., and by B.'s direction, C. insured them, after notice that B. had an undisclosed principal, and received the policy moneys after a claim therefor by A.; A. was held entitled to recover the moneys from B. by reason of his property in the goods, less the cost of insurance only. *Mildred v. Maspons*, 53 L. J. Q. B. 33; 8 App. Cas. 874. With regard to the right to follow moneys received by an agent, it has been held that where A. intrusts a specific chattel to B. for safe custody or sale for A.'s benefit, then the chattel or its proceeds, whether rightfully or wrongfully

disposed of, may be followed at any time, though the chattel or the money representing its proceeds may have been mixed and confounded with the mass of like material. *In re Hallett's Estate*, 49 L. J. Ch. 415; 13 Ch. D. 696. But it is otherwise where although there may have been a trust with reference to the disposition of the chattel, there is none with respect to the money itself, beyond the ordinary duty of a man to pay his debts; S. C.; as in the case of a commission agent who was in the habit of receiving goods generally for sale, and of trading on his own account, to whom the owner has consigned goods for sale. *Kirkham v. Peel*, 43 L. T. 171; affirmed in C. A., (1880) W. N. 168. So where a broker B. sold securities for T. by T.'s order, and in the ordinary course of business paid the cheque he received for the price to his account with his hanker C., which account was then overdrawn beyond the amount of the cheque; C. knew that B. was a broker, and that the cheque was the proceeds of the sale of securities, but did not enquire whether the money it represented was in D.'s hand as agent or otherwise; it was held that C. was entitled to retain the money; *Thomson v. Clydesdale Bank*, 62 L. J. P. C. 91; [1893] A. C. 282; and that T. could not recover it from C., unless C. knew that B. was misapplying the fund in violation of his duty. *Id.* In order to follow money which an agent has been entrusted to receive for the plaintiff, the money must be capable of identification. *Ex pte. Blane*, 63 L. J. Q. B. 573; [1894] 2 Q. B. 237. See further, *Persian Investment Co. v. Malcolm Khan (Prince)*, [1893] W. N. 49. Where one of two tenants in common receives the whole rents of the property, the co-tenant must sue for his moiety in account, and cannot maintain money had and received. *Thomas v. Thomas*, 19 L. J. Ex. 175; 5 Ex. 28.

Failure, or want of consideration.] Where money has been paid on a consideration which has wholly failed, it may be recovered in this action by the party who has paid it. *Royal Bank of Canada v. Regem*, 82 L. J. P. C. 33, 39; [1913] A. C. 283, 296. Thus, if an annuity be defective, and the deeds are set aside, the consideration money may be thus recovered. *Shove v. Webb*, 1 T. R. 732. So if one of several securities for the annuity fails. *Scurfield v. Gouland*, 6 East, 241. So if an annuity be purchased at a time when the annuitant is in fact dead, but neither buyer nor seller knows of this at the time, the buyer may recover back his money. *Strickland v. Turner*, 7 Ex. 208; 22 L. J. Ex. 115. But where an annuity for A.'s life was regularly paid up to the time of A.'s death, but no memorial of the grant of the annuity was enrolled, it was held that although the contract was void, A.'s executor could not, on that ground, recover back the consideration money as money had and received. *Davis v. Bryan*, 6 B. & C. 651. Where the annuity is set aside, and the grantee brings an action to recover the consideration money, the defendant may, on a plea of set-off, deduct the payments made by him within six years in respect of the annuity. *Hicks v. Hicks*, 3 East, 12. So there may be a total failure of part only of the consideration, as where the plaintiff has paid for a parcel of goods of 150 tons at 18s. per cwt., and on delivery, it is found to be of 133 tons only; in such case the plaintiff may recover the difference of value. *Devaux v. Conolly*, 19 L. J. C. P. 71; 8 C. B. 640. But where the contract is entire and the consideration has only partially failed, the action is not maintainable. As where the plaintiff bought 25 sacks of flour, and used 2½ sacks of it, although he had objected that it was not equal to sample, it was held he could not rescind the contract and recover the price paid. *Harnor v. Groves*, 15 C. B. 667; 24 L. J. C. P. 53. So where the thing sold is not severable, and the buyer has enjoyed any part of the consideration for which he paid, he cannot rescind and recover the price. Thus where B. paid A. an annuity for licence to use a patent, which after some years was found to be bad, it was held B. could not recover what he had paid. *Taylor v. Hare*, 1 B. & P. N. R. 260, followed in *Laves v. Purser*, 26 L. J. Q. B. 25; 6 E. & B. 930. So where a premium was paid to the defendant's testator

to instruct an apprentice for six years, and the testator died at the end of one year, it was held that no part of the premium was recoverable from the executor. *Whincup v. Hughes*, 40 L. J. C. P. 104; L. R. 6 C. P. 78. Where money had been paid as the consideration under a contract, the completion of which afterwards became impossible by reason of an event not within the contemplation of the parties, they are both discharged from further performance of the contract, but it is not rescinded *ab initio*, and therefore the money paid is not recoverable back. *Civil Service Co-operative Socy. v. General S. Nav. Co.*, 72 L. J. K. B. 933; [1903] 2 K. B. 756. A broker at A.'s request bought railway scrip for him; before the day of account the company converted the scrip into shares, and made a call; held, that A. was bound to accept the shares and pay the call, and could not repudiate the contract and recover back the price. *M'Ewen v. Woods*, 17 L. J. Q. B. 206; 17 Q. B. 13. As to the recovery of freight, paid under a divisible contract for carriage, the goods having been lost, see *Greeves v. W. India, &c., S. Ship Co.*, 22 L. T. 615.

If A. sell to B. a bill as a foreign bill of exchange, which turns out to be an English bill and unavailable for want of a stamp, B. may recover the price in this action, both being ignorant of the defect; but if it had really been a foreign bill, with some latent defect which made it worthless, B. could not have recovered, unless there was a warranty or fraud. *Gompertz v. Bartlett*, 2 E. & B. 849; 23 L. J. Q. B. 65. So if A. sell to B. a bar of brass as gold, B. may recover the price, though A. was ignorant of the fact. *Per* Ld. Campbell, C.J., *Id.* So where the plaintiff bought of defendant a bill, purporting to be an acceptance of A., but which was in fact forged, he was held entitled to recover back the money paid, although there was one genuine though worthless indorsement. *Gurney v. Womersley*, 4 E. & B. 133; 24 L. J. Q. B. 46. The purchaser in good faith of a foreign bill with bill of lading attached does not by presenting the bill of exchange for acceptance warrant the bill of lading to be genuine, and where money was paid by the defendants on the footing that the bill of lading was genuine, whereas in fact it was a forgery, it was held that they could not recover back the money so paid. *Guaranty Trust Co. of New York v. Hannay*, 87 L. J. K. B. 1223; [1918] 2 K. B. 623. Where plaintiff, a stockbroker, sold for defendant foreign bonds, which proved to be defective for want of a foreign stamp, and the bonds were afterwards returned on that account by the purchaser, whereupon plaintiff took them back and reimbursed the purchaser, it was held that money had and received was maintainable against the defendant for the amount of purchase-money paid over to him by the plaintiff. *Young v. Cole*, 3 Bing. N. C. 724. The defendant, a broker, received £800 from the plaintiffs to purchase a certain number of bales of cotton, and he made a contract in his own name for a larger number; it was held that as the defendant had not made a contract upon which the plaintiffs could sue, they could recover the money back. *Bostock v. Jardine*, 34 L. J. Ex. 142, misreported in 3 H. & C. 700; see L. R. 7 C. P. 101, *per* Mellor, J. Where A. has conveyed land on sale to B., and B. is evicted by C. owing to a defect in A.'s title, B.'s only remedy against A. is on A.'s covenants. *Clare v. Lamb*, 44 L. J. C. P. 177; L. R. 10 C. P. 334.

Where shares in a company have been applied for and allotted, but the allottee has subsequently repudiated the shares, and his name has been removed from the register, it seems that the action lies for the deposit paid. *Stewart v. Austin*, 36 L. J. Ch. 162; L. R. 3 Eq. 299. See also *Ship v. Crosskill*, 39 L. J. Ch. 550; L. R. 10 Eq. 73; *Alison's Case*, 43 L. J. Ch. 1; L. R. 9 Ch. 1, 26. So where an infant on attaining majority repudiates shares previously allotted him, from which he has derived no benefit. *Hamilton v. Vaughan-Sherrin, &c., Co.*, 63 L. J. Ch. 795; [1894] 3 Ch. 589. Where a scheme for establishing a tontine was put forth, stating that the money subscribed was to be laid out at interest; and after some subscriptions had been paid to the directors in whom the management of the concern was vested, but before any part of the money was laid out at

interest, the directors resolved to abandon the project, it was held that each subscriber might, in this action, recover the whole of the money advanced by him without any deduction for expenses. *Nockels v. Crosby*, 3 B. & C. 814. So the money paid for the purchase of shares in a joint-stock company may, under similar circumstances, be recovered from the person of whom the shares were bought. *Kempson v. Saunders*, 4 Bing. 5. So a deposit on shares in a projected company, subsequently abandoned, may be recovered from one of the acting committee. *Walstab v. Spottiswoode*, 15 L. J. Ex. 193; 15 M. & W. 501. But the action must be against a party, or one of the parties, who received the money or sanctioned the application of it. Payment to the bankers named in a letter of allotment "to the credit of the company," of which the defendant is an active managing director, is a payment to him. *Moore v. Garwood*, 19 L. J. Ex. 15; 4 Ex. 681. It is not enough to show that the defendant was a provisional committee-man and chairman of the managing committee, if he never in fact concurred in their acts, though he may have been present at a meeting of them, from whose proceedings, however, he dissented. *Burnside v. Dayrell*, 19 L. J. Ex. 46; 3 Ex. 224. But on a failure of the project, a deposit applied to expenses actually incurred, with the plaintiff's authority, cannot be recovered. *Willey v. Parratt*, 18 L. J. Ex. 82; 3 Ex. 211. It is otherwise if paid without his authority. *Moore v. Garwood*, 19 L. J. Ex. 15; 4 Ex. 681, 690. Where payment of the deposit by the plaintiff was made "subject to the provisions of the subscriber's agreement," and no such agreement was then in existence; but one was subsequently made, which improperly authorized payment of expenses out of the deposits, and which was not signed by the plaintiff, the plaintiff may recover back the deposit in full, on proof of failure of the projected company; for he neither assented, nor could be required to assent, to such an agreement. *Ashpittel v. Sercombe*, 19 L. J. Ex. 82; 5 Ex. 147. Inability to establish the company after a reasonable lapse of time, is evidence of an abandonment of the scheme. *Chaplin v. Clarke*, 4 Ex. 403. It is no answer to the action that the plaintiff signed the parliamentary and subscription contracts, if his signature were obtained by suppressing the fact that the scheme had been abandoned. *Jarrett v. Kennedy*, 6 C. B. 319. Where the deposit was paid to the credit of certain persons in trust for the company, it cannot be recovered from other, though active, members of the company. *Watson v. Charlemont (Earl)*, 18 L. J. Q. B. 65; 12 Q. B. 856. Where all, or substantially all, of the shares in a cost-book mine are not subscribed for, and the directors are obliged to relinquish the mine for want of funds, they are liable to refund to allottees who have not authorized the working or other expenditure; and the deposits are recoverable from the directors, though they were, in fact, paid to their bankers, who were authorized to receive them, and though entered to the credit of some of the directors only. *Johnson v. Goslett*, 3 C. B. (N. S.) 569; 27 L. J. C. P. 122. See *Blackmore v. N. Australasian Co.*, 43 L. J. P. C. 1; L. R. 5 P. C. 24. The defendant sold, and the plaintiff bought, shares in a banking company through brokers on the Stock Exchange in the usual way; the defendant executed a transfer, but the requisite consent by the company to the transfer not having been given, and the company having stopped payment, and ultimately become bankrupt, the plaintiff directed his broker not to pay for the shares or accept the transfer; in obedience, however, to the decision of the Stock Exchange, the broker paid the money to the defendant's broker, who handed it over to the defendant. The plaintiff afterwards paid the money to his broker, under a threat of legal proceedings, and then sued the defendant for money had and received; it was held that the action did not lie, as there was no proof of a total failure of consideration. *Remfry v. Butler*, E. B. & E. 887; *Stray v. Russell*, 1 E. & E. 888; 29 L. J. Q. B. 115. Money paid by the plaintiff, as the price of a grant of a patent right which he knew did not exist, cannot be recovered back, as the plaintiff obtained that for which he paid the price. *Begbie v. Phosphate Sewage Co.*, 44 L. J. Q. B. 233; L. R. 10 Q. B. 491; 1 Q. B. D. 679.

Where a fixed sum has been paid to the parish by the putative father of a bastard in discharge of further liability, and the child dies, the unexpended residue may be recovered in this action. *Watkins v. Hewlett*, 1 B. & B. 1. And in *Chappell v. Poles*, 2 M. & W. 867, the balance was held recoverable, though the defendants (the overseers who had received the money) had handed over the money to their successors, the child having died during the defendants' year of office; and *semble*, the whole sum paid was money had and received to the plaintiff's use from the time it was so paid; such contract being illegal and void. S. C.

If A. pay B., a gratuitous bailee, money to be employed to a particular purpose, which B. neglects to do, A. may recover it back in this form of action; but *semble*, it will be otherwise, if B. have lost it by gross negligence; for this is the subject of a special action for such negligence. *Parry v. Roberts*, 3 Ad. & E. 118; 4 L. J. K. B. 189. Where the plaintiff abandons the purpose for which money was deposited with the defendant; *Baird v. Robertson*, 1 M. & Gr. 981; or countermands a direction to the defendant to pay over the money, before the defendant has paid it over or entered into a binding contract to do so; *Taylor v. Lendey*, 9 East, 49; *Fletcher v. Marshall*, 15 M. & W. 755; he may sue for money had and received. But where money has been paid to an agent to apply in a particular manner, the principal cannot sue the agent in this form of action, for neglecting his instructions, before he has countermanded the agent's authority; *Ehrensperger v. Anderson*, 18 L. J. Ex. 132; 3 Ex. 148; unless there has been a total refusal on the part of the agent to perform his part of the contract. *Id.* If A. give a letter of credit to B. to apply the proceeds to a specific purpose, and B. is persuaded by C., who is cognizant of the facts, to lend the money to him, and he fails to repay it, A. may sue C. in this form of action. *Litt v. Martindale*, 18 C. B. 314.

Conduct money received with a subpoena may be recovered back by the party who paid it, where the attendance of the witness has been countermanded, and he has incurred no expense. *Martin v. Andrews*, 7 E. & B. 1; 26 L. J. Q. B. 39.

In cases of forgery.] Where a party paying money upon a forged instrument, has not been guilty of any want of that caution which, in consequence of the character which he fills, he is bound to exercise, and has not by his conduct affected the rights of any other parties to the instrument, he may in general recover back the money as money paid under a mistake. Thus a person who discounts a forged navy bill, may recover back the money as money had and received to his use. *Jones v. Ryde*, 5 Taunt. 488; 1 Marsh. 157. So in the case of forged bank-notes; *per* Gibbs, C.J., S. C.; and of Bank of England notes, the numbers of which had been altered, and payment was in consequence refused. *Leeds Bank v. Walker*, 52 L. J. Q. B. 590; 11 Q. B. D. 84. So where a banker by mistake paid a bill for the honour of a customer whose name was forged, but, discovering the mistake, gave notice thereof the same morning to the holder in time to enable him to give notice of non-payment to the indorsers, it was held that the money was recoverable from the holder. *Wilkinson v. Johnson*, 3 B. & C. 428. So where the plaintiffs discounted for the defendants a bill of exchange, which the latter did not indorse, and the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged, it was ruled that the defendants were liable to refund the money. *Fuller v. Smith*, Ry. & M. 49.

But where the party paying the money so conducted himself as to lead the holder of the bill to believe that he considered the signature genuine he cannot afterwards withdraw from that position and be allowed to recover. *L. & River Plate Bank v. Bank of Liverpool*, 65 L. J. Q. B. 80; [1896] 1 Q. B. 7. Thus, where two bills were drawn upon the plaintiff, one of which he accepted, and both of which he paid, and it appeared that the handwriting of the drawer was forged, but the plaintiff gave no notice thereof for a long

time to the payee, it was held that he could not recover the amount from the payee. *Price v. Neale*, 3 Burr. 1354; 1 W. Bl. 390. So where a banker paid a bill to a *bonâ fide* holder, which purported to be accepted payable at his house by one of his customers, and the forgery of the acceptor's name was not discovered until the end of a week, it was held that the money could not be recovered from the holder; *Smith v. Mercer*, 6 Taunt. 76; and the banker in such a case cannot recover, though he give notice of the forgery on the day after he has paid it; for the holder is entitled to know whether it is to be dishonoured on the very day it becomes due. *Cocks v. Masterman*, 9 B. & C. 902; *L. & River Plate Bank v. Bank of Liverpool*, 65 L. J. Q. B. 80; [1896] 1 Q. B. 7. Where a cheque, drawn by a customer upon his banker, for a sum of money, described in the body of the cheque in words and figures, was afterwards altered by the holder, who substituted a large sum for that mentioned in the cheque, in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum, it was held that the banker could not charge his customer for anything beyond the original sum. *Hall v. Fuller*, 5 B. & C. 750. But where the customer drew a number of cheques in blank and delivered them to his wife to be filled up with such sums as might from time to time be required, and his wife filled up one for £50, and left a space on the line before the fifty and also a space between the £ and the 50, so that the person to whom it was delivered was enabled to insert *three hundred and* before the fifty, and the figure 3 between the £ and the 50, it was held that the forgery and payment were from the customer's negligence, and he must bear the loss. *Young v. Grote*, 5 L. J. (O. S.) C. P. 165; 4 Bing. 253. This case was approved, and *Colonial Bank of Australasia v. Marshall*, 75 L. J. P. C. 76; [1906] A. C. 559, in which the opposite view was taken was not followed in *London Joint Stock Bank v. Macmillan*, 88 L. J. K. B. 55; [1918] A. C. 777. There a clerk of the respondent wanting a cheque for £2 for petty cash handed to the respondent a cheque which had the figure "2" written in the place left for figures, but the place where the amount would appear in words was left blank, and the cheque in that condition was signed by the respondent. The clerk thereafter inserted the figure "1" before, and "0" after the 2, and inserted in the proper place the words "One hundred and twenty pounds," and obtained payment from the bank of that amount, and absconded. It was held that the respondent in signing the cheque in the condition in which it was presented to him had neglected to take reasonable precautions against forgery and must, as between himself and the banker, bear the loss caused by the forgery that ensued. See also *Imperial Bank of Canada v. Bank of Hamilton*, 72 L. J. P. C. 1; [1903] A. C. 49, where the certification of a cheque had been fraudulently altered by the drawer. The documents described in *Bank of England v. Vagliano*, 60 L. J. Q. B. 145; [1891] A. C. 107, having been accepted by V., payable at the banking house of his bankers, were paid over their counter to G. *bonâ fide*, and in pursuance of letters of advice signed by V., his signature thereto having been fraudulently obtained by G., it was held that the bankers were entitled to charge V. with the amount of the bills. The executor of A. recovered from the maker of a note, purporting to be payable to A. and B., of whom A. survived B. It afterwards appeared that A.'s name had been added by forgery, and B.'s executor thereupon sued A.'s executor for money received to plaintiff's use; held, that he could not recover, for it was not money paid on a note to which, if genuine, the plaintiff would have been entitled. *Vaughan v. Matthews*, 18 L. J. Q. B. 191; 13 Q. B. 187.

Money paid under ignorance or mistake of facts or of law.] Money paid with a knowledge of all the facts, but under a mistake of the law, cannot in general be recovered back, there being nothing against conscience in the other retaining it. *Bilbie v. Lumley*, 2 East, 469; *Brisbane v. Dacres*, 5 Taunt. 143; *Barber v. Pott*, 4 H. & N. 759; 28 L. J. Ex. 381; *Rogers v.*

Ingham, 46 L. J. Ch. 322; 3 Ch. D. 351. Where the plaintiff has suffered the defendant to sell some of his property under an impression that it had passed to the defendant by deed of assignment, which was, in fact, inoperative, he cannot recover the price as money received to his use. *Platt v. Bromage*, 24 L. J. Ex. 63. But money paid under a mistake of facts, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Bize v. Dickason*, 1 T. R. 285; *Milnes v. Duncan*, 6 B. & C. 671. *Semble* (per Channell, J.), this rule applies although the payment was made in connection with a betting transaction. *Gasson v. Cole*, 26 T. L. R. 468. Payment to a banker does not differ from payment to any other person; therefore money paid to a banker under a mistake of fact can be successfully redeemed by the person who so paid it. *Kerrison v. Glyn, Mills, Currie & Co.*, 81 L. J. K. B. 465. See also *Kleinwort v. Dunlop Rubber Co.*, 97 L. T. 263. And money so paid in ignorance may be recovered back, although the defendant cannot be put *in statu quo*. *Standish v. Ross*, 19 L. J. Ex. 185; 3 Ex. 527. Where money was paid on account, and a dispute afterwards occurred between the parties, and a balance was struck omitting to notice the sums paid, and the plaintiff paid the whole balance, he was permitted to recover the sum paid on account, as money paid under a mistake in the hurry of business. *Lucas v. Worswick*, 1 M. & Rob. 293. And a payment, made in *bonâ fide* forgetfulness of a fact formerly known to the plaintiff, may be recovered back. *Kelly v. Solari*, 9 M. & W. 54. And it is not enough to disentitle the plaintiff that he *might* have learnt the real fact upon inquiry, unless he has voluntarily waived all inquiry into the truth. S. C.; *Imperial Bank of Canada v. Bank of Hamilton*, 72 L. J. P. C. 1; [1903] A. C. 49. Thus where, on the dissolution of a partnership, the plaintiff paid the defendant a sum for a share therein, on the footing of an investigation of the partnership accounts which he had made, and on further investigation he found that the profits were less than he had first estimated, so that a smaller sum than he had paid was payable to the defendant under the agreement for sale; held that the plaintiff could recover from the defendant the sum paid in excess. *Townsend v. Crowdy*, 8 C. B. (N. S.) 477; 29 L. J. C. P. 300. The action will lie, although the position of the defendant has been altered since the payment was made, unless there is some mutual relation between the parties creating a duty on the plaintiff, breach of which disentitles him to recover. *Durrant v. Eccl. Comrs.*, 50 L. J. Q. B. 30; 6 Q. B. D. 234.

It has been said that, before commencing the action on the ground of mistake, it is necessary to give the defendant notice of the mistake, and to demand the money. *Freeman v. Jeffries*, 38 L. J. Ex. 116; L. R. 4 Ex. 189; but this is not the case where the parties were under a common mistake. *Baker v. Courage*, 79 L. J. K. B. 313; [1910] 1 K. B. 56. Where a bill was given by one partner for the balance of an account, alleged to be due from the partnership to the defendant, and he afterwards found that this account included a separate debt due from his co-partner, and then paid the amount of the bill to the holder, under protest, to save the drawer's credit; it was held this was not a voluntary payment, and that the plaintiff might recover from the defendant the amount of the private debt. *Kendal v. Wood*, 39 L. J. Ex. 167; L. R. 6 Ex. 243.

Money paid with full knowledge of facts by a person who might have resisted payment cannot be recovered back. Thus where a discharged insolvent, being lawfully arrested by one of his creditors, pays the debt; he cannot get it back in this action; and *semble*, if he had given a security for it (which would itself have been void as against the statute), and paid the amount when due, he could not have recovered it back. *Viner v. Hawkins*, 9 Ex. 266; 23 L. J. Ex. 38. Where a mortgagee gave notice of the mortgage to a tenant and demanded the rent, and the tenant chose to pay it to his landlord, the mortgagor, on an indemnity which proved to be bad, it was held that he could not recover the rent back from his lessor after he

had been obliged by distress to pay it over again to the mortgagee. *Higgs v. Scott*, 7 C. B. 63. The rule in equity is in general the same as at law. *Rogers v. Ingham*, 46 L. J. Ch. 322; 3 Ch. D. 351. In the case of a common mistake of both the payer and the payee, relief may sometimes be given; see *Daniell v. Sinclair*, 50 L. J. P. C. 50; 6 App. Cas. 181. Not every mistake of fact will enable the party to recover money paid in ignorance. Where A. conveyed to his bankers by way of security all his interest in a supposed devise to him, subject to a charge on it of a debt due from A. to B., and the bankers afterwards voluntarily paid to B. the debt at A.'s request, it was held that they could not recover back the money from B. upon discovering that the will had been revoked and the security was worthless. In this case the debt paid was really due to B., and the only mistake of the bankers was in supposing that they held a good security against A. for the advance. *Aiken v. Short*, 1 H. & N. 210; 25 L. J. Ex. 321. So where bankers cash a customer's cheque and afterwards discover that they have no assets of his, they cannot recover the money back from the person to whom they paid it. *Chambers v. Miller*, 13 C. B. (N. S.) 125; 32 L. J. C. P. 30; see also *Pollard v. Bank of England*, 40 L. J. Q. B. 233; L. R. 6 Q. B. 623. See further the notes to *Marriot v. Hampton*, 2 Smith's L. C., 11th ed. 440 *et seq.*

Where money had been paid to the defendant by the plaintiffs on an insurance on a ship effected by the defendant, as the agent of a foreign principal, and the defendant, when effecting the insurance, had suppressed a material fact which if known to the plaintiffs would have enabled them to resist the payment, and on discovering the fact the plaintiffs brought an action against the defendant to recover the money; it was held that the defendant having suppressed the fact with no intention to defraud, and having paid the money over to his principals, or settled it in account with them, before demand by the plaintiffs, was not liable to refund it. *Holland v. Russell*, 1 B. & S. 424; 30 L. J. Q. B. 308; 4 B. & S. 14; 32 L. J. Q. B. 297; *Shand v. Grant*, 15 C. B. (N. S.) 324. Where, however, the defendant has, as principal, so received the money to which he is not entitled, it is no answer that he has paid it over to another person for whom he was acting. *Newall v. Tomlinson*, L. R. 6 C. P. 40.

Where an article is sold, which turns out to be of less value than the price given for it, the extra price if there be no fraud cannot be recovered back. *Cox v. Prentice*, 3 M. & S. 349. But if parties agree to abide by the weighing of any article at any particular scales, and, in the weighing, an error not perceived at the time takes place from an accidental misreckoning of some weight, and the thing is reported of more weight than it really is, and the price is paid thereupon, money had and received is sustainable. S. C.

Though this action will not lie for the purpose of determining a right to an interest in land; *Lindon v. Hooper*, Cowp. 414; yet where the title is not in issue it will often lie to recover back payments made under misapprehension of title. Thus, a tenant who paid rent to his landlord and was afterwards ejected by a third person who recovered mesne profits from him for the period during which the tenant has paid his rent, may recover the rent so paid from his landlord in an action for money had and received, the landlord not having set up any title at the trial of the ejection. *Newsome v. Graham*, 10 B. & C. 234; see Freem., 2nd ed. 479 (*d*). So where a tenant continues to pay rent to the defendant in ignorance of the failure of a life on which his lease depends, he may recover back the payments, there being no dispute about title. *Barber v. Brown*, 1 C. B. (N. S.) 121; 26 L. J. C. P. 41. But rent paid by the tenant F. of the equitable mortgagor, to the equitable mortgagee T. on his claim as such, is not recoverable by F. from T. *Finck v. Tranter*, 74 L. J. K. B. 345; [1905] 1 K. B. 427.

Money obtained by fraud, duress, &c.] Where money has been obtained by fraud, this action lies to recover it back; and money fraudulently

obtained may be recovered, although the defendant may be entitled to it as legatee. *Crockford v. Winter*, 1 Camp. 124. After the death of a bankrupt tenant for life his assignees were allowed to recover as money had and received, the bygone rents from a person who had received them under the colour of a fraudulent assignment. *Pearce v. Day*, cited 2 Russ. & Myl. 124. If A. by means of a false pretence or promise, or condition which he does not fulfil, induce B. to give him a cheque, and hand it over to C. in fraud of B., but C. takes it *bonâ fide* for value and obtains cash for it at B.'s bankers, B. cannot recover the money from C. *Watson v. Russell*, 3 B. & S. 34; 31 L. J. Q. B. 304; 5 B. & S. 968; 34 L. J. Q. B. 93; see *Talbot v. Von Boris*, 80 L. J. K. B. 661; [1911] 1 K. B. 854. Where the defendant, being secretly married already, married the plaintiff and received the rents of her lands, they were held recoverable in this form of action. *Hasser v. Wallis*, 1 Salk. 28. Where A. is agent of B. to pay certain acceptances of B., and the defendant obtains payment from A. by falsely representing himself to be the holder of one of the acceptances, the action for money had and received will lie at the suit of A., or *semb*le of B. also. *Holt v. Ely*, 1 E. & B. 795. In *Govett v. Hopgood*, Exeter Sp. Assizes, 1852, *cor.* Erle, J., the plaintiff, a lady imbecile from age and infirmity, recovered in this form of action a large sum which was alleged to have been a gift by her to the defendant's wife. The plaintiff, being herself called as a witness, showed her incapacity on her examination, and the judge left it to the jury to say whether she knew what she was about when she gave the money. Where the defendant fraudulently colluded with J. S., who was insolvent, to obtain wines from the plaintiff, the proceeds on the re-sale of which eventually came into the defendant's hands in satisfaction of a debt due to him from J. S.; the plaintiff was held entitled to recover in this action. *Abbotts v. Barry*, 2 B. & B. 369; 5 B. Moore, 98. Where the plaintiff was induced to continue payment of premiums on a life policy on the false and fraudulent representation of the defendants' agent that she would receive a free policy after payment of premiums four years longer, she was held entitled to recover the four years' premiums. *Kettlewell v. Refuge Assurance Co.*, 77 L. J. K. B. 421; 78 L. J. K. B. 519; [1908] 1 K. B. 545; [1909] A. C. 243; *Hughes v. Liverpool Victoria Legal Friendly Society*, 85 L. J. K. B. 1643; [1916] 2 K. B. 482. The plaintiff can only rescind a contract on the ground of fraud when he can disaffirm the contract and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 App. Cas. 831, and see also cases cited *infra*.

The promoters of a company advertised a large capital in 120,000 shares: the plaintiff took an allotment of 60 shares; notice was then published by the promoters that all the shares were allotted; whereupon the plaintiff paid a deposit on the shares and signed the subscription contract. He afterwards discovered that less than half the shares had been in fact allotted, and that the company had no funds. Held, that on this evidence of fraud he might recover back his deposit from one of the active promoters. *Wontner v. Shairp*, 17 L. J. C. P. 38; 4 C. B. 404. See also *Jarrett v. Kennedy*, 6 C. B. 319. If a fraudulent statement in a public advertisement can be traced to the secretary of a company, and purport to be by order of the directors, *semb.* an express authority to publish it may be presumed. *Wontner v. Shairp*, *supra*; and see *Watson v. Charlemont (Earl)*, 18 L. J. Q. B. 65; 12 Q. B. 856. But a party who seeks to repudiate shares on the ground of fraud must do so while he is in a condition to put both parties *in statu quo*. Thus he cannot do so after the company has gone into liquidation; *Stone v. City and County Bank*, 47 L. J. C. P. 681; 3 C. P. D. 282; nor after he has received dividends and has permitted the company to become incorporated under 19 & 20 V. c. 47. *Clarke v. Dickson*, E. B. & E. 148; 27 L. J. Q. B. 223; *Cole v. Bishop*, E. B. & E. 150, n.; *Addie v. W. Bank of Scotland*, L. R. 1 H. L. Sc. 145, 165. But he may sue for the fraud and so get damages; S. C.; *Clarke v. Dickson*, 6 C. B. (N. S.) 453; 28 L. J. C. P. 225; see *Action for deceit*, *post*; he has not, however, this

remedy against the company. Where an allottee of shares has repudiated them on the ground of fraud by the company, and his name has been removed from the register, it seems that the sum paid on the shares is recoverable in this form of action. See *Ship v. Crosskill*, 39 L. J. Ch. 550; L. R. 10 Eq. 73; *Askew's Case*, L. R. 9 Ch. 664, 666; 43 L. J. Ch. 633.

There is an important difference between cases where a contract may be rescinded on account of fraud and those in which it may be rescinded on the ground that there is a difference in substance between the thing bargained for and that obtained; for "it is enough to show that there was a fraudulent representation as to any part of that which induced the party to enter into the contract which he seeks to rescind; but where there has been an innocent misrepresentation or misapprehension, it does not authorize a rescission, unless it is such as to show that there is a complete difference in substance between what was supposed to be and what was taken, so as to constitute a failure of consideration." *Kennedy v. Panama, &c., R. Mail Co.*, L. R. 2 Q. B. 580, 587; *Seddon v. N. E. Salt Co.*, 74 L. J. Ch. 199; [1905] 1 Ch. 326; *Lecky v. Walter*, [1914] 1 I. R. 378. See further, cases cited *sub tit. Action for deceit, post.*

Where a man has been obliged involuntarily, and by wrongful duress, to pay money, it may be recovered in this action; as where he has paid an exorbitant sum to redeem his goods from pawn; *Astley v. Reynolds*, 2 Str. 915; or wrongful detention; *Ashmole v. Wainwright*, 11 L. J. Q. B. 79; 2 Q. B. 837; *Green v. Duckett*, 52 L. J. Q. B. 435; 11 Q. B. D. 275. See *Kendal v. Wood*, 39 L. J. Ex. 167; L. R. 6 Ex. 243. Plaintiff being indebted to the defendant and others, offered a composition of 5s. in the pound, which some of the creditors accepted, but the defendant refused until the plaintiff had privately given him £50, when he executed the deed. Some of the other creditors had refused to sign unless the defendant signed, and this he knew; held, that the plaintiff could recover the £50. *Atkinson v. Denby*, 7 H. & N. 934; 31 L. J. Ex. 362; *In re Lenzberg's Policy*, 47 L. J. Ch. 178; 7 Ch. D. 650. So where a party to a reference has been obliged to pay an unreasonable charge of the arbitrator in order to take up the award; *Re Coombs*, 4 Ex. 839. See *Roberts v. Eberhardt*, 3 C. B. (N. S.) 482; 28 L. J. C. P. 74. So the action lies where goods, not liable to seizure, are seized by a revenue officer, who extorts money to release them; *Irving v. Wilson*, 4 T. R. 485; or a public officer demands and exacts an excessive fee, as a parish clerk for a search in a register; *Steele v. Williams*, 8 Ex. 625; 22 L. J. Ex. 225 (but not where duties have been paid where the revenue officials *bonâ fide* but erroneously believed them to be legally exigible: *Whiteley v. Reg.*, 101 L. T. 741); or a corporation officer extorts a fee for granting a licence; *Morgan v. Palmer*, 2 B. & C. 729; or a sheriff claims and receives a larger fee than he is entitled to; *Dew v. Parsons*, 2 B. & A. 562; or a toll-keeper exacts an illegal toll; *Parsons v. Blandy*, Wightw. 22; *Maskell v. Horner*, 84 L. J. K. B. 1752; [1915] 3 K. B. 106; or a railway company, bound by their special Act to charge rates equally to all, detains or refuses to carry the parcels of a particular person until he pays an unreasonable charge. *Parker v. Gt. W. Ry. Co.*, 7 M. & Gr. 253; *Edwards v. Id.*, 11 C. B. 588; 21 L. J. C. P. 72; *Baxendale v. Id.*, 16 C. B. (N. S.) 137; 33 L. J. C. P. 197; *Sutton v. Id.*, 3 H. & C. 800; 35 L. J. Ex. 18; L. R. 4 H. L. 226; *Baxendale v. L. & S. W. Ry. Co.*, 35 L. J. Ex. 108; L. R. 1 Ex. 137; *Lancashire & Yorkshire Ry. Co. v. Gidlow*, 45 L. J. Ex. 625; L. R. 7 H. L. 517. And this, although part of the money was received by the defendants as agents of another company and for their use. *Parker v. Bristol & Exeter Ry. Co.*, 6 Ex. 702. So if a mortgagee with power of sale refuse to stop a sale unless the mortgagor pays expenses not duly chargeable upon him, which the mortgagor accordingly pays under protest. *Close v. Phipps*, 7 M. & Gr. 586. So where a mortgagee having agreed to assign his security on payment of principal, interest and costs, made a claim for costs to which he was not entitled, and on his refusal to execute the assignment on any other terms, the assignee, by direction of the mortgagor, paid

the sum demanded under protest; held, that the mortgagor could recover the excess, as paid not under duress in the strict legal sense, but as paid involuntarily under undue pressure. *Fraser v. Pendlebury*, 31 L. J. C. P. 1. So if a sheriff obtain payment by a wrongful seizure under a *fi. fa.* by a threat of selling the goods, though not liable to the execution; *Valpy v. Manley*, 14 L. J. C. P. 204; 1 C. B. 594; or a solicitor illegally detain deeds till an undue claim is satisfied; *Wakefield v. Newbon*, 13 L. J. Q. B. 258; 6 Q. B. 276; *Turner v. Deane*, 18 L. J. Ex. 343; 3 Ex. 836; even though he detain them as solicitor of the third person, who had no right to payment, and though he has paid over the money to his client; *Oates v. Hudson*, 6 Ex. 346; 20 L. J. Ex. 112;—in all such cases this action is maintainable. See also *Gibbon v. Gibbon*, 13 C. B. 205; 22 L. J. C. P. 131. And in these cases it makes no difference that the defendant, who has obtained the money as an agent, has handed it over to his principal. See *Steele v. Williams*, 22 L. J. Ex. 225; 8 Ex. 625; *Oates v. Hudson*, *supra*. *Aliter*, if the agent have received, without fraud, money paid under a mistake of facts, and has paid it over to his principal, or settled it in account with him. *Holland v. Russell*, 4 B. & S. 14; 32 L. J. Q. B. 297; *Shand v. Grant*, 15 C. B. (N. S.) 324.

Personal duress will, of course, avoid a payment made under its influence; and the wrongful detention of the plaintiff's goods or property for the purpose of obtaining money will, we have seen above, be ground for reclaiming the money paid under such circumstances; but this is not on the ground of *duress*, but because the payment is involuntary. Where there is a fair and *bonâ fide* agreement to pay for redelivery of the detained goods, and no undue advantage taken, the action will not lie; for generally mere duress of goods will not avoid a contract or agreement, so as to enable a party to recover back money paid under it. See *Atlee v. Backhouse*, 7 L. J. Ex. 234; 3 M. & W. 650; *Skeate v. Beale*, 9 L. J. Q. B. 233; 11 Ad. & E. 983.

A party cannot try a title to land in an action for money paid, to release goods taken as a distress by a claimant of the land. *Lindon v. Hooper*, Cowp. 414. And see observations in *Gingell v. Purkins*, 19 L. J. Ex. 129; 4 Ex. 720, 725. Nor can the owner of cattle *rightfully* distrained damage feasant, recover in this action an excessive demand for damage, though paid under protest. *Gulliver v. Cosens*, 14 L. J. C. P. 215; 1 C. B. 788. So it did not lie by a tenant against his landlord for the overplus after sale under a distress; for the proper remedy was an action for not leaving it in the hands of the sheriff or constable; *Yates v. Eastwood*, 6 Ex. 805; 20 L. J. Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J. Ex. 50; but it seems that the stat. 35 & 36 V. c. 92, s. 13, makes it the duty of the landlord to pay the overplus to the tenant, and this form of action is therefore now the appropriate remedy. Where an action is brought, and the defendant pays the demand "without prejudice," he nevertheless cannot afterwards recover the money so paid. *Brown v. M'Kinally*, 1 Esp. 279. So money recovered by regular legal process, though in fact not due, cannot be recovered back in this action; *Marriott v. Hampton*, 7 T. R. 269; even though the process was not followed by a final order or judgment; *Hamlet v. Richardson*, 9 Bing. 644; *Moore v. Fulham Vestry*, 64 L. J. Q. B. 226; [1895] 1 Q. B. 399; or even though recovered after judgment by a writ of *fi. fa.* knowingly issued to levy a sum already paid by the judgment debtor. *De Medina v. Grove*, 15 L. J. Q. B. 287; 10 Q. B. 152. The same principle applies where the money was recovered under the process of a foreign court. *Clydesdale Bank v. Schröder*, 82 L. J. K. B. 750; [1913] 2 K. B. 1. In *Ward v. Wallis*, 69 L. J. Q. B. 423; [1900] 1 Q. B. 675, 678, it was, however, held by Kennedy, J., that the above principle did not apply unless there was *bonâ fides* on the part of the person A. who had got the benefit, under legal process, of the payment of his opponent B. and that if A. had therein taken an unfair advantage, or acted unconscientiously, knowing he had no right to the money, that principle did not prevent B. from recovering it back. Thus where B. sued A. for work and labour done

and on the writ by mistake gave credit for the payment of £75 on account, and claimed the balance, A., knowing of the mistake, paid the amount claimed, and B. gave him a receipt for the whole sum due; B. was held entitled to recover the £75 from A. in another action. *S. C.* So where a certificated bankrupt, upon being arrested upon a *ca. sa.* for a debt provable under the commission, paid the money under a protest stating his bankruptcy and certificate, and warning the sheriff that he should apply to the Court to have the money returned, it was held that this was not such a payment under legal process, with knowledge of the facts, as precluded the bankrupt from recovering back the money. *Payne v. Chapman*, 4 Ad. & E. 364. And where defendant, knowing he had no real claim, arrested the plaintiff, a foreigner, on his arrival from abroad, for £10,000, and, under the compulsion of a colourable legal process, extorted from him £500, "as a payment in part of the writ," the court held that this action was maintainable. *De Cadaval (Duke) v. Collins*, *Id.* 858, see further notes to *Marriott v. Hampton*, 2 Smith's L. C.

Against officer de facto.] Though a title to land cannot, as we have seen, be tried in this form of action, a title to an office or appointment is often tried in it. Thus the person entitled may sue a usurper of an office for the fees wrongfully received, as in the case of the disputed title to a stewardship of an honour or a court baron; *Howard v. Wood*, 2 Lev. 245; Freem. 478, the cases collected *Id.* in 2nd ed.; or office of clerk of the papers in the King's Bench office; *Woodward v. Aston*, 1 Vent. 296; or office of clerk of the peace; *Wildes v. Russell*, 35 L. J. M. C. 241; L. R. 1 C. P. 722; or the office of registrar of an inferior court; *Osgood v. Nelson*, 41 L. J. Q. B. 329; L. R. 5 H. L. 636; or a rightful against a tortious guardian in socage; *obiter, per Holt*, C.J., in *Lamine v. Dorrell*, 2 Ld. Raym. 1217; or the office of crier of a court; *Green v. Hewett*, 1 Peake, 182; or prothonotary; *Campbell v. Hewlitt*, 16 Q. B. 258. And in such actions it will be sufficient to show the fees received *communibus annis*. *Montague v. Preston*, 2 Vent. 170, 171; B. N. P. 76 (e) *semb.* *Campbell v. Hewlitt, supra.* But if there be no accustomed fees attached to the office, and the profits be only casual, as in the case of a sexton who receives only gratuities for showing a cathedral, no such action lies. *Boyer v. Dodsworth*, 6 T. R. 681. The action lies against a corporation which has taken, and wrongfully detained, fees belonging to an officer of it; *Hall v. Swansea (Mayor)*, 13 L. J. Q. B. 107; 5 Q. B. 526; and thus the title to the office itself may be tried.

On waiver of tort.] We have seen that a taking or detention of goods from the plaintiff may be sometimes treated as a sale to the wrongdoer. So a wrongful receipt by the defendant of the proceeds of the goods wrongfully sold may be treated as a receipt to the plaintiff's use by waiving the preceding tortious detention of them. *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Kitchen v. Campbell*, 3 Wils. 304. So where the defendant has wrongfully received payment of the plaintiff's cheque, or post office order for money. *Fine Art Society v. Union Bank of London*, 56 L. J. Q. B. 70; 17 Q. B. D. 705. See *Bavins v. L. & S. W. Bank*, 69 L. J. Q. B. 164; [1900] 1 Q. B. 270. So where the defendants wrongfully seized money of the plaintiff, and paid it to their joint account at the banker's, it was held that this action lay against both. *Neate v. Harding*, 6 Ex. 349; 20 L. J. Ex. 250. Where a member of the defendant's firm sold the plaintiff's government stock under a forged power of attorney, and the defendants received the price innocently, it was held that the plaintiff could recover the price in this form of action. *Stone v. Marsh*, 6 B. & C. 551; *Marsh v. Keating*, 1 Bing. N. C. 198. See on *S. C.*, *Reid v. Rigby*, 63 L. J. Q. B. 451; [1894] 2 Q. B. 40; and *Jacobs v. Morris*, 71 L. J. Ch. 363; [1902] 1 Ch. 816. The right to maintain this action seems in such cases to be founded, not on the right to treat a mere tort as a contract, but on the right to refrain from suing for the tort, and to estop the wrongdoer from

setting up his own wrong to defeat the plaintiff's remedy for the proceeds. Thus, if, after a wrongful sale of goods, the owner elect to claim and to accept part of the proceeds of the sale from the wrongdoer as money paid to his use, the tort is waived, and the owner's only remedy for the residue of the proceeds is by action for money had and received. *Lythgoe v. Vernon*, 5 H. & N. 180; 29 L. J. Ex. 164. See *Smith v. Baker*, *infra*; *Roe v. Mutual Loan Fund*, 56 L. J. Q. B. 541; 19 Q. B. D. 347. Conversely, where the plaintiff has elected to treat the conversion as a tort by recovering a judgment in trover against A., he cannot, even though the judgment be unsatisfied, sue for the proceeds of the sale by A. and the defendant, which sale was the conversion complained of, although the defendant alone received the proceeds. *Buckland v. Johnson*, 15 C. B. 145; 23 L. J. C. P. 204. Such a defence will, however, require to be specially pleaded. In some cases, however, the act relied on as an election "is of an ambiguous character and may or may not be done with the intention of adopting and affirming the wrongful act. In such cases the question whether the tort has been waived becomes rather a matter of fact than of law." *Smith v. Baker*, L. R. 8 C. P. 350, 355, 356; 42 L. J. C. P. 155; *Rice v. Reed*, [1900] 1 Q. B. 66, *per* A. L. Smith, L. J. See further notes to *Smith v. Hodson*, 2 Smith L. Cases; and *Verschures Creameries v. Hull and Netherlands S.S. Co.*, [1921] 2 K. B. 608.

This action lies to recover money in the hands of an overseer, levied on a conviction which has been quashed. *Feltham v. Terry*, cited 1 T. R. 387.

Money stolen by the defendant from the plaintiff constitutes a debt from the defendant to the plaintiff; but the generally received opinion has been that it could not be sued for until after the prosecution of the defendant for the felony. See *Stone v. Marsh*, *supra*; *Chowne v. Baylis*, 31 Beav. 351; 31 L. J. Ch. 757. And it has been held that the plaintiff would be nonsuit, or his action stayed, where his case was founded on an unprosecuted felony. *Wellock v. Constantine*, 2 H. & C. 146; 32 L. J. Ex. 285; *Smith v. Selwyn*, 83 L. J. K. B. 1339; [1914] 3 K. B. 98. In *Wells v. Abrahams*, 41 L. J. Q. B. 306; L. R. 7 Q. B. 554, it was said that it was not the duty of the judge to nonsuit the plaintiff although facts were proved disclosing a felony; and this case was followed in *Carlisle v. Orr*, [1917] 2 I. R. 534 and *Carlisle v. Orr* (No. 2), [1918] 2 I. R. 442, but the view therein expressed would seem inconsistent with *Smith v. Selwyn*, *supra*. See further on this subject, *Ex pte. Ball*, 48 L. J. Bk. 57; 10 Ch. D. 667; *Midland Insur. Co. v. Smith*, 50 L. J. Q. B. 329; 6 Q. B. D. 561, and *Roope v. D'Avigdor*, 10 Q. B. D. 412.

In case of wagering contracts.] By the Gaming Act, 1845 (8 & 9 V. c. 109), s. 18, all contracts by way of gaming or wagering shall be null and void; and no suit can be maintained "for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made: provided always that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or toward any plate, prize or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The words "any person" include the other party to the wager. See *Strachan v. Universal Stock Exchange* (No. 2), 65 L. J. Q. B. 178; [1895] 2 Q. B. 697. As to what is a wagering contract see *Carlill v. Carbolic Smoke Ball Co.*, 61 L. J. Q. B. 696; 62 L. J. Q. B. 257; [1892] 2 Q. B. 484; [1893] 1 Q. B. 256; see also *Thacker v. Hardy*, 48 L. J. Q. B. 289; 4 Q. B. D. 685; *Richards v. Starck*, 80 L. J. Q. B. 213; [1911] 1 K. B. 296.

The section prohibits only actions by one party to the wager against the other, or against the stake-holder to recover the stake won. Thus if the party depositing the sum staked, claimed it back from the stake-holder, even after the event is ascertained, but before the money is paid over, he can

maintain money had and received against him. *Hampden v. Walsh*, 45 L. J. Q. B. 238; 1 Q. B. D. 189; *Diggle v. Higgs*, 46 L. J. Ex. 721; 2 Ex. D. 422; see also *Hermann v. Charlesworth*, 74 L. J. K. B. 620; [1905] 2 K. B. 123. Money deposited as a wager upon a lawful game or race in which the depositors are engaged, does not come within the proviso in sect. 18, and can, therefore, be recovered from the stake-holder as money deposited on a void contract. S. C.; *Trimble v. Hill*, 49 L. J. P. C. 49; 5 App. Cas. 342. A deposit of money or other securities by S. with V. as "cover" or security for the payment of differences on a wagering contract for the sale and purchase of stocks is not deposited to "abide the event" within sect. 18, and may be recovered by S. if the contract has been determined by revocation or otherwise before the money, &c., has been applied in satisfaction of losses incurred by S.; *Ex pte. Waud*, 67 L. J. Q. B. 620; [1898] 2 Q. B. 383; *Universal Stock Exchange v. Strachan*, 65 L. J. Q. B. 429; [1896] A. C. 166; but not otherwise; *Id. v. Id.* (No. 2), *supra*. See further *In re Gieve*, 68 L. J. Q. B. 509; [1899] 1 Q. B. 794. The recovery back of stakes deposited is not affected by the Gaming Act, 1892, s. 1; *Burge v. Ashley and Smith*, 69 L. J. Q. B. 538; [1900] 1 Q. B. 744. But where C. advanced £500 to P. to enable P. to deposit it with a stake-holder, to abide the event of a wager between P. and X., on the terms that P. should repay C. the amount, only if P. won, P. did win and received the stakes, it was held that C. was precluded by the section from recovering the £500 from P. *Carney v. Plimmer*, 66 L. J. Q. B. 415; [1897] 1 Q. B. 634. See *Richards v. Starck*, 80 L. J. K. B. 213; [1911] 1 K. B. 296. A principal who has employed an agent, A., to make bets for him on commission, can sue A. for bets so made, and won and received by him. *Bridger v. Savage*, 54 L. J. Q. B. 464; 15 Q. B. D. 363; *Beeston v. Beeston*, 45 L. J. Ex. 230; 1 Ex. D. 13. But he cannot sue A. for damages for not making the bets for him. *Cohen v. Kittell*, 58 L. J. Q. B. 241; 22 Q. B. D. 680.

While no action is maintainable on a wagering contract, there may however be a new contract arising thereout, which may be sued upon. Thus an agreement to give time for settlement and to abstain from posting the defaulter have been held to constitute good consideration to support a new contract upon which an action is maintainable. *Goodson v. Baker*, 98 L. T. 415; *Hyams v. Stuart King*, 77 L. J. K. B. 794; [1908] 2 K. B. 696; *Wilson v. Conolly*, 104 L. T. 94; *Whiteman v. Newey*, 28 T. L. R. 240. But cf. *Hyams v. Coombes*, 28 T. L. R. 413.

[*In cases of illegal contracts.*] Where money has been paid in pursuance of an illegal contract, it is generally irrecoverable. See *Lowry v. Bourdieu*, 2 Doug. 468. And there is no distinction in this respect between *mala prohibita* and *mala in se*. *Aubert v. Maze*, 2 B. & P. 371; *Cannan v. Bryce*, 3 B. & A. 179. But in some cases it is recoverable as money had and received to the use of the party paying it, as in the following cases: see 1 H. Bl., 4th ed. 65, n. —

1. When the contract remains *executory*, though the plaintiff and defendant be *in pari delicto*; *Tappenden v. Randall*, 2 B. & P. 467; as a deposit upon an illegal wager; *Aubert v. Walsh*, 3 Taunt. 277; *Busk v. Walsh*, 4 Taunt. 290. Where the plaintiff authorized his money to be applied to an illegal purpose, he may recover it before it has been paid over or applied to such purpose. *Bone v. Ekless*, 5 H. & N. 925; 29 L. J. Ex. 438. See also *Taylor v. Bowers*, 45 L. J. Q. B. 163; 1 Q. B. D. 291; and comments thereon in *Kearley v. Thomson*, 59 L. J. Q. B. 288; 24 Q. B. D. 742.

2. Money is recoverable from a stake-holder in whose hands it has been deposited upon an illegal consideration, though *executed* by the happening of the event upon which a wager is made; provided the money has not been paid over by the stake-holder to the other party, or was paid over after notice to the contrary. *Cotton v. Thurland*, 5 T. R. 405; *Bate v. Cartwright*, 7 Price, 540; *Hastelow v. Jackson*, 8 B. & C. 221; *Hodson v. Terrill*, 1 Cr. & M. 797. See *Barclay v. Pearson*, 62 L. J. Ch. 636; [1893] 2 Ch. 154.

3. The money is recoverable, though the contract be executed, if the plaintiff be not *in pari delicto* with the defendant. *Per* Ld. Mansfield, C.J., *Lowry v. Bourdieu*, 2 Doug. 472. As where money is extorted from the plaintiff by the threat of prosecuting a penal action against him; *Unwin v. Leaper*, 1 M. & Gr. 747; *Williams v. Hedley*, 8 East, 378; or, to induce the plaintiff to accept a composition, in common with the other creditors, on the plaintiff's debt to him. *Smith v. Bromley*, 2 Doug. 696, n.; *Atkinson v. Denby*, 31 L. J. Ex. 362; 7 H. & N. 934; and *In re Lenzberg's Policy*, 47 L. J. Ch. 178; 7 Ch. D. 650. So where the plaintiff gave the defendant a promissory note for the like purpose, and was compelled to pay it at the suit of a third person, to whom the defendant had indorsed it, he was held entitled to recover the amount from the defendant in this form of action. *Smith v. Cuff*, 6 M. & S. 160. But in a similar case, where the plaintiff had voluntarily paid the note to the defendant, it was held to be a voluntary payment, which he could not recover back. *Wilson v. Ray*, 10 Ad. & E. 82. As to the recovery of premiums paid on an illegal policy, *vide infra*.

4. Money is not recoverable where the contract is *executed* and the plaintiff is *in pari delicto* with the defendant. *Andree v. Fletcher*, 3 T. R. 266; *Thistlewood v. Cracroft*, 1 M. & S. 500; *Stokes v. Twitchen*, 8 Taunt. 492. Thus where on a criminal charge an order has been made on A. to find a surety for his good behaviour, and B. becomes such surety on the terms that £50, the amount of the recognizance, should be deposited by A. with B. as security to him, A. cannot recover the £50 either before or after the expiration of the recognizance, and although he has made no default. *Herman v. Jeuchner*, 54 L. J. Q. B. 340; 15 Q. B. D. 561. So in the case of a surety for the appearance of a prisoner in a criminal case. *Wilson v. Strugnell*, 50 L. J. M. C. 145; 7 Q. B. D. 548, as corrected by *Herman v. Jeuchner*, *supra*. See also *Consolidated, &c., Co. v. Musgrave*, 69 L. J. Ch. 11; [1900] 1 Ch. 37; *Rex v. Porter*, 79 L. J. K. B. 241; [1910] 1 K. B. 369. So where the plaintiff has paid money to compromise a prosecution for disobeying an order of sessions, which he afterwards finds to be irregular and void, he cannot recover back his money. *Goodall v. Loundes*, 6 Q. B. 464. So where the plaintiff paid money to the defendant on the terms that he should not appear at the public examination of a bankrupt or oppose his discharge. *Kearley v. Thomson*, 59 L. J. Q. B. 288; 24 Q. B. D. 742. Partial execution of the contract is sufficient to prevent the money being recovered back. S. C. See further *Begbie v. Phosphate Sewage Co.*, 1 Q. B. D. 679; *Scott v. Brown*, and *Slaughter v. Brown*, 61 L. J. Q. B. 738; [1892] 2 K. B. 724. So where the agent A. of an insurance company P., has *bonâ fide* induced H. to effect a policy with P. which is illegal and void for want of interest, the premiums paid are not recoverable by H. *Harse v. Pearl Life Assur. Co.*, 73 L. J. K. B. 373; [1904] 1 K. B. 558; *Evanson v. Crooks*, 106 L. T. 264; *Elson v. Crookes*, 106 L. T. 462; *Howarth v. Pioneer Life Assur. Co.*, 107 L. T. 155. *Secus* where the agent's statements were fraudulent. *Harse's Case*, *supra*, *per* Collins, M.R., following *British Workman's Assur. Co. v. Cunliffe*, 18 T. L. R. 502. See also *Hughes v. Liverpool Victoria Legal Friendly Socy.*, 85 L. J. K. B. 1643; [1916] 2 K. B. 482.

5. By sect. 1 of the Gaming Act, 1835 (5 & 6 W. 4, c. 41), a note, bill or mortgage given for a consideration declared by certain recited Acts to have been absolutely void, is to be deemed to have been made, drawn, &c., for an illegal consideration; and by sect. 2 where a person has drawn or given a bill, &c., for a consideration declared by the recited Acts to be void, and he actually pays the indorsee, holder, or assignee thereof, the money so paid is deemed to have been paid for or on account of the person to whom the bill, &c., was originally given upon an illegal consideration, and is to be deemed to be a debt due and owing from such last-named person to the person who has paid the money, and is recoverable by action at law. A cheque is a bill within sect. 2. *Lynn v. Bell*, Ir. R. 10 C. L. 487. But the payee of a cheque given for racing bets is not a holder within this section.

Nicholls v. Evans, 83 L. J. K. B. 301; [1914] 1 K. B. 118. A "holder" or "indorsee" within the section must be a person with a title distinct from that of the payee. *Dey v. Mayo*, 89 L. J. K. B. 241; [1920] 2 K. B. 346; but a "holder" includes other persons in lawful possession of the note or bill, and therefore includes a banker who receives it for collection. S. C. The fact that an indorsee for value takes with notice that the cheque was given for gaming is immaterial. *Golding v. Bradlaw*, 89 L. J. K. B. 19; [1919] 2 K. B. 238.

The agent of a party to an illegal contract, who receives money paid under it to the use of his principal, cannot set up the illegality of the transaction to an action brought against him by his principal. *Tenant v. Elliott*, 1 B. & P. 3; *Farmer v. Russell*, *Id.* 296. But it is otherwise where the receipt itself is illegal, and the agent is therefore also *particeps criminis*. *M'Gregor v. Lowe*, Ry. & M. 57; *per Crompton, J.*, in *Nicholson v. Gooch*, 5 E. & B. 1016; 25 L. J. Q. B. 137.

The defence of illegality should be specially pleaded, but if the illegality clearly appears the court will take notice of it. *In re Robinson's Settlement*, 81 L. J. Ch. 393; [1912] 1 Ch. 717; *North Western Salt Co. v. Electrolytic Alkali Co.*, 83 L. J. K. B. 530; [1914] A. C. 461; *Montefiore v. Menday Motor, &c., Co.*, 87 L. J. K. B. 907; [1918] 2 K. B. 241.

On transfer of debt.] Where A. was indebted to B., and B. to C., and B. gave an order to A. to pay C. the sum due from A. to B., and the order was assented to by A., on the security of which C. lent B. a further sum; it was held that, on A.'s refusal to pay, C. might maintain an action for money had and received against him. *Israel v. Douglas*, 1 H. Bl. 239; *Wilson v. Coupland*, 5 B. & A. 228; *Walker v. Rostron*, 11 L. J. Ex. 173; 9 M. & W. 411; *Griffin v. Weatherby*, 37 L. J. Q. B. 280; L. R. 3 Q. B. 753. It seems, however, that the agreement must be such that the debt due from B. to C. is thereby extinguished. *Cuxon v. Chadley*, 3 B. & C. 591; *Wharton v. Walker*, *infra*; *Liversidge v. Broadbent*, 28 L. J. Ex. 332; 4 H. & N. 603; *Cochrane v. Green*, 9 C. B. (N. S.) 448; 30 L. J. C. P. 97. Where A., being indebted to B., gave him an order upon C., his (A.'s) tenant, to pay the amount out of the next rent that would become due, and B. sent the order to C., but had not any direct communication with him upon the subject, and at the next rent-day C. produced the order to A., and promised him to pay the amount to B., and, upon receiving the difference between that and the whole rent, A. gave a receipt for the whole,—it was held that B. could not recover the amount of the order from C., either in an action for money had and received, or upon an account stated. *Wharton v. Walker*, 4 B. & C. 163; see the principle of the cases discussed in *Liversidge v. Broadbent*, 4 H. & N. 603; 28 L. J. Ex. 332. So where an overseer stopped part of a pauper's allowance, and engaged to pay it to the pauper's landlord for his rent, in pursuance of an understanding between the three, it was held that the landlord could not maintain money had and received against the overseer. *Blackledge v. Harman*, 1 M. & Rob. 344. Where, by the consent of all parties, the defendant is to pay to the plaintiff a debt due from defendant to A., who is the plaintiff's debtor, it lies on the plaintiff to show that there was, at the time of the agreement, an ascertained debt due from defendant to A. *Fairlie v. Denton*, 8 B. & C. 395. A promise by A. to B. to pay money when A. receives a debt due to him from C., does not constitute an equitable assignment, so as to charge the debt in the hands of C., or to afford a defence in an action by A. against C. for the debt due to him. *Field v. Megaw*, L. R. 4 C. P. 660. But an undertaking to pay when and as received "all dividends coming to me in respect of my proof for £800, upon the estate of J. L.," operates as an equitable assignment of such dividends. *Ex pte. Brett*, 47 L. J. Bk. 38; 7 Ch. D. 419. So a letter from A. and B. to their creditor, C., "we hold at your disposal the sum of about £425, due to us from D. for goods delivered by us to them," is an equitable assignment to C. of D.'s debt. *Gorringe v. Irwell*

India Rubber, &c., Works, 34 Ch. D. 128. An assignment of all the grantor's future book debts is good, although it is not confined to those arising in a particular business. *Talby v. Official Receiver*, 58 L. J. Q. B. 75; 13 App. Cas. 523. The assignment is subject to any lien or set-off available against the assignor. *Roxburghe v. Cox*, 50 L. J. Ch. 772; 17 Ch. D. 520; *Webb v. Smith*, 30 Ch. D. 192. See also *Young v. Kitchin*, 47 L. J. Ex. 579; 3 Ex. D. 127; and *Newfoundland Government v. Newfoundland Ry.*, 57 L. J. P. C. 35; 13 App. Cas. 199. A writing opening a credit for a particular sum does not constitute an equitable assignment thereof. *Morgan v. Lariviere*, 44 L. J. Ch. 457; L. R. 7 H. L. 423. If an order given by A. to B. to pay C. a debt due from B. to A. amount to a bill of exchange, as defined in the Stamp Act, 1891, s. 32, it will in general be inadmissible in evidence unless stamped as such. *Pott v. Lomas*, 6 H. & N. 529; 30 L. J. Ex. 210. See *Griffin v. Weatherby*, 37 L. J. Q. B. 280; L. R. 3 Q. B. 753. It may be observed that the Bills of Exchange Act (45 & 46 V. c. 61), s. 53, provides that "a bill of itself does not operate as an assignment of funds in the hands of the drawee, available for payment thereof."

Under the J. Act, 1873, s. 25 (6), any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt of which notice in writing shall have been given by the debtor, is effectual to transfer the legal right (subject to equities affecting the same), to the debt and the remedies therefor from the date of the notice. As to the form of notice, see *Denny v. Conklin*, 82 L. J. K. B. 953; [1913] 3 K. B. 177. Under this sub-section the legal right to the debt itself passes to the assignee. *Read v. Brown*, 58 L. J. Q. B. 120; 22 Q. B. D. 128; *Bennett v. White*, 79 L. J. K. B. 1133; [1910] 2 K. B. 643. In *Skipper v. Holloway*, 79 L. J. K. B. 91; [1910] 2 K. B. 630, Darling, J., held that there can be a valid assignment of part of a debt. That decision was reversed on the facts 79 L. J. K. B. 496; [1910] 2 K. B. 635 n.; it is opposed to the view taken by Bray, J., in *Forster v. Baker*, 79 L. J. K. B. [1910] 2 K. B. 636, to the Irish decision in *Conlan v. Carlow County Council*, [1912] 2 I. R. 535, and to *In re Steel Wing Co.*, 90 L. J. Ch. 116; [1921] 1 Ch. 349. A mortgage of debts due to the mortgagor in the ordinary form, with the usual proviso for redemption, &c., is "an absolute assignment (not purporting to be by way of charge only)." *Tancred v. Delagoa Bay, &c., Ry. Co.*, 58 L. J. Q. B. 459; 23 Q. B. D. 239; *Durham v. Robertson*, 67 L. J. Q. B. 484; [1898] 1 Q. B. 765; and *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530; *Hughes v. Pump House Hotel Co.*, 71 L. J. K. B. 630; [1902] 2 K. B. 190. So an assignment of debts may be absolute, although a trust is thereby created as to the proceeds of such debts in favour of the assignor. *Comfort v. Betts*, 60 L. J. Q. B. 656; [1891] 1 Q. B. 737; *Fitzroy v. Capel*, 74 L. J. K. B. 829; [1905] 2 K. B. 364; such an assignment is not invalid as savouring of maintenance, or because taken for a collateral purpose. S. C. Where the defendants, the trustees and executors under a will, sent G., a residuary legatee, an account showing the amount of the share due to him, and G. sent this account to H., with the direction, signed by him, "I hereby instruct the trustees in power to pay H. the balance shown in the above statement," whereof notice was given to the defendants, it was held that H. could recover under subsect. 6. *Harding v. Harding*, 55 L. J. Q. B. 462; 17 Q. B. D. 442. But a memorandum, "we hereby charge the sum of £1,080, which will become due to us from J. R. on the completion of the above buildings as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest shall be repaid you," is not within subsect. 6. *Durham v. Robertson*, 67 L. J. Q. B. 484; [1898] 1 Q. B. 765. See also *Mercantile Bank of London v. Evans*, 68 L. J. Q. B. 921; [1899] 2 Q. B. 613; *Jones v. Humphreys*, 71 L. J. K. B. 23; [1902] 1 K. B. 10. A deed signed and sealed by one partner A. in the name of his firm, purporting to assign a partnership debt for valuable consideration, is good as an equitable assignment, although A. had no authority to execute

a deed for the partnership. *Marchant v. Morton Down & Co.*, 70 L. J. K. B. 820; [1901] 2 K. B. 829, 832; *Ex pte. Wright*, 75 L. J. K. B. 591; [1906] 2 K. B. 209. Debts may be assigned under the sub-section before they become due. *Walker v. Bradford Old Bank*, 53 L. J. Q. B. 280; 12 Q. B. D. 511. The debtor cannot object that there is no consideration for the assignment. S. C. It is sufficient to give notice of assignment after the death of the assignor; S. C.; or after that of the assignee. *Bateman v. Hunt*, 73 L. J. K. B. 782; [1904] 2 K. B. 530. Where there have been successive assignments to several persons of a debt, priority of notice determines the title of the assignees. *Marchant v. Morton Down & Co.*, *supra*. As to the deductions which the defendant may make in respect of claims he has against the assignor, see *Young v. Kitchin*, 47 L. J. Ex. 579; 3 Ex. D. 127; and *Newfoundland Government v. Newfoundland Ry. Co.*, 57 L. J. P. C. 35; 13 App. Cas. 199; see these cases distinguished in *Stoddart v. Union Trust*, 81 L. J. K. B. 140; [1912] 1 K. B. 181. See also *Reeves v. Pope*, 83 L. J. K. B. 771; [1914] 2 K. B. 284. This sub-section is retrospective. *Dibb v. Walker*, [1893] 2 Ch. 429. The notice of assignment may be disregarded where the debtor had given a negotiable security for the debt. *Bence v. Shearman*, 67 L. J. Ch. 513; [1898] 2 Ch. 582. Although the requirements of sub-sect. 6 have not been complied with, the assignee of a debt for valuable consideration may, after notice to the debtor of the assignment, sue him for the debt. *Brandt v. Dunlop Rubber Co.*, 74 L. J. K. B. 898; [1905] A. C. 454, making the assignor a party to the action; *Id.*

In case of partnership.] One partner cannot sue his co-partner for his share of the profits as long as the partnership is undissolved and accounts unsettled; therefore, where two persons agree to divide the profits of an agency between them, and one of them receives, on account of such agency, a certain sum of money, the other cannot maintain this action for a moiety, it being a partnership transaction, and there being no account settled. *Bovill v. Hammond*, 6 B. & C. 149. A transaction between partners may, however, by agreement or a separate security, be so separated from the partnership affairs, though arising out of them, as to form the subject of an action by one against another. Such an action involves no general account. See *Jackson v. Stopherd*, 2 Cr. & M. 361; *Coffee v. Brian*, 3 Bing. 54; *Pearson v. Skelton*, 1 M. & W. 504. A partnership in a bookmaker's business is not *per se* illegal or impossible in law. *Jeffrey v. Bamford*, [1921] 2 K. B. 351. A partner may therefore sue for an account, and may recover so much of any capital advanced by him for the business as has not been applied in payment of bets, but he cannot recover anything which represents profits of the business. *Keen v. Price*, 83 L. J. Ch. 865; [1914] 2 Ch. 98. See also *Brookman v. Mather*, 29 T. L. R. 276; and cf. *Thomas v. Dey*, 24 T. L. R. 272.

ACTION FOR INTEREST.

Where interest is recoverable by law, it is either claimed in a special claim on an agreement—or given by way of damages by the jury, though not demanded in the claim—or it is the subject of a separate claim for interest, which last form has been commonly adopted, where the principal sum only is recoverable under another claim. Thus, as interest is not generally recoverable, at common law, on claims for goods sold, money lent or had and received, it is usual, if interest be due at all, to demand it in a separate claim. Gibbs, C.J., in *Maberley v. Robins*, 5 Taunt. 625, thought that a separate count was not necessary to enable the jury to give interest by way of damage even on a count to recover a deposit paid on a sale, and in cases within the statute 3 & 4 W. 4, c. 42, the claim seems to be superfluous, for the jury may give interest on any issue in such cases.

See also *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J. C. P. 72. A claim for interest is not supported by proof that the defendant, a widow, promised the plaintiff to pay interest on a debt of her husband, if the plaintiff forebore to "proceed against her" for payment of the debt; for the debt was not *her* debt. *Petch v. Lyon*, 15 L. J. Q. B. 393; 9 Q. B. 147.

Under this head the subject of interest will be noticed generally, and without reference to a special claim.

Interest, when recoverable, is to be calculated down to the time of final judgment. *Robinson v. Bland*, 2 Burr. 1085—8. But if there has been a tender, it runs only to the time of such tender. *Dent v. Dunn*, 3 Camp. 296. Where a principal sum is payable with interest at a fixed rate the interest ceases to accrue on the recovery of a judgment for the principal, for the contract has then passed *in rem judicatam*; *Florence v. Jennings*, 2 C. B. (N. S.) 454; 26 L. J. C. P. 274; *Ex pte. Fewings*, 53 L. J. Ch. 545; 25 Ch. D. 338; and the judgment debt bears interest at 4 per cent. under 1 & 2 V. c. 110, s. 17. *Ex pte. Oriental Financial Association*, 46 L. J. Ch. 57; 4 Ch. D. 33. If however the interest is payable at a given rate under a covenant so expressed as to avoid such merger, that rate will continue to be payable, notwithstanding the judgment. *Economic Life Assur. Soc. v. Osborne*, 71 L. J. P. C. 34; (1902) A. C. 147.

When due at common law.] The principle upon which interest is claimed at common law is, that it is matter of contract, express or implied, between the parties. "It is now established as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest; or where such promise is to be implied from the usage of trade, or other circumstances"; *per* Abbott, C.J., *Higgins v. Sargent*, 2 B. & C. 349; *Page v. Newman*, 9 B. & C. 381; *Rhodes v. Rhodes*, Johns. 653; 29 L. J. Ch. 418; *L. Chatham & Dover Ry. v. S. E. Ry.*, 63 L. J. Ch. 93; [1893] A. C. 429; *Johnson v. Reg.*, 73 L. J. P. C. 113; [1904] A. C. 817; notwithstanding many older cases at variance with the rule as above stated. But "money obtained by fraud and retained by fraud can be recovered with interest." *Id.*, p. 822, *per* J. C. See also *Borthwick v. Elderslie S.S. Co.*, 74 L. J. K. B. 772, 775; [1905] 2 K. B. 516, 520, *per* Collins, M.R. There may be a usage to pay a certain interest on the settled balance of a merchant's account; see *Orme v. Galloway*, 9 Ex. 544; 23 L. J. Ex. 118. Where title deeds have been deposited to secure a loan the loan carries interest. *In re Kerr's Policy*, L. R. 8 Eq. 331. *In re Drax*, 72 L. J. Ch. 505; [1903] 1 Ch. 781. In an action on an undertaking to let judgment go by default in a suit for a mortgage debt, and to pay principal and interest, in consideration of staying execution for a certain time, it was held that the jury might give interest by way of damages down to the date of the verdict for breach of the agreement by non-payment; and this without the aid of stat. 3 & 4 W. 4, c. 42. *Harper v. Williams*, 12 L. J. Q. B. 227; 4 Q. B. 219. Under a warrant of attorney to pay a sum of money, with interest at a given rate, on a given day, if the sum be not paid on that day, there is no contract to continue to pay the same rate of interest after the day for payment; damages may, however, be awarded by the jury for the non-payment, and the former rate may be taken by them as a guide in assessing the damages. *Cook v. Fowler*, 43 L. J. Ch. 855; L. R. 7 H. L. 27. See also *In re Roberts*, 14 Ch. D. 49. In the case of a money bond, see *In re Dixon*, 69 L. J. Ch. 609; [1900] 2 Ch. 561.

Interest in the case of mercantile instruments.] The mercantile instruments which have always been held to carry interest, whether mentioned or not, are bills of exchange and promissory notes. By the Bills of Ex. Act, 1882, s. 9 (3), where a bill of exchange, or promissory note, is expressed to be payable with interest, unless the instrument otherwise

provides, interest runs from the date thereof, and, if undated, from its issue; and where interest is made payable at a certain rate, the jury may give interest at the *same* rate, against the drawer, from the time of being due; *Keene v. Keene*, 3 C. B. (N. S.) 144; 27 L. J. C. P. 88; but the jury are not bound to give it. *Cook v. Fowler*, *supra*. If the instrument be silent about interest, it is payable only from the time when the instrument becomes due. Upon a bill or note, payable on demand generally, not specifying interest, interest is given from the time of the demand proved; *Blaney v. Hendricks*, 2 W. Bl. 761; or, dispensed with, *e.g.*, by the bank which gave the note closing its doors; *In re East of England Banking Co.*, 38 L. J. Ch. 121; L. R. 6 Eq. 368; L. R. 4 Ch. 14; overruling *In re Herefordshire Banking Co.*, 36 L. J. Ch. 806; L. R. 4 Eq. 250. And when no demand is proved, from the issuing of the writ. *Pierce v. Fothergill*, 2 Bing. N. C. 167. Against the drawer of a bill, not mentioning interest, interest is only recoverable from the time of his receiving notice of dishonour. *Walker v. Barnes*, 5 Taunt. 240; 1 Marsh. 36. It has, however, been said that, in an action on a bill not bearing interest on its face, interest is in the nature of damages, and the jury may allow it, or may disallow it in case the delay of payment has been occasioned by the default of the holder. *Per Bayley, J., Cameron v. Smith*, 2 B. & A. 308; *Brewerton v. Parker*, 17 L. T. 325. But though the jury are to decide whether interest is to be allowed, and what is the interest current at any particular place, it is a question of law what *rate* of interest is to be allowed on such a bill; therefore where the jury gave the indorsee of a bill interest at 6 per cent., in an action against the drawer on non-acceptance, and the interest at the place where it was drawn was found to be 25 per cent., it was held that the plaintiff was entitled by law to the higher rate. *Gibbs v. Fremont*, 9 Ex. 25; 22 L. J. Ex. 302. The indorsee of a bill may sue the acceptor for interest, although he has taken another bill from the defendant for the amount of the first, which has been duly paid. *Lumley v. Musgrave*, 7 L. J. C. P. 49; 4 Bing. N. C. 9.

When goods are sold to be paid for by bill, interest from the time when the bill would, if given, have become due may be recovered as part of the price in an action for goods sold and delivered. *Farr v. Ward*, 3 M. & W. 25; *Davis v. Smyth*, 10 L. J. Ex. 473; 8 M. & W. 399.

Interest Implied.] A promise to pay interest may be implied from the acts of the parties. Thus, where a former balance has been settled upon an allowance of interest in a banker's book, it is an admission by the party of a contract to pay interest on the sums advanced to him by the banker. *Calton v. Bragg*, 15 East, 223, 228, *per* Ld. Ellenborough, C.J. So where a tradesman S. in his yearly accounts delivered to his customer A., charged interest for 3 years and longer, and A. made no objection to the charge, and paid S. from time to time sums generally on account, it was held that an agreement to pay interest should be inferred. *In re Anglesey (Marquis)*, 70 L. J. Ch. 810; [1901] 2 Ch. 548. But where the defendant undertook to transfer to plaintiff's account a sum due from defendant to A., plaintiff cannot recover interest on it merely because interest was allowed in the usual course of dealing between defendant and A. *Frühling v. Schroeder*, 4 L. J. C. P. 290; 2 Bing. N. C. 77.

Compound interest is not generally allowed unless the parties have expressly or impliedly contracted to pay it, or there be a custom. *Fergusson v. Fyffe*, 8 Cl. & F. 121. Even where the defendant contracted to pay money by certain instalments, and also interest on each instalment from the day appointed for payment, and to secure payment of such interest by his bond, it was held that, on default of payment, a jury was not bound, either at common law or under stat. 3 & 4 W. 4, c. 42, s. 28, to award interest upon such interest. *Attwood v. Taylor*, 1 M. & Gr. 279. Where the plaintiffs had acted as agents for the defendant, and advanced moneys, and at the close of each account (which was delivered annually) had charged interest, and at each rest had added the interest of the preceding year to the principal,

Ld. Ellenborough held that the accounts, which had not been objected to for a number of years, afforded evidence of a promise to pay interest in this manner. *Bruce v. Hunter*, 3 Camp. 467. But where compound interest is so charged, it must appear that the debtor knew that the practice was to make such rests. *Moore v. Voughton*, 1 Stark. 487; and see *Dawes v. Pinner*, 2 Camp. 486, n. And even where a mortgage debtor had settled mortgage accounts on the footing of compound interest, both he and the mortgagee being under the erroneous impression that compound interest was payable under the mortgage deed, the debtor was held entitled to have the accounts reopened. *Daniell v. Sinclair*, 50 L. J. P. C. 50; 6 App. Cas. 181. Trustees may be charged with compound interest where they ought to have so dealt with the trust funds as to have received such interest, e.g., where there is a trust for accumulation. *In re Barclay*, 68 L. J. Ch. 383; [1899] 1 Ch. 674.

Where, by the course of dealing between a banker and his customer, the former has charged compound interest on the amount of the customer's overdrawn account, the banker loses the right to charge compound interest when the relation of banker and customer ceases between the parties, as on the death of the customer. *Williamson v. Williamson*, L. R. 7 Eq. 542; following *Fergusson v. Fyffe*, 8 Cl. & F. 121. But it seems that the balances will carry simple interest from the customer's death. S. CC.

Interest by statute.] By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 28, "upon all debts or sums certain payable at a certain time or otherwise, the jury on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

By sect. 29, the jury "may, if they shall think fit, give damages in the nature of interest over and above the value of the goods at the time of the conversion or seizure in all actions of trover or trespass de bonis asportatis, and over and above the money recoverable in all actions on policies of assurance made after the passing of this Act" (14th August, 1833). An agreement by the Admiralty to take the liability for war risks of a steamer chartered by them was held not to be a policy of insurance within sect. 29, and therefore interest was not payable on the sum which the Admiralty had to pay on the loss by war risks of the steamer. *Admiralty Commissioners v. Ropner*, 86 L. J. K. B. 1030.

Money claimed on a special agreement in writing, to let judgment go by default, in an action against a mortgagor for principal and interest, and to pay the amount of debt and costs on a named day, if certain securities were then ready, is not a debt certain payable at a time certain within sect. 28; *Harper v. Williams*, 12 L. J. Q. B. 227; 4 Q. B. 219. The deposit paid on a consideration that has failed may be recovered back with interest, on a previous demand of interest made under it; *Mowatt v. Londesborough*, 4 E. & B. 1; 23 L. J. Q. B. 177; claiming interest from an earlier date than the date of the demand will not vitiate it. S. C. On money recovered by the defendant, as a solicitor, on behalf of the plaintiff, and not paid over, interest is payable as from the date of the demand by the plaintiff for payment, not from the date when it was received by the defendant. *Barclay v. Harris*, 85 L. J. K. B. 115. So interest may be recovered on an overpayment made by a person to obtain his goods from a carrier, on which an illegal charge has been made, if due demand be made under the statute. *Edwards v. Gt. W. Ry. Co.*, 11 C. B. 588; 21 L. J. C. P. 72. Interest was allowed at five per cent. on money deposited with a dock company by

receivers of cargo in order to release the lien claimed by shipowners where it was ultimately decided that the shipowners were not entitled to the sum deposited or any part thereof. *Red "R" S.S. Co. v. Allatini*, 14 Com. Cas. 82. A letter of application for a loan till a day certain, not showing on the face of it an obligation to repay, is not an instrument by virtue of which the debt is payable at a certain time. *Taylor v. Holt*, 3 H. & C. 452; 34 L. J. Ex. 1. A demand of payment of the balance of an account, stated therein inaccurately, is not within the statute. *Hill v. S. Staffordshire Ry. Co.*, 43 L. J. Ch. 566; L. R. 18 Eq. 154; *Ward v. Eyre*, 49 L. J. Ch. 657; 15 Ch. D. 130. A lump sum payable for freight, under a charter-party, on the delivery of the cargo, is not within the section, because it is not payable at a time certain. *Merchant Shipping Co. v. Armitage*, 43 L. J. Q. B. 24; L. R. 9 Q. B. 99, 114; see also *L. Chatham & Dover Ry. Co. v. S. E. Ry. Co.*, 63 L. J. Ch. 93; [1893] A. C. 429. So where, under a written agreement, a provisional payment subject to adjustment was to be made. S. C. The "sum certain payable must be a certain sum which is due absolutely and in all events from the one party to the other, although it may not come strictly within the term 'debt.'" S. C.; per Ld. Herschell, C. A covenant by A. to pay a sum within 6 years after his death has been held to be within the section. *In re Horner*, 65 L. J. Ch. 694; [1896] 2 Ch. 188. See also *Duncombe v. Brighton Club, &c., Co.*, 44 L. J. Q. B. 216; L. R. 10 Q. B. 371. A claim may be for a "sum certain" notwithstanding that a set-off is pleaded which may cause a reduction in the amount which may finally be found due to the plaintiff. *Alexandra Docks, &c., Co. v. Taff Vale Ry.*, 28 T. L. R. 163.

▲ A claim indorsed on the writ for interest on the amount claimed thereby, from its date till payment or judgment, is not a sufficient demand within sect. 28. *Rhymney Ry. Co. v. Rhymney Iron Co.*, 59 L. J. Q. B. 414; 25 Q. B. D. 146. A notice of a call made on a contributory of a company being wound up, stating that interest would be charged if payment were not made by a certain day, is within it. *Ex pte. Lintott*, 36 L. J. Ch. 510; L. R. 4 Eq. 184; *Barrow's Case*, 38 L. J. Ch. 15; L. R. 3 Ch. 784; see *In re Welsh Flannel, &c., Co.*, 44 L. J. Ch. 391; L. R. 20 Eq. 360; as to interest on calls on forfeited shares, see *Stocken's Case*, 37 L. J. Ch. 5, 230; L. R. 5 Eq. 6; L. R. 3 Ch. 412. As to demand for interest when the amount of debt is not ascertained, vide [1893] A. C. 436, per Ld. Herschell, C.

Interest is not payable under sect. 29, under a policy of insurance, in respect of a delay in payment occasioned only by there being no person who could give a discharge for the amount thereof. *Webster v. British Empire, &c., Assur. Co.*, 49 L. J. Ch. 769; 15 Ch. D. 169. Nor in an action brought against an executor for the proceeds of the plaintiff's minerals, severed and converted by his testator. *Phillips v. Homfray*, 61 L. J. Ch. 210; [1892] 1 Ch. 465.

By 17 & 18 V. c. 90, s. 1, all Acts or parts of Acts of Parliament mentioned in the schedule, and "all existing laws against usury," are repealed. By sect. 3, where interest was payable on August 10th, 1854, on any contract, express or implied, for payment of the legal or current rate of interest, or where interest was then payable by any rule of law, the same rate shall be recoverable as if the Act had not passed. By sect. 4, nothing is to affect the law relating to pawnbrokers. See *Flight v. Reed*, 1 H. & C. 703; 32 L. J. Ex. 265, and observations thereon in *Rimini v. Van Praagh*, 42 L. J. Q. B. 1; L. R. 8 Q. B. 1. The repeal of the usury laws does not, however, deprive the Court of the power of relieving expectant heirs from unconscionable bargains. *Aylesford (Earl) v. Morris*, 42 L. J. Ch. 546; L. R. 8 Ch. 484. See also *Bolingbroke v. O'Rorke*, 2 App. Cas. 814. Now by the Money Lenders Act, 1900, 63 & 64 V. c. 51, s. 1 (1), in an action by a money-lender for money lent, or for enforcing a security, where the interest is excessive the Court may grant relief.

ACTION ON AN ACCOUNT STATED.

By Rules, 1883, O. xx. r. 8, "in every case in which the cause of action is a stated or settled account, the same shall be alleged with particulars, but in every case in which a statement of account is relied on by way of evidence or admission of any other cause of action which is pleaded, the same shall not be alleged in the pleadings."

To recover upon a claim on an account stated the plaintiff must prove an absolute acknowledgment by the defendant of the plaintiff's claim. A qualified acknowledgment is not sufficient, as "I would have paid you if you had not done so and so." *Evans v. Verity*, Ry. & M. 239. And an offer of a sum certain, on demand of a larger, is not evidence on the account stated. *Wayman v. Hilliard*, 4 Moore & P. 729; 7 Bing. 101. An entry in a bankrupt's examination of a certain sum being due to A., is not, it seems, evidence of an account stated between them. *Pott v. Clegg*, 16 L. J. Ex. 210; 16 M. & W. 321; and *Ex pte. Topping*, 34 L. J. Bky. 44, overruling *Eicke v. Nokes*, 1 M. & Rob. 359. An oral admission of a debt due for goods sold, is evidence of an account stated, though the agreement for the sale was in writing. *Newhall v. Holt*, 6 M. & W. 662. An agreement by a member of a company, on behalf of the company, to pay the plaintiff's bills in consideration of withdrawing an attachment against the company's funds, is evidence of an account stated in an action against the member as one of the company, though the defendant became a member after the debt was incurred. *Barker v. Birt*, 10 M. & W. 61. The company in this case seems to have been an unincorporated company or trading partnership. Where a party, examined before commissioners of bankrupt, admitted that he had received a sum on account of the bankrupt, after an act of bankruptcy, but not that it was a subsisting debt; held that this would not support a count on an account stated with the assignees. *Tucker v. Barrow*, 7 B. & C. 623.

A promissory note given in 1844 by the defendant for a sum described as interest on a note for £117 dated 1838, is evidence on an account stated of a subsisting debt of £117 due in 1844. *Perry v. Slade*, 15 L. J. Q. B. 10; 8 Q. B. 115. An I O U is evidence of an account stated with the person who produces it, though not named in it, and if another person was meant, the defendant must prove this. *Fesenmeyer v. Adcock*, 16 M. & W. 449. But it may be shown that it was given on a consideration that has failed; as for part of a deposit on a sale which has gone off for want of title. *Wilson v. Wilson*, 14 C. B. 616; 23 L. J. C. P. 137; and see *Berry v. Storey*, 2 C. L. R. 815. Where an I O U was given for a stipulated premium, extra the consideration specified in an apprentice deed, which was therefore void by 8 A. c. 9, s. 39, yet the master may recover the money under an account stated, the boy having, in fact, served out his full term. *Westlake v. Adams*, 5 C. B. (N. S.) 248; 27 L. J. C. P. 271. An account stated may be maintained on an oral agreement of what the balance between the parties is, though one of the items be the price of land sold under an oral agreement, whether the statement be after the land has changed hands; *Cocking v. Ward*, 15 L. J. C. P. 246; 1 C. B. 858; or before, if it be shown to have subsequently come into the defendant's possession. *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J. Q. B. 43. See also *Wilson v. Marshall*, *infra*. But there must be an admission of a debt due, in order to support an account stated; therefore when the defendant orally agreed to purchase a lease from the plaintiff, and gave as deposit an I O U for £25, and afterwards refused to complete the purchase; it was held that the I O U, taken with the circumstances under which it was given, was no evidence of an account stated. *Lemere v. Elliott*, 6 H. & N. 656; 30 L. J. Ex. 350. See *Buck v. Hurst*, L. R. 1 C. P. 297.

In an action by the plaintiff as executrix, where the defendant, on being applied to by her for the payment of interest, stated that she would bring her some, it was held that, though this was an admission that something was

due, still, as the nature of the debt did not appear, nor whether it was due to the plaintiff as executrix, or in her own right, nor that it was one for which assumpsit would lie, the plaintiff was not entitled to recover even nominal damages. *Green v. Davies*, 4 B. & C. 235; and see *Teal v. Auty*, 2 B. & B. 101. And, generally, an account is not stated unless some specific sum is agreed upon; therefore a letter asking the plaintiff "to hold the defendant's cheque till Monday, when I will send the amount," the amount of the cheque being unknown, will not support this claim. *Lane v. Hill*, 18 Q. B. 252; 21 L. J. Q. B. 318. If it appear that the account is stated of a debt due from a third person to the plaintiff, which defendant promised to pay without any consideration, this is a defence. *French v. French*, 2 M. & Gr. 644; *Wilson v. Marshall*, 1 R., 2 C. L. 356. So where the defendant gave a written promise to pay a debt due from her deceased husband to the plaintiff's deceased husband with interest, this was held no evidence on a common count for interest, or on an account stated; for the debt was not due from the defendant. *Petch v. Lyon*, 15 L. J. Q. B. 393; 9 Q. B. 147. A promissory note was found among the testator's papers, upon which the executors promised to pay it, but it afterwards appeared that it was intended as a legacy, and was not in payment of a debt; held, not evidence of an account stated with the payee. *Gough v. Findon*, 7 Ex. 48; 21 L. J. Ex. 58. A written guarantee by one of several partners without the authority of the others, and a letter written by their clerk explaining it, also without the authority of all, are not evidence of an account stated by the firm. *Brettel v. Williams*, 19 L. J. Ex. 123; 4 Ex. 623. It is sufficient to prove the account stated without giving evidence of the several items constituting the account; *Bartlett v. Emery*, 1 T. R. 42, n.; and proof of the admission of a single item is sufficient. *Higmore v. Primrose*, 5 M. & S. 65.

Where a partnership has been dissolved and a balance struck, it may be recovered under this claim even as between partners; *Foster v. Allanson*, 2 T. R. 479; *Brierly v. Cripps*, 7 C. & P. 709; *Wilson v. Cutting*, 10 Bing. 436; and the action is then maintainable without any express promise to pay. *Wray v. Milestone*, 5 M. & W. 21. But it will only lie on a final balance of the partnership accounts, and not during the continuance of the partnership. *Fromont v. Coupland*, 2 Bing. 170; *Goddard v. Hodges*, 1 Cr. & M. 37; *Carr v. Smith*, 5 Q. B. 128. If an account were stated of the balance due on a deed or bond, this action did not lie, for it continued to be a specialty debt. *Middleditch v. Ellis*, 2 Ex. 623.

The fact that a company had returned its pass-book to its bank without objection by the company which at the time had no knowledge of certain forgeries was held not to constitute a settled account between the bank and the company. *Keptigalla Rubber Estates v. National Bank of India*, 78 L. J. K. B. 964; [1909] 2 K. B. 1010.

The plaintiff may recover, though the account was, in fact, stated by the defendant with the plaintiff's wife; but not on an account stated by the wife of the defendant; *Styart v. Rowland*, B. N. P. 129; unless she is proved to be the defendant's agent in the transaction. An acknowledgment in a casual conversation with a stranger, not shown to be the agent of the plaintiff, is not sufficient. *Breckon v. Smith*, 1 Ad. & E. 488. Where there were accounts between A. and B., and C. became a partner with B., and dealings continued between the partners and A. who afterwards settled an account with B. and C., wherein was included the money due from A. to B. alone, *Ld. Kenyon* held that the whole might be given in evidence in an action by B. and C. as on an account stated. *Moore v. Hill*, Peake, Ev., 5th ed. 253; see *Gough v. Davies*, 4 Price, 214; *David v. Ellice*, 5 B. & C. 196. The debt on which the account is founded may be an equitable one; thus, where a trustee holds money in trust for the plaintiff, and states an account with him and acknowledges himself a debtor for the amount, he is liable on this claim. *Per Crompton, J., Howard v. Brownhill*, 23 L. J. Q. B. 23, citing *Roper v. Holland*, 3 Ad. & E. 99. An account stated was formerly considered conclusive, but errors in it may

now be corrected. *Per* Ld. Mansfield, C.J., *Trueman v. Hurst*, 1 T. R. 42; *Dails v. Lloyd*, 17 L. J. Q. B. 247; 12 Q. B. 531; *Holland v. Manchester and Liverpool District Banking Co.*, 14 Com. Cas. 241. If the defendant account with the plaintiff in a particular character, he will be taken to have admitted that character. *Peacock v. Harris*, 10 East, 104.

A promissory note, if not properly stamped, cannot be given in evidence as an admission of an account stated; *Green v. Davies*, 4 B. & C. 235; but an unstamped foreign bill of exchange drawn abroad, which has not been presented for payment, or indorsed or negotiated in the United Kingdom, can so be used. *Griffin v. Weatherby*, 37 L. J. Q. B. 280; L. R. 3 Q. B. 753. A note, payable on a contingency, is not evidence of an account stated. *Morgan v. Jones*, 1 C. & J. 162.

The account must be stated before the commencement of the action; and where a defendant, after action brought, had offered a cognovit, it was held insufficient evidence to support the count. *Spencer v. Parry*, 3 Ad. & E. 331; *Allen v. Cook*, 2 Dowl. 546.

Where the plaintiff relies on an account stated on one day, the defendant cannot prove, without pleading payment or set-off, a subsequent accounting including fresh items, by which the balance was turned against the plaintiff. *Fidgett v. Penny*, 1 C. M. & R. 108. But if the second accounting were a mere correction of the first, it would be admissible. See *Thomas v. Hawkes*, 8 M. & W. 140.

Where accounts are submitted to an arbitrator, his award cannot be given in evidence as an account stated. *Bates v. Townley*, 19 L. J. Ex. 399; 2 Ex. 152. But where an incoming tenant agrees to take fixtures at a valuation to be made by brokers, and after it has been made the tenant enters, the value so ascertained may be recovered on such a claim. *Salmon v. Watson*, 4 B. Moore, 73.

The Infants' Relief Act, 1874 (37 & 38 V. c. 62), s. 1, makes all accounts stated with infants absolutely void, and they are therefore now incapable of ratification; see also sect. 2.

No account can be stated with the agent of a lunatic, so as to bind the lunatic; nor can a lunatic state one. *Tarback v. Bispham*, 2 M. & W. 2.

ACTIONS AGAINST CARRIERS.

COMMON CARRIERS.

The obligations of carriers by land are regulated in some respects by the Carriers Act (11 G. 4 and 1 W. 4, c. 68), which relates to their liability for loss of goods. Canal and railway companies are subject to the regulations of the Railway and Canal Traffic Act, 1854 (17 & 18 V. c. 31), and the Regulation of Railways Act, 1873 (36 & 37 V. c. 48). Railway companies are further regulated by the Regulation of Railways Act, 1868 (31 & 32 V. c. 119).

The Railway and Canal Traffic Act, 1854, professes only to regulate the obligations of companies as carriers on their respective rails or canals, and does not apply to other carriers using such rails or canals. Hence the obligation of these latter carriers must depend on the general law of carriers. It is presumed that carriers by inland waters are within the Carriers Act (11 G. 4 & 1 W. 4, c. 68). Where the carriage is partly by land and partly by sea the Carriers Act protects the carrier as regards the land carriage. *Le Conteur v. L. & S. W. Ry.*, 35 L. J. C. P. 40; L. R. 1 Q. B. 54; *L. & N. W. Ry. v. Ashton*, 88 L. J. K. B. 1157; [1920] A. C. 84.

There is no analogy between the transmission of a telegram and the consignment of goods through a carrier. *Playford v. United Kingdom Telegraph Co.*, 38 L. J. Q. B. 249; L. R. 4 Q. B. 706; *Dickson v. Reuter's Telegraph Co.*, 46 L. J. C. P. 197; 47 L. J. C. P. 1; 2 C. P. D. 62; 3 C. P. D. 1.

Action for loss of, or injury to, goods.] In an action for loss of, or injury to, goods, the plaintiff will have to prove (if denied): 1. That the defendant is a common carrier; 2. The delivery of the goods for conveyance, and the contract, if special; 3. The loss or injury; 4. The damage.

Action for refusing to carry.] In this action the plaintiff will have to prove, besides the defendant's character as a common carrier, the tender of the goods to the defendant for conveyance, and the refusal of the defendant to accept the goods for that purpose, although the plaintiff was then ready and willing to pay a reasonable reward in that behalf. The action is one of tort for refusal to perform a public duty, whereby the plaintiff has sustained special damage.

Who are common carriers.] A common carrier is a person who undertakes to transport from place to place, for hire, the goods of such persons as think fit to employ him. Coach owners are common carriers, as well as owners of carts and waggons carrying for hire. So the owners or masters of vessels, whether engaged in coasting trade or voyages beyond seas. *Morse v. Slue*, 2 Lev. 69; *Nugent v. Smith*, 45 L. J. C. P. 19; 1 C. P. D. 19; reversed on another ground, 45 L. J. C. P. 697; 1 C. P. D. 423. But this has been doubted, at any rate, unless the ship is a general ship. *Id.*, per Cockburn, C.J. See also *Benett v. Peninsular & Oriental Steamboat Co.*, 18 L. J. C. P. 85; 6 C. B. 775; and per Gorell Barnes, P., in *Baxter's Leather Co. v. Royal Mail Steam Packet Co.*, 77 L. J. K. B. 988, 991; [1908] 2 K. B. 626, 631—2. So lightermen; *Maving v. Todd*, 1 Stark. 72; barge-men; *Rich v. Kneeland*, Cro. Jac. 330; and all persons who openly profess to carry goods between different places by road or water for hire, are common carriers. See, however, *Liver Alkali Co. v. Johnson*, 43 L. J. Ex. 216; L. R. 7 Ex. 267; L. R. 9 Ex. 338. Railway companies may become common carriers (8 & 9 V. c. 20, ss. 86, 89). So canal and navigation companies (*Id.* c. 42, ss. 5, 6). And such companies may be common carriers as to such things as they publicly profess to carry, or are obliged by their several Acts to carry. *Johnson v. Midland Ry. Co.*, 18 L. J. Ex. 366; 4 Ex. 367; but there appears to be no obligation on a railway company to be a common carrier. *Smith v. L. & N. W. Ry.*, 88 L. J. K. B. 742; and even where it has acted as such it can cease to do so at any time. *Id.*

A carman undertaking jobs for special bargains, and not professing to carry generally is not a common carrier. *Brind v. Dale*, 2 M. & Rob. 80; *Scalfe v. Farrant*, 44 L. J. Ex. 36, 234; L. R. 10 Ex. 358; *Belfast Rope-work Co. v. Bushell*, 87 L. J. K. B. 740; [1918] 1 K. B. 210. Nor is a wharfinger merely as such, though he has been treated as a carrier in some reported cases. See *Sideways v. Todd*, 2 Stark. 400; *Consolidated Tea, &c., Co. v. Oliver's Bonded Wharf*, 79 L. J. K. B. 810; [1910] 2 K. B. 395, and cases cited 2 Kent, Comm. § 599, n. Nor is a London cab-driver or a hackney coachman, plying for passengers, a common carrier. *Ross v. Hill*, 15 L. J. C. P. 182; 2 C. B. 877. In cases like the last, the liability is that of an ordinary hired bailee, which falls far short of that of a common carrier. S. C.; *Coggs v. Barnard*, 2 Ld. Raym. 909. Nor is a furniture remover. *Watkins v. Cottell*, 85 L. J. K. B. 287; [1916] 1 K. B. 10. A ferryman, though bound to carry all comers, is not a common carrier. See *Willoughby v. Horridge*, 12 C. B. 751; 22 L. J. C. P. 90; *Walker v. Jackson*, 12 L. J. Ex. 165; 10 M. & W. 161; *contra*, 2 Kent, Comm. § 599. A barge owner who lets out his barges to all that come to him, and to only one person for each voyage, each being made under a separate agreement, the customer fixing the termini in each case, incurs the responsibilities of a common carrier with respect to the goods he carries. *Liver Alkali Co. v. Johnson*, 43 L. J. Ex. 216; L. R. 7 Ex. 267; L. R. 9 Ex. 338. The Ex. Ch., however, declined to hold that he was a common carrier so as to be bound to carry all goods tendered him for carriage; and Brett, J., held that neither the defendant nor any other shipowner who carried goods in his

ship was a common carrier. See further as to carriers by ship, *Nugent v. Smith*, 45 L. J. C. P. 19; 1 C. P. D. 423; and *Hill v. Scott*, 64 L. J. Q. B. 635; [1895] 2 Q. B. 371, 713.

The common law liability and implied contract of a common carrier.] A common carrier is bound, at common law, to receive and carry all goods reasonably offered to him, and for which the person bringing the goods is ready and willing and offers to pay reasonable hire and reward. *Pickford v. Gd. Junction Ry.*, 10 L. J. Ex. 342; 8 M. & W. 372; *Garton v. Bristol & Exeter Ry.*, 1 B. & S. 112; 30 L. J. Q. B. 273. He is, in the absence of any special contract, bound to deliver within a time that is reasonable, having regard to all the circumstances of the case; *Taylor v. Gt. N. Ry.*, 35 L. J. C. P. 210; L. R. 1 C. P. 385; *Donohoe v. L. & N. W. Ry.*, 1 R. 1 C. L. 304; but he is not responsible for the consequences of delay, arising from causes beyond his own control. *Taylor v. Gt. N. Ry.*, *supra*; as e.g., in the case of a strike by the carrier's servants. *Sims v. Midland Ry.*, 82 L. J. K. B. 67; [1913] 1 K. B. 103 (applying *Hick v. Raymond*, 62 L. J. Q. B. 98; [1893] A. C. 22), unless indeed it can be shown that the strike was brought about by the carrier's default; and see *Raphael v. Pickford*, 5 M. & Gr. 551. He is bound to carry by the route which he professes to be his route, and must use reasonable diligence in delivering the goods, having reference to the means at his disposal for forwarding them; and he is not justified in delaying the delivery by adopting a particular mode of forwarding the goods, merely because that is the mode usually adopted. *Hales v. L. & N. W. Ry.*, 4 B. & S. 66; 32 L. J. Q. B. 292; *Gunyon v. S. E. & Chatham Ry.*, 84 L. J. K. B. 1212; [1915] 2 K. B. 370. But provided he carry by a reasonable and usual route, he is not bound to carry by the shortest route, even though empowered by statute to charge a mileage rate for carriage. *L. & S. W. Ry. v. Myers*, 39 L. J. C. P. 57; L. R. 5 C. P. 1. If the road be obstructed by snow, he is not bound to use extraordinary means, involving additional expense, for accelerating the conveyance of cattle or goods, though the delay may be prejudicial to the goods or their owner, and though, by extra exertions, the passengers have been forwarded. *Briddon v. Gt. N. Ry.*, 28 L. J. Ex. 51. He is also an insurer of the goods against all accidents, except the act of God or the king's enemies; *Forward v. Pittard*, 1 T. R. 27; and whether the loss occurs by accident, robbery, violence, or the negligence of third persons. *Trent Navigation v. Wood*, 4 Doug. 287; 3 Esp. 127. Act of God means not merely an accidental circumstance, but something overwhelming (*Oakley v. Portsmouth, &c., Steam Packet Co.*, 11 Ex. 623; 25 L. J. Ex. 101, *per* Martin, B.), which "could not happen by the intervention of man, as storms, lightning, and tempests" (*Forward v. Pittard*, 1 T. R. 33, and which "could not have been prevented by any amount of foresight and pains and care reasonably to be expected from" the carrier. *Nugent v. Smith*, 1 C. P. D. 441, 444, *per* James, L.J. See also *Nichols v. Marsland*, 46 L. J. Ex. 174; 2 Ex. D. 1; *Nitrophosphate, &c., Manure Co. v. L. & S. Katharine's Dock Co.*, 9 Ch. D. 503.

Common carriers from a place within to a place without the realm, are subject to the same liabilities, at common law, as a common carrier who carries only within the realm. *Crouch v. L. & N. W. Ry.*, 14 C. B. 255; 23 L. J. C. P. 73.

If a common carrier fails to deliver goods entrusted to him for carriage and proves something which *prima facie* raises a case of exception, he so far has done his duty, and the burden is shifted to the plaintiff; if the carrier proves something which is equally consistent with liability and non-liability he fails to displace the plaintiff's case. *Ashton v. L. & N. W. Ry.*, 87 L. J. K. B. 1128; [1918] 2 K. B. 488, *per* Scrutton, L.J. See S. C. in H. L., 88 L. J. K. B. 1157; [1920] A. C. 84.

In the case of live stock, a carrier is not liable for an injury caused by the inherent vice of the animal; it is sufficient if he provide for its carriage

a truck that is reasonably fit for the purpose. *Blower v. Gt. W. Ry. Co.*, 41 L. J. C. P. 268; L. R. 7 C. P. 655; explaining *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Ex. 707; 21 L. J. Ex. 263, per Parke, B., cited by Erle, J., in *M'Manus v. Id.*, 4 H. & N. 347; 28 L. J. Ex. 358; *Kendall v. L. & S. W. Ry. Co.*, 41 L. J. Ex. 184; L. R. 7 Ex. 373; see also *Richardson v. N. E. Ry. Co.*, 41 L. J. C. P. 60; L. R. 7 C. P. 75; *Gill v. Manchester, &c., Ry. Co.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. 186. Nor is he liable if the injury done is such that no reasonable precaution could have prevented. *Nugent v. Smith, supra*. So, a carrier is not liable for injury to goods caused by their inherent unsfitness for the carriage contemplated, though not known to either party. *Lister v. Lanc. & Yorkshire Ry. Co.*, 72 L. J. K. B. 385; [1903] 1 K. B. 878. Nor for that caused by ordinary wear and tear, or chafing during the journey, nor for the natural decay of perishable goods. Story on Bailments, § 492 a, cited *Blower v. Gt. W. Ry. Co., supra*. Nor for damage to goods arising from improper packing even though at the time they were delivered to the carrier they were manifestly in an unsafe condition for carriage owing to the improper packing. *Gould v. S. E. & C. R. Ry.*, 89 L. J. K. B. 700; [1920] 2 K. B. 186. As to the liability of carrier where goods have been signed for as having been received in good condition, see *L. & N. W. Ry. v. Hudson*, 89 L. J. K. B. 323; [1920] A. C. 324.

A carrier may limit, generally, his business to certain goods, and is then not obliged to carry other kinds of goods; his obligation in this respect depends upon what he publicly professes to do. *Johnson v. Midland Ry. Co.*, 18 L. J. Ex. 366; 4 Ex. 367; *In re Oxlade & N. E. Ry. Co.*, 1 C. B. (N. S.) 454; 26 L. J. C. P. 129; 15 C. B. (N. S.) 680.

Any statutory exemption from liability must be pleaded specially. See Rules, 1883, O. xix. r. 15.

[*Evidence of the contract.*] The contract implied from the delivery and acceptance of the goods, to and by the defendant, in his capacity of carrier, is to charge a reasonable reward for the conveyance, and the jury are the judges of this; *semb. Ashmole v. Wainwright*, 11 L. J. Q. B. 79; 2 Q. B. 837; *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 122; 31 L. J. Q. B. 113; and if the carrier refuse to carry or deliver, except upon payment of an exorbitant charge, the excess, if paid, may be recovered back. S. C. But it is competent, at common law, to make a previous special bargain in each case, for the rate of charge; and under the Carriers Act, 1830, s. 6. *Carr v. Lancashire & Yorkshire Ry. Co.*, 7 Ex. 707; 21 L. J. Ex. 261.

Where the carrier delivers a ticket or other notice to the person from whom he receives the articles, specifying the terms on which he agrees to carry, and the customer assents (or does not dissent), the terms of the notice will establish a special agreement, and will exclude the common law contract, so far as it is varied by those terms: *Wyld v. Pickford*, 10 L. J. Ex. 382; 8 M. & W. 443; *Gt. N. Ry. Co. v. Morville*, 21 L. J. Q. B. 319; *Phillips v. Edwards*, 3 H. & N. 813; 28 L. J. Ex. 52; *Zunz v. S. E. Ry. Co.*, 38 L. J. Q. B. 209; L. R. 4 Q. B. 539, 544; see also *Watkins v. Rymill*, 52 L. J. Q. B. 121; 10 Q. B. D. 178, and cases there cited; and such a specific notice is not "a public notice or declaration" within sect. 4 of the Carriers Act. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 750; 23 L. J. Q. B. 73. If the customer in such a case decline the terms, and wish to fix the carrier with the common law liability, he must tender or offer a reasonable compensation, and sue for the refusal to receive the goods. Per Parke, B., in *Carr v. Lancashire Ry. Co., supra*; *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273. Where goods are sent by the defendants, "the company accepting no liability," the stipulation does not exempt the company from liability for a loss arising wholly from their own negligence. *Martin v. Gt. Indian Peninsular Ry. Co.*, 37 L. J. Ex. 27; L. R. 3 Ex. 9. But a condition to relieve the carrier "from all liability for loss or damage by delay in transit, or from whatever other cause

arising," protects him against the consequences of his servant's negligence, including damage from loss of market. *Manchester, &c., Ry. Co. v. Brown*, 53 L. J. Q. B. 124; 8 App. Cas. 703. And where a passenger, by steamer, takes luggage subject to the further condition, that the ship will not be accountable unless bills of lading have been signed therefor, and the luggage is lost through the negligence of the captain, the plaintiff cannot recover unless the condition has been complied with. *Wilton v. Atlantic Mail, &c., Co.*, 10 C. B. (N. S.) 453; 30 L. J. C. P. 369. See also *Peninsular & Oriental S. Nav. Co. v. Shand*, 3 Moo. P. C. (N. S.) 272.

A contract that goods should be carried "at owner's risk," was held not to exempt the carrier from liability in respect of delay. *Robinson v. Gt. W. Ry.*, H. & R. 97; 35 L. J. C. P. 125; *D'Arc v. L. & N. W. Ry.*, L. R. 9 C. P. 325. It seems that in these cases the purport of the condition "owner's risk" was to free the company from all liability whatever in respect of the goods. The present modified meaning of the term "owner's risk," is to free the carrying company "from all liability of loss, damage or delay except upon proof that such loss, damage or delay arose from wilful misconduct on the part of the company's servants." This condition was, however, held not to exonerate the company where goods which were to be carried by G. by a particular route, were by mistake sent by another route and in consequence delayed, because the delay did not arise in the performance of the contract; *Mallet v. Gt. E. Ry.*, 68 L. J. Q. B. 256; [1899] 1 Q. B. 309. But where goods sent under a similar contract were in the course of their journey by mistake not transferred into the proper train, and were therefore sent by another route for expedition, and delay was occasioned, G. was held protected by the condition. *Foster v. Gt. W. Ry.*, 73 L. J. K. B. 811; [1904] 2 K. B. 306. This case was, however, distinguished in *Gunyon v. S. E. & C. Ry.*, 84 L. J. K. B. 1212; [1915] 2 K. B. 370. There the railway company was held not to be protected by a clause exempting them from liability for delay, except upon proof that such delay arose from wilful misconduct on the part of the company's servants, where it was of the essence of the contract that the goods (fruit) should be carried by passenger train and in the course of the transit they were transferred from a passenger to a goods train and being thus delayed, were damaged. See also *Neilson v. L. & N. W. Ry.*, [1921] W. N. 196. In *G. W. Ry. v. Wills*, 86 L. J. K. B. 641; [1917] A. C. 148, the special owner's risk contract exempted the company from liability in case of the non-delivery of any package or consignment fully and properly addressed, unless the non-delivery was due to accidents to trains or fire. It was held that the non-delivery of a part of a consignment was not the "non-delivery of a consignment" within the meaning of the exception. As to evidence of "wilful misconduct" see *Lewis v. G. W. Ry.*, 47 L. J. Q. B. 131; 3 Q. B. D. 195; *Forder v. G. W. Ry.*, 74 L. J. K. B. 871; [1905] 2 K. B. 532; *Bastable v. N. B. Ry.*, [1912] S. C. 555 (doubting *dicta* in *Lewis v. G. W. Ry.*, *supra*, and in *Graham v. Belfast and Northern Ry.*, [1901] 2 I. R. 13); *Norris v. Great Central Ry.*, 85 L. J. K. B. 285 n.; and *Sheppard v. Midland Ry.*, 85 L. J. K. B. 283. In *Smith v. Midland Ry.*, 88 L. J. K. B. 868, the circumstance that no member of the general public had effective access to a parcel sent by the plaintiff, was held to warrant the inference that something abstracted therefrom must have been stolen by some person in the company's employment and therefore that the company were liable. But where a whole parcel disappeared and there was no evidence where or how, it was held that the plaintiffs had failed to show wilful misconduct. *Smith v. G. W. Ry.*, 90 L. J. K. B. 644; [1921] 2 K. B. 237.

The general notice affixed in the offices of carriers, or advertised in newspapers, by which carriers were accustomed to limit, or attempt to limit, their common law liability, is deprived of that effect, so far as regards all common carriers *by land*, by the Carriers Act, s. 4. And it would seem that even if a *knowledge* of such a public notice could be brought home to

the customer, it would not now protect the carrier. There ought to be proof of a specific agreement between the carrier, or his agent, and the individual tendering the goods. The case of special contracts with railway and canal companies is now provided for by stat. 17 & 18 V. c. 31, s. 7.

By the Railway Clauses Consolidation Act (8 & 9 V. c. 20), s. 90, and by clauses in most of the special Acts constituting railway companies, the company is enabled to determine upon "reasonable charges" in respect of the carriage of passengers and goods; and it is generally provided, among other things, that these charges shall also be "equal," i.e., that all persons and classes of goods shall, under like circumstances, be treated alike as to charges. See *Denaby Colliery v. Manchester, &c., Ry.*, 55 L. J. Q. B. 181; 11 App. Cas. 97. When the question of reasonableness comes in issue, it is one for the jury, and is not a question of law. And where the question of "equality" involves an inquiry into the greater or less risk incurred by the company in the conveyance of certain parcels as compared with others, it is for the jury. *Crouch v. Gt. N. Ry. Co.*, 11 Ex. 742; 25 L. J. Ex. 137. Under these Acts it has been held that a railway company cannot treat other carriers on their rail on a different footing from other customers, and therefore that it cannot charge such carriers on a higher scale for "packed parcels," that is, parcels enclosing smaller parcels collected by the consigning carrier from different persons, and consigned to a single agent for distribution among other persons. *Parker v. Gt. W. Ry.*, 7 M. & Gr. 253; *Crouch v. G. N. Ry.*, 9 Ex. 556; 23 L. J. Ex. 148; *Id. v. Id.*, 11 Ex. 742; 25 L. J. Ex. 137; *Piddington v. S. E. Ry.*, 5 C. B. (N. S.) 111; 27 L. J. C. P. 295; *Sutton v. Gt. W. Ry.*, 3 H. & C. 800; 35 L. J. Ex. 18; L. R. 4 H. L. 226; *Baxendale v. L. & S. W. Ry.*, 35 L. J. Ex. 108; L. R. 1 Ex. 137. But if the packed parcels be separately directed so as to give more trouble on delivery, a higher charge is justifiable. *Baxendale v. E. Counties Ry.*, 4 C. B. (N. S.) 63; 27 L. J. C. P. 137. A railway company charged a through rate, including collection and delivery as well as conveyance, which rate was charged whether the goods were collected and delivered by the company or not; it charged the plaintiff who collected and delivered the goods the full amount, as if it had done so; it was held that he could recover such overcharge in an action for money had and received. *Baxendale v. Gt. W. Ry.*, 14 C. B. (N. S.) 1; 32 L. J. C. P. 225; 16 C. B. (N. S.) 137; 33 L. J. C. P. 197; see *Pickford v. Gd. Junction Ry.*, 10 M. & W. 399; *Baxendale v. L. & S. W. Ry.*, 35 L. J. Ex. 108; L. R. 1 Ex. 137; and *Evershed v. L. & N. W. Ry.*, 46 L. J. Q. B. 289; 48 L. J. Q. B. 22; 2 Q. B. D. 254; 3 Q. B. D. 134; 3 App. Cas. 1029. *Secus* in cases where the company is under no statutory obligation to carry the goods. *Stone v. Midland Ry.*, 73 L. J. K. B. 392; [1904] 1 K. B. 669. The special Acts of railway companies generally authorize higher charges for small parcels sent in separate packages, and sometimes provide that large aggregate quantities of goods sent in several small parcels at the same time, shall be subject to a tonnage charge on the aggregate, and not to the higher rate, as upon small separate packages. See *Parker v. Gt. W. Ry.*, 6 E. & B. 77; 26 L. J. Q. B. 209. In order to show a breach by the railway company of the equality clauses, it may be proved that it was well known in the trade and, inferentially, to the company, that mercantile houses were in the habit of despatching packed parcels by the company, and that the company charged less for these parcels than for the packed parcels of the plaintiff, a carrier. *Sutton v. Gt. W. Ry.*, 35 L. J. Ex. 18; 3 H. & C. 800. Evidence that the agent and traffic manager of the company were present at a reference between another carrier and the defendants, where facts of this sort were proved in their hearing, is also admissible to prove that the defendants knew the usage of the mercantile houses above stated, and knowingly charged the plaintiff a higher rate than others for the carriage of like packed parcels. S. C. See further as to evidence of inequality, *Taylor v. Metropolitan Ry.*, 75 L. J. K. B. 735; [1906] 2 K. B. 55.

By the Regulation of Railways Act, 1868 (31 & 32 V. c. 119), s. 16, equality is secured to all persons using steamers worked by railway companies; and by sect. 17 railway companies are now bound on application to deliver particulars of the charge for the conveyance of goods on their railway, distinguishing how much is for conveyance and how much for loading and other expenses.

When a railway company undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, this is evidence of a contract with them for the whole distance, and the other railway company will be regarded as its agents, and not as contracting with their original hailer. *Muschamp v. Lancaster, &c., Ry.*, 8 M. & W. 421; *Webber v. Gt. W. Ry.*, 3 H. & C. 771; 34 L. J. Ex. 170; 4 H. & C. 582. And the same position obtains in the case of passengers. But the first railway company might, by a special contract evidenced by the terms of the receipt note or otherwise, restrain its own liability as carrier to the limits of its own rail where it expressly acts as agent for the other company; *Fowles v. Gt. W. Ry.*, 7 Ex. 699; 22 L. J. Ex. 76; such a condition embodied in a notice signed by the consignor has been held just and reasonable within the meaning of the Railway and Canal Traffic Act, and, therefore, to protect the company (assuming they would be otherwise liable) beyond its own line; *Aldridge v. Gt. W. Ry.*, 15 C. B. (N. S.) 582; 33 L. J. C. P. 161; and that Act does not apply at all to the carriage of goods over lines not worked by the company. *Zunz v. S. E. Ry.*, 38 L. J. Q. B. 209; L. R. 4 Q. B. 539. Where X. Railway Co. undertook to carry goods over X. and Y. railways, which were damaged on Y. railway, and the contract with X. excluded liability for damage done on Y., it was held that company Y. could not be sued for it, for there was no contract with Y. *Coxon v. Gt. W. Ry. Co.*, 5 H. & N. 274; 29 L. J. Ex. 165. Plaintiff, a passenger, took a ticket from a place on railway X. to a place on railway Y.; in the Railway Act for X., the company was made not liable for ordinary passenger's luggage; on railway Y., there was no such provision; plaintiff's luggage was lost on railway Y.; it was held that the Y. company was not liable, the contract being with X.; and *semble*, X. company was not liable by reason of their statutable exemption. *Mytton v. Midland Ry.*, 4 H. & N. 615; 28 L. J. Ex. 385; see *Bristol & Exeter Ry. Co. v. Collins*, 7 H. L. C. 194; 29 L. J. Ex. 41. A receipt note by railway A. for goods "to be sent" to a place on another railway, and there "delivered" for one entire sum, is one entire contract with railway A. for the whole distance, and a subsequent company cannot be sued for loss on their railway. S. C. But the effect of such special acceptances, and of the conditions contained in them, when the contract involves an undertaking to cause goods to be conveyed over successive portions of distinct railways forming a continuous line, has been the subject of much difference of opinion among the judges; and it cannot be taken as yet settled how far conditions or limitations inserted in the receipt note, and therein confined to the carriage of the goods while on the railway of the first company, can be considered as accompanying the goods throughout the whole distance;—or whether the company is to be considered as carrying with the ordinary common law liability of carriers when beyond its own limits;—or on the conditions and limitations which may be legally in force on each successive railway. The principle to be deduced from the above cases is that, in respect of any cause of action arising out of the contract of carriage of goods, the contracting party can alone sue the carrier. The owner of the goods, however, although not a party to the contract, may sue for a tort, which would have been actionable, apart from the terms of the contract. *Martin v. Gt. Indian Peninsular Ry Co.*, 3 Ex. 9, 14; 37 L. J. Ex. 27. Where a railway company, A., contracts to carry over its own line and that of another company, B., and enters into such contract as agent for the company B., the company B. may be sued for an accident on its line. *Gill v. Manchester, &c., Ry. Co.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. 186.

Where there has been a general acceptance by company A. to convey goods over another railway, B., to C., the bailor may countermand the bailment while in the hands of company B., and if the goods be lost in consequence of inattention to the countermand, and of delivery at C., he may sue A. for the loss. *Scothorn v. S. Staffordshire Ry. Co.*, 8 Ex. 341; 22 L. J. Ex. 121. The plaintiff sent goods to a carrier, X., to be carried from A. to D. by three independent carriers, X., Y., Z.; there being an arrangement between X., Y., Z., that X. should carry from A. to B., Y. from B. to C., and Z. from C. to D.; X. received the freight for the whole journey, and paid over to Y. and Z. their proportion, after notice that the goods were lost before arriving at B.: held, that X. was not liable, in an action for money had and received, to repay the sum he had so paid over. *Greeves v. W. India, &c., S. Ship Co.*, Ex. Ch., *ex relatione amici*, revers. S. C., 20 L. T. 912.

A railway company is liable on its contract, whether the transit be over other railways, or partly by sea, or partly by coach, and whether payment for the whole be before or after delivery to the consignee; and where a railway company receives a parcel directed to a place beyond its line without objection or special contract, there is an implied contract of carriage over the entire distance, although the consignor may have pointed out a route different from the one usually adopted by the company. *Wilby v. W. Cornwall Ry. Co.*, 2 H. & N. 703; 27 L. J. Ex. 181. A condition that the company will not be responsible for loss or injury in receiving, &c., live stock, if occasioned by the restiveness of the animals, does not exonerate them from injury proximately caused through negligence of the company. *Gill v. Manchester, &c., Ry.*, 42 L. J. Q. B. 89; L. R. 8 Q. B. 186.

When the carrier's receipt for the goods is offered in evidence in order to prove the contract, the necessity for an agreement stamp depends on the amount payable for the carriage, and not on the value of the goods; *Latham v. Rutley, Ry. & M.* 13; if the sum payable amount to £5, a stamp is now required. The receipt in the case of an inland carrier is exempt from duty as a warrant for goods, but where the goods are exported or carried coastwise, it becomes a bill of lading, and must be stamped as such. A receipt under the Carriers Act, s. 3, is exempt from duty.

Though a cab driver is not a common carrier, yet if charged on an implied contract to carry a passenger's luggage "safely and securely," it is no variance; for this shall be taken to mean such obligation to use ordinary care as arises out of the relation between a bailee for him and his bailor, and not the more extended liability of a common carrier. *Ross v. Hill*, 15 L. J. C. P. 182; 2 C. B. 877. As to the liability of the proprietor of a metropolitan cab for a loss occasioned by the driver, see *Powles v. Hider*, 6 E. & B. 207; 25 L. J. Q. B. 331. A carrier, even without reward, is liable for gross neglect. *Beauchamp v. Powley*, 1 M. & Rob. 38.

Where the action is for refusing to carry, the plaintiff need not aver or prove a strict tender of the fare; it is enough that he was ready to pay. *Pickford v. Gd. Junction Ry.*, 10 L. J. Q. B. 342; 8 M. & W. 372. But where the carrier has limited his liability unless a certain charge be paid, payment or tender of that charge must be proved. *Wylde v. Pickford*, 10 L. J. Ex. 382; 8 M. & W. 443.

An exception of "insurance risks" in a contract with A. for carriage by water, does not relieve A. from his liability as a common carrier. *Sutton v. Ciceri*, 15 App. Cas. 144. Nor from that resulting from his negligence; *Price & Co. v. Union Lighterage Co.*, 72 L. J. K. B. 374; [1904] 1 K. B. 412; *Nelson Line v. Nelson*, 77 L. J. K. B. 82; [1908] A. C. 16; cf. *Rosin and Turpentine, &c., v. Jacobs*, 15 Com. Cas. 111; *Travers v. Cooper*, 83 L. J. K. B. 1787; [1915] 1 K. B. 73.

A contract to undertake sea risk for additional freight or otherwise is, under 54 & 55 V. c. 39, s. 92 (2), a contract for sea insurance, and must comply with the stamp and other provisions of that statute.

Carriers Act, 1830, 11 G. 4 & 1 W. 4, c. 68]. By sect. 1, no common carrier by land for hire shall be liable for the loss of or injury to any articles of the descriptions following; (that is to say),—gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title deeds, paintings, engravings, pictures, gold or silver plate or plated articles, glass, china, silk in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials, furs, or lace (not machine-made, 28 & 29 V. c. 94), or any of them, contained in any parcel which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage coach or other public conveyance, *when the value of such articles contained in such parcel or package shall exceed £10—unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such common carrier, or to his book-keeper, coachman, or other servant, for the purpose of being carried or of accompanying the person of any passenger, the value and nature of such articles shall be declared by the person sending or delivering the same, and the increased charge hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package.*

Sect. 2 authorizes the demand of an increased rate of charge for such articles, notified by a notice publicly affixed in the carrier's office, which all persons sending parcels are to be bound by without further proof of the same having come to their knowledge.

Sect. 3 “when the value shall have been so declared, and the increased rate of charge paid, or an engagement to pay the same shall have been accepted, as hereinbefore mentioned, the person receiving such increased rate of charge, or accepting such agreement, shall, if thereto required, sign a receipt for the package or parcel acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty; and if such receipt shall not be given when required, or such notice as aforesaid shall not have been affixed, the . . . carrier . . . shall not have or be entitled to any benefit or advantage under this Act, but shall be liable and responsible as at the common law, and be liable to refund the increased rate of charge.”

By sect. 4, no public notice or declaration heretofore made, or hereafter to be made, shall be deemed or construed to limit or in anywise affect the liability at common law of any such public common carriers in respect of any articles or goods to be carried by them; but all such common carriers shall be liable, as at the common law, to answer for the loss of or injury to any articles and goods, in respect whereof they may not be entitled to the benefit of the Act, any public notice or declaration by them made and given contrary thereto, or in anywise limiting such liability, notwithstanding.

By sect. 5, for the purposes of the Act, every office, warehouse, or receiving-house, used or appointed by such common carrier for receiving parcels, shall be taken to be the receiving-house or office of such carrier; and any one or more carriers may be sued without joining their co-proprietors.

By sect. 6, nothing in the Act shall be construed to annul or affect any special contract between such common carrier and any other parties for the conveyance of goods and merchandise.

By sect. 7, a person who has insured, as above, may recover back the extra charge as well as the value of the goods lost or damaged.

By sect. 8, nothing in the Act shall be deemed to protect any common carrier for hire from liability to answer for loss or injury to any goods

whatsoever arising from the felonious acts of any coachman, guard, book-keeper, porter, or other servant in his employ, nor to protect any such coachman, &c., from liability for any loss or injury occasioned by his own personal neglect or misconduct.

By sect. 9, common carriers shall be liable to pay only the actual value, as proved, not exceeding the declared value, together with the increased charges paid by the owner.

Where a carrier makes one contract to carry by land and sea, and goods are lost on the land journey, the carrier is within the protection of the Act. *Pianciani v. L. & S. W. Ry. Co.*, 18 C. B. 226; *Le Conteur v. Id.*, 35 L. J. C. P. 40; L. R. 1 Q. B. 54; *Baxendale v. Gt. E. Ry.*, 38 L. J. Q. B. 137; L. R. 4 Q. B. 244; but the onus is on the carrier to show that the loss occurred during the land transit. *L. & N. W. Ry. v. Ashton*, 88 L. J. K. B. 1157; [1920] A. C. 84.

Under sect. 1, articles more for ornament than use have been considered "trinkets," as bracelets, shirt pins, rings, brooches, ornamental purses, and scent bottles; but not a plain metal fusee box. So silk made into articles, as watch-guards, is within it; silk hose, gold chains for eye-glasses, &c. *Bernstein v. Baxendale*, 6 C. B. (N. S.) 251; 28 L. J. C. P. 265. So is a silk dress made up for wearing. *Flowers v. S. E. Ry. Co.*, 16 L. T. 329; overruling *Davey v. Mason*, Car. & M. 45. Hand-painted designs of carpets are not within the term "paintings," which is to be used in its ordinary sense as meaning works of art. *Woodward v. L. & N. W. Ry. Co.*, 47 L. J. Ex. 263; 3 Ex. D. 121. Whether an article is of the description mentioned in this section is a question of fact for the jury. S. C., following *Brunt v. Midland Ry. Co.*, 2 H. & C. 889; 33 L. J. Ex. 187. Opera glasses and photographic apparatus were found by the jury not to be "trinkets," "glass" or "plated articles." *Levi, Jones & Co. v. Cheshire Lines Committee*, 17 T. L. R. 443. A blank acceptance for £11, lost by the carrier before delivery, and before the drawer's name has been inserted, is not a bill nor a writing of the value of £10 within sect. 1. *Stoessiger v. S. E. Ry. Co.*, 3 E. & B. 549; 23 L. J. Q. B. 293.

The Act extends to all the articles enumerated in sect. 1, although not (within the words of the preamble) "an article of great value in small compass." To entitle a party to recover for loss or injury to any article of such description, he must give *express* notice to the carrier of the value and nature of the article. A looking-glass exceeding the value of £10 was packed up in a case and sent to the carrier's office to be conveyed from London to a house near Lymington; a notice was fixed up in the office pursuant to sect. 2: the words "looking-glass," "keep this edge upwards," were written on the case, but no declaration was made of the nature and value of the article, and no increased rate of carriage paid; the parcel was conveyed from Lymington to its destination on a brewer's truck, which was the usual way; it was held that the carrier was not liable for breakage of the glass. *Owen v. Burnett*, 2 Cr. & M. 353; 4 Tyr. 133; *Doey v. L. & N. W. Ry.*, 88 L. J. K. B. 737; [1919] 1 K. B. 623. A packed wagon sent for carriage by the defendants, containing enumerated articles, is a parcel or package within sect. 1. *Whaite v. Lancashire & Yorkshire Ry. Co.*, 47 L. J. Ex. 263; L. R. 9 Ex. 67. The expressed opinion of the carrier as to its real value will not supersede the necessity of a formal declaration of it. *Boys v. Pink*, 8 C. & P. 361. The packing-case in which goods mentioned in sect. 1 are contained is usually considered as accessory to them. *Wyld v. Pickford*, 8 M. & W. 443. So the frame of a framed picture is accessory to it, and within the Act. *Anderson or Henderson v. L. & N. W. Ry. Co.*, 39 L. J. Ex. 55; L. R. 5 Ex. 90. But where the packing-case contains articles, some within the statute and some not, the value of the case, and of the articles not within the statute, may be recovered separately. *Treadwin v. Gt. E. Ry. Co.*, 37 L. J. C. P. 83; L. R. 3 C. P. 308. The defendant must prove that the goods fall within sect. 1. See *Sutton v. Ciceri*, 15 App. Cas. 144. The Act applies to a

railway passengers's ordinary luggage carried free of charge. *Casswell v. Cheshire Lines Committee*, 76 L. J. K. B. 734; [1907] 2 K. B. 499; *Dyke v. S. E. & C. Ry.*, 17 T. L. R. 651. A comedian's theatrical clothing is not "personal luggage." *Gilbey v. G. N. Ry.*, 36 T. L. R. 562.

The declaration required by sect. 1 must be given at the time of delivery, whether that be at the carrier's office or to a carter sent to the customer's house to collect parcels, or on the road, or elsewhere; the carrier may then demand the increased charge as publicly notified in his office under sect. 2, and on payment thereof he is to give the receipt, if required, under sect. 3. If no such declaration be made by the bailor on delivery, the carrier is protected by sect. 1 in respect of the specified articles, except in cases of felony referred to in sect. 8. *Hart v. Baxendale*, 6 Ex. 769; 21 L. J. Ex. 123, Ex. Ch. But by sect. 3, if no notice has been affixed under sect. 2, the carrier is not protected, even though no declaration has been made. See *Baxendale v. Hart*, 6 Ex. 769, 778; 20 L. J. Ex. 338, 340. In *Hart v. Baxendale*, supra, which is cited in many text books in support of the contrary proposition, the Court decided that there had been a sufficient notice under sect. 2, and the exception to the ruling of Pollock, C.B., at the trial being allowed on that hypothesis, the effect on the carrier's liability of the absence of a notice, did not directly arise in Exch. Cham. Where the plaintiff sent a valuable picture by a railway, and declared its nature and value at the time of its delivery to the carrier, and the carrier did not demand any increased rate to which he was entitled under sect. 2, and only the ordinary charge was paid, the carrier was held not to be protected by the statute from his common law liability for an injury which happened to the picture on its journey. *Behrens v. Gt. N. Ry. Co.*, 7 H. & N. 950, 953; 31 L. J. Ex. 299, 300. "There is nothing in the statute which protects the carrier from liability if, after the value is declared to be such as would entitle him to demand an increased rate of charge, he chooses to accept the goods to be carried without making any demand for such increased rate or requiring it to be either paid or promised"; *per Cur.*, S. C. *Seble* a customs declaration is not a declaration within sect. 1. *Hirschel v. G. E. Rly.*, 12 Com. Cas. 11. The "loss" provided for by sect. 1 means loss by the carrier or his servant, so that the parcel cannot be delivered; it protects the carrier against liability for damage caused by delay in delivery in consequence of a temporary loss. *Millen v. Brasch*, 52 L. J. Q. B. 127; 10 Q. B. D. 142. But in the case of a temporary loss the carrier will be liable for detention of the goods beyond a reasonable time after they have been found; *Hearn v. L. & S. W. Ry. Co.*, 10 Ex. 793; 24 L. J. Ex. 180; an injury done to goods sent beyond their destination is within the protection of sect. 1. *Morritt v. N. E. Ry. Co.*, 45 L. J. Q. B. 289; 1 Q. B. D. 302.

Where an innkeeper had no express authority from the defendants to take in parcels, and used his discretion in sending them by the defendant's mail or any other coach; though he kept no regular booking-office, it was held that for the purpose of taking in a parcel the inn was a receiving-house of the defendant's within sect. 5. *Syms v. Chaplin*, 5 Ad. & E. 634. See also *Stephens v. L. & S. W. Ry. Co.*, *infra*.

Since this Act, if articles mentioned in sect. 1 are sent without declaration of value and payment of the increased charge, carriers who have complied with the requirements of the Act are not liable though the loss be occasioned by the gross negligence of their servants. *Hinton v. Dibbin*, 2 Q. B. 646; *Morritt v. N. E. Ry. Co.*, supra. And it seems that there is no distinction between the negligence of themselves or their servants; but *wilful misfeasance* would come under a different consideration. See S. CC. By sect. 8, where the loss is by the felony of the carrier's servants, the Act does not protect. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B. (N. S.) 307; 27 L. J. C. P. 205. The servants of a common carrier or other agent employed by a railway company to forward goods to their destination are

servants of the company within that section; *Machu v. L. & S. W. Ry. Co.*, 17 L. J. Ex. 271; 2 Ex. 415; *Stephens v. L. & S. W. Ry. Co.*, 56 L. J. Q. B. 171; 18 Q. B. D. 121; accord, *Doolan v. Midland Ry. Co.*, 2 App. Cas. 792; but the company is not estopped from denying that the thief is its servant, and may show that though he represented himself as being one of the servants of the carrier employed by the company, he was not so in fact. *Way v. Gt. E. Ry. Co.*, 45 L. J. Q. B. 874; 1 Q. B. D. 692; nor is the company estopped by the fact that in prosecuting the fraudulent person the property in the goods was laid in the company. *Harrison v. L. & N. W. Ry.*, 86 L. J. K. B. 1461; [1917] 2 K. B. 755. Where to a defence founded on sect. 1 that the value of the goods had not been declared, the plaintiff replies under sect. 8, alleging a felony by the defendant's servants, the plaintiff must prove facts which show not merely that *somebody* must have stolen them while they were *in transitu*, but also that it is more likely that they were stolen by the defendant's servants than any one else. *Metcalfe v. L. & Brighton Ry. Co.*, 4 C. B. (N. S.) 311; 27 L. J. C. P. 333; *Gt. W. Ry. Co. v. Rimmell*, *infra*. It is not sufficient to show merely that they had greater opportunity of committing the theft; *M'Queen v. Gt. W. Ry. Co.*, 44 L. J. Q. B. 130; L. R. 10 Q. B. 569; although it is not necessary to give evidence which would fix any one servant of the company with the felony. *Vaughton v. L. & N. W. Ry. Co.*, 43 L. J. Ex. 75; L. R. 9 Ex. 93. See also *Kirkstall Brewery Co. v. Furness Ry. Co.*, 43 L. J. Q. B. 142; L. R. 9 Q. B. 468. Where the carrier carries on a special contract exempting him from liability for loss unless the goods are declared, and extra charge paid, felony by his servant will not deprive him of this protection unless there be also gross negligence; *Shaw v. Gt. W. Ry. Co.*, [1894] 1 Q. B. 373, following *Butt v. Gt. W. Ry. Co.*, 11 C. B. 140; 20 L. J. C. P. 241, which case is explained in *Gt. W. Ry. Co. v. Rimmell*, 18 C. B. 575; 27 L. J. C. P. 201; and in *Metcalfe v. L. & Brighton Ry. Co.*, 4 C. B. (N. S.) 307; 27 L. J. C. P. 205, as not, in fact, being a case under the Carriers Act at all; negligence is the material point when there is a special contract; felony, when the statute is set up as a defence. S. CC.

A specific notice repudiating liability in certain cases, and served on the customer, is not a public notice or declaration within sect. 4, and it may, if he assent to it, or do not dissent, amount to a *special contract*, or be evidence of one for the jury, within sect. 6. *Walker v. York & N. Midland Ry. Co.*, 2 E. & B. 750; 23 L. J. Q. B. 73. It has, however, been held that sect. 6 applies only to contracts, the provisions of which are inconsistent with the exemption claimed by the carriers under sect. 1. *Barendale v. Gt. E. Ry. Co.*, 38 L. J. Q. B. 137; L. R. 4 Q. B. 244.

Railway and Canal Traffic Act, 1854, 17 & 18 V. c. 31.] By this Act, very important provisions are made respecting the traffic on railways and canals. "Traffic" includes not only passengers and their luggage, and goods, animals and other things conveyed by any railway or canal company, but also carriages, waggons, trucks, boats, and vehicles of every description adapted for running or passing on the railway or canal of any such company; and "railway company" or "canal company" includes as well lessees and contractors working railways or canals as the companies or owners, and all navigations whereon tolls are levied by Act of Parliament. Sect. 1. The Act provides against neglect of any company to afford facilities for traffic, or undue preference being shown by such company in favour of certain persons or traffic; sect. 2. No proceedings shall be taken for any violation of the above enactment except in the manner provided by the Act, but nothing therein is to take away any right, remedy, or privilege of any person against such company. Sect. 6. Hence it has been held that no action lies for the breach of the provisions of sect. 2; *Manchester &c., Ry. Co. v. Denaby Main Colliery Co.*, 54 L. J. Q. B. 102; 14 Q. B. D. 209; *Rhymney Ry. Co. v. Rhymney Iron Co.*, 59 L. J. Q. B. 414;

25 Q. B. D. 146; *Lancashire, &c., Ry. Co. v. Greenwood*, 58 L. J. Q. B. 16; 21 Q. B. D. 215; except, perhaps, after an adjudication by the railway commission that the company has been guilty of undue preference, for money subsequently extorted by the company. See *Id.*; *Denaby Main Colliery Co. v. Manchester, &c., Ry. Co.*, 55 L. J. Q. B. 181; 11 App. Cas. 97, 112. The section imposes an obligation on the company to provide reasonable facilities for carrying animals and other classes of goods which they are not bound to convey as common carriers. See *Dickson v. Gt. N. Ry. Co.*, 56 L. J. Q. B. 111; 18 Q. B. D. 176; *Sutcliffe v. G. W. Ry.*, 79 L. J. K. B. 437; [1910] 1 K. B. 478. In such a case the liability of the company is neither that of a common carrier nor that of a bailee for reward, but is that which is defined by the statute. S. C. (*per* Buckley, L.J.). This Act has been extended to the steam vessels of a railway company, and the traffic carried on thereby, where the railway has been constructed by a special Act, passed after July 28th, 1863, incorporating the Railway Clauses Act, 1863, 26 & 27 V. c. 91. See *Id.* s. 31. It applies even where the carriage is wholly by sea in the railway company's steamer. *Jenkins v. Gt. Central Ry.*, 81 L. J. K. B. 24; [1912] 1 K. B. 1.

The Regulation of Railways Act, 1873 (36 & 37 V. c. 48), ss. 11 *et seq.*, extended the provisions of 17 & 18 V. c. 31; and sect. 6 dealt with the jurisdiction of the Railway Commissioners. By the Railway and Canal Traffic Act, 1888 (51 & 52 V. c. 25), the jurisdiction of these Commissioners has been, by sect. 8, transferred to the Railway and Canal Commission.

By 17 & 18 V. c. 31, s. 7, every company, &c., shall be liable for loss of or injury to any horses, cattle or other animals, or to any articles, goods, or things, in receiving, forwarding, or delivering thereof, occasioned by the neglect or default of the company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability; and every such notice, condition, or declaration is declared to be null and void. Provided that nothing therein shall be construed to prevent such companies from making such conditions with respect to receiving, forwarding, and delivering such animals, articles, &c., as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable. The section further provides certain limits to damages recoverable for loss or injury to any such animals (namely, a horse, £50; neat cattle, £15 each; sheep and pigs, £2 each), unless the person sending or delivering the same to the company shall, at the time of delivering, have declared them to be of higher value, in which case the company may charge a reasonable percentage on the excess of value above the limited sum, to be paid in addition to the ordinary charge, such percentage to be notified in the manner prescribed by the Carriers Act, s. 2, and to be binding on the company as therein mentioned. Proof of the value and amount of injury is to lie on the claimant. No special contract between the company and the other parties respecting the receiving, forwarding, or delivering of any goods, &c., shall be binding on or affect such party, unless it be signed by him or the person delivering the goods for carriage. Nothing in the Act is to alter or affect the rights or liabilities of the company under the Carriers Act, with respect to the articles mentioned in that Act.

Sect. 7 applies only to loss occasioned by the negligence of the company or default in the nature of negligence, or within the scope of the servant's employment. Theft by the company's servants, without negligence on the part of the company, is not within it. *Shaw v. Gt. W. Ry. Co.*, [1894] 1 Q. B. 373.

The language of sect. 7 differs much from that of the Carriers Act. The word "public" is not inserted before the word "notice," but it is now settled that "general notices to limit the liability shall be null and void; but the parties may make special contracts with the companies, provided those contracts are adjudged by the court to be just and reasonable, and provided they be signed by the parties." *Simons v. Gt. W. Ry. Co.*,

18 C. B. 805, 829; 26 L. J. C. P. 25, 32, *per* Jervis, C.J. *Accord.* *M'Manus v. Lancashire & Yorkshire Ry. Co.*, 28 L. J. Ex. 353; 4 H. & N. 327, and *Peek v. N. Staffordshire Ry. Co.*, 32 L. J. Q. B. 241; 10 H. L. C. 473. The section only applies to carriage of goods over lines which the company are working themselves, and not to contracts by the company to carry over other lines. *Zunz v. S. E. Ry. Co.*, L. R. 4 Q. B. 539; 38 L. J. Q. B. 209. But where the company contract to carry over their own as well as other lines, they must prove that the loss did not occur on their line, in order to avail themselves of a condition of non-liability. *Kent v. Midland Ry. Co.*, 44 L. J. Q. B. 18; L. R. 10 Q. B. 1. See also *Flowers v. S. E. Ry. Co.*, 16 L. T. 329.

In *Simons v. Gt. W. Ry. Co.*, 18 C. B. 805; 26 L. J. C. P. 25, the Court held that a condition exempting a company from liability for loss, detention, or damage, if goods were improperly packed, was unreasonable. *Accord.* *Garton v. Bristol & Exeter Ry. Co.*, 1 B. & S. 112; 30 L. J. Q. B. 273, where an action was held to lie for refusing to carry unless the plaintiff signed that condition. But a company may stipulate not to be liable for loss or damage, "however caused," in a contract to carry at a special or mileage rate. *Simons v. Gt. W. Ry. Co.*, *supra*. If the particular condition relied on by the company to protect them in the particular case be a reasonable one, the unreasonableness of other conditions in the contract, not relied on, is not material. *Per Cur.*, S. C. The Act makes the question of reasonableness one of law, and not of fact. *Per Cur.*, S. C.; *Gt. W. Ry. Co. v. McCarthy*, 56 L. J. P. C. 33; 12 App. Cas. 218.

A special contract professing to protect a company from damage to horses, "however occasioned," is not reasonable; *M'Manus v. Lancashire & Yorkshire Ry. Co.*, 4 H. & N. 327; 28 L. J. Ex. 353; *M'Canse v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J. Ex. 65; 3 H. & C. 343; 34 L. J. Ex. 39; *Doolan v. Midland Ry. Co.*, 2 App. Cas. 792; *Ashendon v. L. Brighton & S. Coast Ry. Co.*, 5 Ex. D. 190. Conditions annexed by a railway company to its "cattle tickets," that the company should not be liable for damage to cattle from any cause whatever, "it being agreed that the animals are to be carried at the owner's risk, and that the owner of the cattle is to see to the efficiency of the waggon before his stock is placed therein; complaint to be made in writing to the company's officer before the waggon leaves the station," are not reasonable; *Gregory v. W. Midland Ry. Co.*, 2 H. & C. 944; 33 L. J. Ex. 155; even though the owner is allowed a free pass for a man to take care of the cattle. *Rooth v. N. E. Ry. Co.*, 36 L. J. Ex. 83; L. R. 2 Ex. 173. But a declaration in such a contract that the horses sent thereunder did not exceed £10 in value, binds the sender. *M'Canse v. L. & N. W. Ry. Co.*, *supra*. A railway company gave the plaintiff a printed notice, that it would only carry marbles, subject to the conditions therein stated, one of which was that it would not be responsible for any loss or injury *unless* the marbles were *declared and insured according to their value*. With knowledge of these conditions the plaintiff instructed the company by letter, to forward them "not insured," which it did, and the marbles were injured,—it was held, though there was no wilful default or neglect found, that the company were liable, and that the condition was neither just nor reasonable, for the effect of such a condition would be to exempt the company from responsibility for injury, however caused, whether by its own negligence, or even by fraud or dishonesty on the part of its servants. *Peek v. N. Staffordshire Ry. Co.*, 10 H. L. C. 473; 32 L. J. Q. B. 241. The conditions must be embodied in a special contract signed by the party, otherwise they will not bind him. Thus the above letter was held not to constitute a special contract in writing, the words "not insured" being insufficient, either expressly or by reference, to embody the above condition. S. C. Where, however, the defendant has been in the habit of conveying the plaintiff's goods on certain printed conditions exempting the defendant from liability, and known as "owner's risk," a memorandum signed by the

plaintiff, "Please receive and forward," &c.; "owner's risk," is a sufficient contract, and evidence of the terms is admissible. *Lewis v. Gt. W. Ry. Co.*, 47 L. J. Q. B. 131; 3 Q. B. D. 195. Where an agent who is employed to deliver cattle to be sent by a railway company signs the consignment note, he must be taken to have known the contents and thereby binds his principal. *Kirby v. Gt. W. Ry. Co.*, 18 L. T. 658; *Gt. W. Ry. Co. v. McCarthy*, 56 L. J. P. C. 33; 12 App. Cas. 218.

Where a special contract provided that the company should not be liable for damage to horses conveyed, and a horse was injured in consequence of its being left without food all night in a box at the station, there being no one to receive it on its arrival; held, that the company was not liable; and *semble*, the damage being the fault of the sender or the consignee, in not providing for the reception of the horse, the defendants would not be responsible, independently of the special contract. *Wise v. Gt. W. Ry. Co.*, 1 H. & N. 63; 25 L. J. Ex. 258. A condition exempting the company from liability "in respect of any loss or detention of or injury to cattle" in the receiving, forwarding, or delivery thereof, except on proof that it arose from the wilful misconduct of the company's servants, does not protect the company from liability for a wrongful detention at the end of the transit under a mistaken claim for unpaid freight. *Gordon v. Gt. W. Ry. Co.*, 51 L. J. Q. B. 58; 8 Q. B. D. 44. Where cattle were accidentally smothered by the fall of the lid of a van in which they were carried on a railway, and the van was not objected to by the drover, who was allowed a free pass to accompany the cattle, it was held, that a special contract exempting the company from liability for loss or damage from suffocation, or any other cause, was reasonable, and would protect them; and *semble*, even without such contract, the company would not be liable under the above circumstances. *Pardington v. S. Wales Ry. Co.*, 1 H. & N. 392; 26 L. J. Ex. 105. On sending fish the plaintiff signed a condition, that, as to fish, the company should not be responsible under any circumstances for loss of market, or other loss or injury arising from delay or detention of trains, or from any other cause whatever, other than *gross neglect* or fraud; the fish arrived too late for the market they were intended for, but the cause of the delay was not shown; it was held that the condition was reasonable, and protected the defendants. *Beal v. S. Devon Ry. Co.*, 5 H. & N. 875; 29 L. J. Ex. 441. The decision was affirmed in Ex. Ch. 3 H. & C. 337; the court holding the condition reasonable, as it left the company liable in all cases where carriers are liable for gross negligence, that is, for want of reasonable care, skill, and expedition. So a condition that the company should not as to meat, &c., be liable for loss of market, provided they were delivered within a reasonable time, was held reasonable. *Lord v. Midland Ry. Co.*, 36 L. J. C. P. 170; L. R. 2 C. P. 339; see also *White v. Gt. W. Ry. Co.*, 2 C. B. (N. S.) 7; 26 L. J. C. P. 158. But a condition that the company should not be answerable for any consequences arising from over-carriage, detention, or delay in the conveying or delivering of cattle, *however caused*, was held unreasonable. *Allday v. Gt. W. Ry. Co.*, 5 B. & S. 903; 34 L. J. Q. B. 5.

In determining whether a condition is reasonable, the courts consider whether any reasonable alternative is offered to the customer, as of sending at a legal higher rate, not subject to the condition. In such case, even although the condition relieve the company from all liability, there is strong *prima facie* ground for holding it to be reasonable. *Brown v. Manchester, &c., Ry. Co.*, 53 L. J. Q. B. 124; 8 App. Cas. 703. See further *Lewis v. Gt. W. Ry. Co.*, 47 L. J. Q. B. 131; 3 Q. B. D. 195; and *Gt. W. Ry. Co. v. McCarthy*, 56 L. J. P. C. 33; 12 App. Cas. 218. An alternative offer to carry at the company's risk at a rate not exceeding the rate authorized by the company's Act, is reasonable. S. C. In the case of goods liable to damage, a condition that the company will not be liable for loss or damage resulting from their not being so protected is reasonable. *Sutcliffe v. Gt. W. Ry.*, 79 L. J. K. B. 437; [1910] 1 K. B. 478. A

condition that the company would not be liable beyond £2 for loss or injury to dogs carried, unless $1\frac{1}{2}$ per cent. on the declared value beyond £2 were paid, is reasonable. *Williams v. Midland Ry.*, 77 L. J. K. B. 157; [1908] 1 K. B. 252. *Secus*, where the alternative was to pay 5 per cent. *Dickson v. Gt. N. Ry.*, 56 L. J. Q. B. 111; 18 Q. B. D. 176.

A special contract made by a railway company which owns or uses steamers must be just and reasonable, whether the carriage is partly or wholly by its steamers. *Jenkins v. Great Central Ry.*, 81 L. J. K. B. 24; [1912] 1 K. B. 1; *Western Electric Co. v. Great Eastern Ry.*, 83 L. J. K. B. 1326; [1914] 3 K. B. 554. For a condition to be reasonable, the company must offer an alternative rate both as regards the sea transit and land transit. S. C.

A condition as to risk of luggage on a passenger's ticket is within sect. 7. *Cohen v. S. E. Ry. Co.*, 45 L. J. Ex. 298; 2 Ex. D. 253 (overruling *Stewart v. L. & N. W. Ry. Co.*, 3 H. & C. 135; 33 L. J. Ex. 199); *Wilkinson v. Lancashire, &c., Ry. Co.*, 76 L. J. Q. B. 801; [1907] 2 K. B. 222. Sect. 7 does not apply if the railway company does not receive the goods in the capacity of carriers, as where luggage was left at the defendants' cloak-room by a person who had been a passenger by the railway. *Van Toll v. S. E. Ry. Co.*, 12 C. B. (N. S.) 75; 31 L. J. C. P. 241.

Most of the above cases are cases relating to injury, which have happened after the contract for the carriage has been completely made; but the statute goes further. Sect. 7, in terms, applies to injuries in the receiving, forwarding, or delivering, and protects railway companies, beyond a certain amount, unless the value is declared. Where injury was done to a horse at a railway station by the negligence of the company, before the declaration of value had been made, or ticket taken, or fare demanded, it was held that this was an injury in the *receiving*, and the owner could not recover more than £50, even though it was the usual practice to put horses in their boxes before declaring their value or paying the fare. *Hodgman v. W. Midland Ry. Co.*, 5 B. & S. 173; 33 L. J. Q. B. 233; 6 B. & S. 560; 35 L. J. Q. B. 85.

A railway company cannot repudiate a special contract on the ground that it has not been signed by the consignor: the proviso in sect. 7 only applies to cases where the company seek to relieve themselves from liability, by reason of there being a special contract. *Baxendale v. Gt. E. Ry.*, 38 L. J. Q. B. 137; L. R. 4 Q. B. 244. As to the signature of a consignment note, see *Wade v. L. & N. W. Ry.*, 90 L. J. K. B. 593; [1921] 1 K. B. 582.

To entitle the company to demand the percentage under sect. 7, the sender must make a declaration of the value with the intention of paying the percentage; but the company is bound to carry at the ordinary rate without increased risk if the sender require it, even though the company have notice of the higher value of the animals. *Robinson v. L. & S. W. Ry. Co.*, 19 C. B. (N. S.) 51; 34 L. J. C. P. 234. The reasonableness of the percentage is a question for the jury. *Harrison v. L. Brighton & S. C. Ry. Co.*, 2 B. & S. 152, 167; 31 L. J. Q. B. 113, 119. The principle is not what profit it may be reasonable for the company to make, but what is reasonable to charge the party charged. See *Canada Southern Ry. Co. v. International Bridge Co.*, 8 App. Cas. 723. See further as to percentage for risk, *Williams v. Midland Ry. Co.*, 77 L. J. K. B. 157; [1908] 1 K. B. 252; and *Dickson v. Gt. N. Ry.*, 56 L. J. Q. B. 111; 18 Q. B. D. 176.

By sect. 14 of the Regulation of Railways Act, 1868 (31 & 32 V. c. 119), where a company, by through booking, contracts to carry any animals, luggage or goods, from place to place, partly by railway and partly by sea, or partly by canal and partly by sea, a condition exempting the company from liability for any loss or damage which may arise during the carriage of such animals, &c., by sea, from the act of God, the king's enemies, fire, accidents from machinery, boilers and steam, and all and every other dangers and accidents of the seas, rivers, and navigation, of

whatever nature and kind soever, shall, if published in a conspicuous manner in the office where such through booking is effected, and if printed in a legible manner on the receipt or freight note which the company gives for such animals, &c., be valid as part of the contract between the consignor of such animals, &c., and the company, in the same manner as if the company had signed and delivered to the consignor a bill of lading containing such condition. For the purposes of this section the word "company" includes the owner, lessees or managers of any canal or other inland navigation. See *The Stella*, 69 L. J. P. 70; [1900] P. 161.

By sect. 15 railway companies are to exhibit in their booking offices a table of the fares of passengers by the trains included in the time tables of the company, from that station to every place for which passenger tickets are there issued.

Sect. 16: "Where a company is authorized to build, or buy, or hire, and to use, maintain, and work, or to enter into arrangements for using, maintaining, or working steam vessels for the purpose of carrying on a communication between any towns or ports, and to take tolls in respect of such steam vessels, then and in every such case, tolls shall be at all times charged to all persons equally, and after the same rate, in respect of passengers conveyed in a like vessel, passing between the same places under like circumstances, and no reduction or advance in the tolls shall be made in favour of or against any person using the steam vessels, in consequence of his having travelled, or being about to travel, on the whole or any part of the company's railway, or not having travelled or not being about to travel, on any part thereof, or in favour of or against any person using the railway, in consequence of his having used or being about to use, or his not having used, or not being about to use; the steam vessels; and where an aggregate sum is charged by the company for conveyance of a passenger by a steam vessel and on the railway, the ticket shall have the amount of toll charged for conveyance by the steam vessel distinguished from the amount charged for conveyance on the railway."

Sect. 18: "Where two railways are worked by one company, then in the calculation of tolls and charges, for any distances in respect of traffic (whether passengers, animals, goods, carriages, or vehicles), conveyed on both railways, the distances traversed shall be reckoned continuously on such railways, as if they were one railway."

This Act is extended by 34 & 35 V. c. 78.

The equality clauses did not, under 17 & 18 V. c. 31, originally apply to steamers worked by railway companies. *Branley v. S. E. Ry. Co.* 12 C. B. (N. S.) 63; 31 L. J. C. P. 286. The Act was, however, extended to them in certain cases by 26 & 27 V. c. 91, s. 31.

The Regulation of Railways Act, 1871 (34 & 35 V. c. 78).] By sect. 12, where railway companies under contract to carry passengers or goods by sea, procure the same to be carried in a vessel not belonging to them, they are liable for loss or damage to the same extent as though the vessel had belonged to them.

This section extends the provisions of 31 & 32 V. c. 119, s. 16, to the carriage of goods which the company contract to carry, but procure to be carried in ships not belonging to them.

Who should be plaintiff.] The proper person to sue, as plaintiff, is the person in whom the property was vested, when lost or damaged. Hence, the consignee is usually the proper plaintiff, because delivery of goods to the carrier commonly vests the property in the consignee. *Dunlop v. Lambert*, 6 Cl. & F. 600; *Fragano v. Long*, 4 B. & C. 219; *Dawes v. Peck*, 8 T. R. 330. But where there is a special contract between the consignor and carrier, the consignor may be plaintiff, and the ownership is immaterial. *Dunlop v. Lambert, supra*. See also *Gt. W. Ry. Co. v. Bagge*, 54 L. J. Q. B. 599; 15 Q. B. D. 625. If the consignment do not change the property,

as where goods are sent on approval, the consignor should sue; *Swain v. Shepherd*, 1 M. & Rob. 223; or where the sale is insufficient to bind the vendee under the Sale of Goods Act, 1893. *Coats v. Chaplin*, 11 L. J. Q. B. 315; 3 Q. B. 483; *Coombs v. Bristol & Exeter Ry. Co.*, 3 H. & N. 510; 27 L. J. Ex. 401. On the other hand, where there is a contract between the consignee and the carrier, so that the former is liable to the latter for the freight, the consignee may sue. *Mead v. S. E. Ry. Co.*, 18 W. R. 735.

Where a single box containing the separate property of A. and B. is delivered to the carrier by a joint agent, A. and B. may join in the action. *Metcalf v. L. & Brighton Ry. Co.*, 4 C. B. (N. S.) 317; 27 L. J. C. P. 333. A special property is sufficient to support the action. Thus, a laundress may sue a carrier employed by her, who loses the linen returned by her through him. *Freeman v. Birch*, 3 Q. B. 492, n.

Proof of delivery to defendant.] In an action against the proprietor of a stage coach for the loss of a parcel, it is sufficient to prove the delivery of the parcel to the driver. *Williams v. Cranston*, 2 Stark. 82. A delivery of goods on the wharf, to some officer accredited for that purpose, as to the mate, binds the shipowner; *Cobban v. Downe*, 5 Esp. 41; *British Columbia, &c., Co. v. Nettleship*, 37 L. J. C. P. 235; L. R. 3 C. P. 499; or if the master receive goods at the quay or beach, or send his boat for them, the shipowner's responsibility commences with the receipt; *Abbott on Shipping*, 14th ed. 503; unless it appears that the consignee does not intend to trust the shipowner with the custody, as where he sends his own servant in charge of the goods, who has the exclusive management of them. *E. India Co. v. Pullen*, Str. 690. Where the only proof of delivery was that the goods were left at an inn-yard where defendant and other carriers put up, it was held to be insufficient. *Selway v. Holloway*, 1 Ld. Raym. 46. So, leaving goods at a wharf piled up among other goods, without communication with any one there, is not a delivery to the wharfinger. *Buckman v. Levi*, 3 Camp. 414. Where the ordinary course of business, at a railway office, was to accept goods, with a special limitation of liability, in writing, and this was known to the plaintiff, who nevertheless caused his goods to be left with a railway porter at the station, without complying with the regular course, and the porter received them, and they were lost: held, that the company was not liable as on contract, the delivery not being in due course, and the porter not being shown to have, or to have professed to have, power to contract with the plaintiff otherwise than in the ordinary course. *Slim v. Gt. N. Ry. Co.*, 14 C. B. 647; 23 L. J. C. P. 166. The company may hold out a porter as a person authorized to receive the plaintiff's luggage. *Soames v. L. & S. W. Ry.*, 88 L. J. K. B. 524. See also *Steers v. Midland Ry.*, 36 T. L. R. 703.

Proof of non-delivery by defendant.] Very slight evidence of non-delivery is sufficient to call upon the defendant to prove delivery. *Griffiths v. Lee*, 1 C. & P. 110; *Hawkes v. Smith*, Car. & M. 72. Whether the carrier is bound to deliver at the residence of the consignee seems to depend on the circumstances of each particular case. In the absence of any express contract or usage, carriers by land are bound to deliver the goods to, or at the house of, the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 389; *Storr v. Crowley*, M'Cl. & Y. 129; *Duff v. Budd*, 3 B. & B. 182, citing *Bodenham v. Bennett*, 4 Price, 31. And if it be the carrier's course of trade to deliver goods at the consignee's residence, he is clearly bound to do so. *Golden v. Manning*, 2 W. Bl. 916. Where goods are conveyed by sea, it seems to be sufficient for the captain to deposit them in some place of safety, and give notice to the consignee. See *Hyde v. Trent and Mersey Navigation Co.*, 5 T. R. 397. And he is bound to keep them a reasonable time until fetched, and is liable during that time. *Bourne v. Gatcliffe*, 3 M. & Gr. 643; 7 M. & Gr. 850. Although the consignor of goods directs

the carrier to deliver them at a certain place, the carrier may deliver them wherever he and the consignee agree; *L. & N. W. Ry. Co. v. Bartlett*, 7 H. & N. 400; 31 L. J. Ex. 92; and in such a case the carrier is not liable to an action by the consignor for not delivering at such place, as the non-delivery was pursuant to the orders of the consignee. S. C.; *Cork Distilleries Co. v. Gt. S. & W. Ry. Co.*, L. R. 7 H. L. 269. But *semble*, where there is a special contract between the carrier and the consignor, he may sue the carrier for breach thereof. S. C. If the carrier deliver the goods at the place directed, in accordance with the ordinary usage, he has fulfilled his obligation, although he has delivered them to a person the sender did not intend. *M'Kean v. M'Ivor*, 40 L. J. Ex. 30; L. R. 6 Ex. 36. If the consignee refuse to receive the goods, and the carrier put them into his warehouse, he is not bound as a carrier to give notice to the consignor of the refusal; it is a question for the jury "whether the carrier has done what is reasonable under the circumstances." *Hudson v. Baxendale*, 2 H. & N. 575; 27 L. J. Ex. 93. *Quære*, if the carrier be bound to keep possession of them after refusal. S. C. In an action for non-delivery of a parcel, it appeared that, on refusal of the plaintiff, the consignee, to pay the carriage, the company had sent it back forthwith to a distant terminus where it had been first delivered to them, and took no further step; held, that they ought to have kept it for the consignee a reasonable time, and that, on tender of the charges the next day, plaintiffs might sue defendants. *Crouch v. Gt. W. Ry. Co.*, 2 H. & N. 491; 26 L. J. Ex. 418; 3 H. & N. 183; 27 L. J. Ex. 345. Where the consignee makes default in receiving the goods, the carrier is entitled to recover from him the expenses reasonably incurred in taking care of them. *Gt. N. Ry. Co. v. Swaffield*, 43 L. J. Ex. 89; L. R. 9 Ex. 132. With regard to perishable goods, the power of the carrier to sell them depends upon two conditions—(1) that a real necessity exists for the sale; and (2) that it is practically impossible to get the owner's instructions in time as to what should be done. *Per Scrutton, J., in Sims v. Midland Ry.*, 82 L. J. K. B. 67; [1913] 1 K. B. 103; *Springer v. G. W. Ry.*, 89 L. J. K. B. 1010; [1921] 1 K. B. 257.

The liability of a carrier continues till he delivers the goods or ceases to hold them, *quà* carrier. Therefore, where goods are destroyed by fire after they are deposited in the defendant's wharf, and before a reasonable time has elapsed for the plaintiff to fetch them, the defendant is liable. *Bourne v. Galliffe*, see above. And where the question is whether the goods have been delivered by the defendant at London, evidence is admissible to show what constitutes a delivery in London, according to the usage of that port; and former dealings between the plaintiff and defendant are evidence of such usage. S. C.

Where there has been a delivery by the carrier, actual or constructive, though the goods remain on his premises, he is no longer liable as carrier, but only as warehouseman, or on any special terms of bailment which he may choose to impose on the customer. See *Mitchell v. Lancashire & Yorkshire Ry.*, 44 L. J. Q. B. 107; L. R. 10 Q. B. 256. Thus, where cattle sent by railway were kept at the arrival station, by the direction of the owner's servant, until they could be removed according to the police regulations, the company were held not liable as carriers. *Shepherd v. Bristol & Exeter Ry.*, 37 L. J. Ex. 113; L. R. 3 Ex. 189. So where goods are carried, "to be left till called for," and the carrier does not know the consignee's address, and the consignee does not call for the goods within a reasonable time, the carrier becomes an involuntary bailee, and is liable only for negligence. *Chapman v. Gt. W. Ry.*, 49 L. J. Q. B. 420; 5 Q. B. D. 278. So, after refusal of the goods at the consignee's address. *Heugh v. L. & N. W. Ry.*, 39 L. J. Ex. 48; L. R. 5 Ex. 51.

The declarations of the coachman respecting the loss of a parcel are evidence against the coach proprietor. *Mayhew v. Nelson*, 6 C. & P. 58. So where in an action for not delivering a parcel sent by rail to V., the plaintiff, to a plea of the Carriers Act, replied felony of the company's

servants, the statements of the station-master at V. to the superintendent of police, with reference to the loss, and to the absconding of the parcel porter at V., are admissible in evidence. *Kirkstall Brewery Co. v. Furness Ry.*, 43 L. J. Q. B. 142; L. R. 9 Q. B. 468. But the statements of a night inspector at a railway station as to the detention of goods, which would pass through the station, and there be under the inspector's charge, were held to be inadmissible against the company. *Gt. W. Ry. v. Willis*, 18 C. B. (N. S.) 748; 34 L. J. C. P. 195.

If the carrier deliver the goods to a wrong person, he is liable in trover; *Stephenson v. Hart*, 4 Bing. 476; *aliter*, if only lost; *Ross v. Johnson*, 5 Burr. 2825.

Damages.] Where goods are sent from A. to B. and are lost, the consignee is entitled to their value at B., as distinguished from the place where they were delivered to the carrier. *Rice v. Baxendale*, 7 H. & N. 96; 30 L. J. Ex. 371. And in such case the measure of damages is, in general, the market value of the goods, at the place and time at which they ought to have been delivered; and if there be no market for the sale of such goods at the place, the jury must ascertain their value, by taking their price at the place of manufacture, together with the cost of carriage, and a reasonable sum for importer's profits. *O'Hanlan v. Gt. W. Ry.*, 6 B. & S. 484; 34 L. J. Q. B. 154; *Ströms Bruks Aktie Bolag v. Hutchison*, [1905] A. C. 515. Where the contract provided for delivery at a place where there is no market for them, damages for non-delivery are calculable with reference to the market at which the purchaser, as the vendor knew, intended to sell them, with allowance for the cost of carriage. *Wertheim v. Chicoutimi Pulp Co.*, 80 L. J. P. C. 91; [1911] A. C. 301. See this case considered in *Slater v. Hoyle & Smith*, 89 L. J. K. B. 401; [1920] 2 K. B. 11. The market value is to be estimated "independently of any circumstances peculiar to the plaintiff, and so independently of any contract made by him for the sale of the goods." *Rodocanachi v. Milburn*, 56 L. J. Q. B. 202; 18 Q. B. D. 67; approved in *Williams v. Agius*, 83 L. J. K. B. 715; [1914] A. C. 510, where, however, it was pointed out that *Rodocanachi v. Milburn* (*supra*) had no reference to late delivery of goods as distinguished from non-delivery. Where goods are delivered late, and the purchaser has sold them at a less price than the market price at the due date of delivery, he is only entitled to recover the difference between those two prices; on the other hand, if the purchaser has resold at a price in excess of that prevailing at the date of delivery, he must, in estimating his damages, give credit therefor. *Wertheim v. Chicoutimi Pulp Co.* (*supra*). Unpaid freight, for which the shipowner has a lien, is to be deducted from the market value, but not advanced freight. *Rodocanachi v. Milburn* (*supra*); *Dufourcet v. Bishop*, 57 L. J. Q. B. 497; 18 Q. B. D. 373.

The damages recoverable are either "such as may fairly and reasonably be considered arising naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it." *Hadley v. Baxendale*, 9 Ex. 341; 23 L. J. Ex. 179; see also *Cory v. Thames Iron Works Co.*, 37 L. J. Q. B. 68; L. R. 3 Q. B. 181, and *Elbinger Actien-Gesellschaft v. Armstrong*, 43 L. J. Q. B. 211; L. R. 9 Q. B. 473. Plaintiff being under contract to deliver coals at a certain time in a distant colony, engaged defendant to convey them, defendant being aware of the contract: held that, on failure of the defendant, he was liable to the extra expense of conveyance by other means, incurred by plaintiff, as special damage. *Prior v. Wilson*, 8 W. R. 260. And even where plaintiff was under no contract to deliver, a rise in price of coal at the pit's mouth, between the times when the defendant's ship should have been ready to take the coals on board, and when the plaintiff could obtain another ship to carry them, was held to be

prima facie recoverable in addition to extra freight; as by the custom of the colliery trade, the plaintiff was not able to secure a cargo, till he had vessels to carry it. *Featherston v. Wilkinson*, 42 L. J. Ex. 78; L. R. 8 Ex. 122. Where, owing to the delay of a month in the delivery of cloth by the defendants, which the plaintiff wanted immediately to make up into caps, the plaintiff lost the season, it was held that he could not recover, as damages, the loss of the profit he would have made by the sale of the caps, but that he could recover the amount of depreciation in the market value of the cloth owing to the lapse of the season. *Wilson v. Lancashire, &c., Ry. Co.*, 9 C. B. (N. S.) 632; 30 L. J. C. P. 232; see also *Gt. W. Ry. v. Redmayne*, 35 L. J. C. P. 123; L. R. 1 C. P. 329. So the plaintiff may recover the difference between the market price of hops, on the day when they ought to have been delivered, and the price when they were available for sale, owing to delay and damage caused by the defendants. *Collard v. S. E. Ry. Co.*, 7 H. & N. 79; 30 L. J. Ex. 393; see also *Gee v. Lancashire, &c., Ry. Co.*, 6 H. & N. 211; 30 L. J. Ex. 11. In an action for not delivering samples, which the carrier knew to be such, until the season had elapsed, by reason of which they had become valueless, it was held that their value to the plaintiffs, as samples, at the time they should have been delivered was recoverable. *Schulze v. Gt. E. Ry.*, 56 L. J. Q. B. 442; 19 Q. B. D. 30. So, in an action for not delivering samples in time for exhibition at a show, it was held that damages were recoverable for loss of estimated profits by reason of their not being exhibited, without evidence of the prospect of profits at the particular show. *Simpson v. L. & N. W. Ry.*, 45 L. J. Q. B. 182; 1 Q. B. D. 274. See, further, as to the recovery and estimation of damages dependent on contingencies. *Chaplin v. Hicks*, 80 L. J. K. B. 1292; [1911] 2 K. B. 786.

In order to recover damages for non-sale, owing to delay in carrying, there must have been an actual contract to buy for a price. *Hart v. Baxendale*, 16 L. T. 390. Loss of a beneficial sub-contract cannot be recovered without notice to the carrier of the special terms thereof; *Horne v. Midland Ry.*, 42 L. J. C. P. 59; L. R. 7 C. P. 583; L. R. 8 C. P. 131; and it seems that a mere notice of such sub-contract will not be sufficient, unless it be given under such circumstances as to make it a term of the contract that the carrier will, on breach thereof, be liable for such loss. S. C., L. R. 8 C. P. 139, 141, 145; *British Columbia, &c., Sawmill Co. v. Nettleship*, 37 L. J. C. P. 235; L. R. 3 C. P. 499, 509. Loss of hire of goods, sent for hire, cannot be recovered unless the carrier had notice that they were sent for that purpose. *Hales v. L. & N. W. Ry.*, 4 B. & S. 66; 32 L. J. C. P. 292. The plaintiffs delivered to the defendants machinery intended for the erection of a saw-mill at Vancouver's Island; the defendants knew generally of what the shipment consisted; part was lost, so that the mill could not be erected, and the plaintiffs had to send to England to replace the loss: held, that the measure of damages was the cost of replacement in Vancouver's Island, with interest at 5 per cent. upon the amount until judgment. *British Columbia, &c., Sawmill Co. v. Nettleship, supra*. Even in the case of the carriage of goods by ship, damages for loss of market are recoverable where the state of the market at the time of arrival was a factor in the contract between the parties. *Dunn v. Bucknall Bros.*, 71 L. J. K. B. 963; [1902] 2 K. B. 614, explaining *The Parana*, 2 P. D. 118.

Where, by reason of a refusal to carry, or of non-delivery or delay by a railway company, a carrier, who uses the railway for his parcels, is injured in his own business as a carrier, such injury is too remote to be considered in damages. *Semb. Crouch v. Gt. N. Ry.*, 11 Ex. 743; 25 L. J. Ex. 137. The hotel expenses of the plaintiff, a commercial traveller, while he was waiting for the goods, which the defendants ought to have delivered, were held to be too remote to be recovered. *Woodger v. Gt. W. Ry.*, 36 L. J. C. P. 177; L. R. 2 C. P. 318. A carrier, B., contracted with A. to carry A.'s goods, and B. sent them by an independent carrier, C., who injured them in transit whereby B. was compelled to pay damages in an action

brought against him by A. B. gave notice to C. of the claim and action, but C. declined to interfere. It was held that B. could not recover from C. the costs of that action. *Baxendale v. L., Chatham & Dover Ry.*, 44 L. J. Ex. 20; L. R. 10 Ex. 35. Where hales of rags were sent for carriage without notice to the carrier that they were damp, and, in consequence only of their being damp, delay in carriage caused them to heat, and become worthless, the carrier was held liable to nominal damages only. *Baldwin v. L., Chatham & Dover Ry. Co.*, 9 Q. B. D. 582.

The cases on the measure of damages are collected and discussed in the notes to *Vicars v. Wilcocks*, 2 Smith's L. C., 12th ed. 513.

When the plaintiff has made a false declaration of the value of horses, in order to induce a railway company to carry them on lower terms, and they are injured by the company's negligence, he cannot recover more than the declared value. *M'Cance v. L. & N. W. Ry. Co.*, 7 H. & N. 477; 31 L. J. Ex. 65; 3 H. & C. 343; 34 L. J. Ex. 39. The defendants had in this case admitted liability by payment into court; but *quære* if they were liable at all?

Defence.

By Rules, 1883, O. xix. r. 15, the defendant must plead specially all facts not previously stated, on which he relies, and must raise all such grounds of defence as, if not pleaded, would be likely to take the plaintiff by surprise; and r. 17 provides that the defendant shall not deny generally the allegations in the statement of claim. By r. 20 a bare denial denies the making of the contract in point of fact only, and not its sufficiency in point of law. A defence arising under the Carriers Act, s. 1, must therefore be specially pleaded. *Syms v. Chaplin*, 5 Ad. & E. 634. A carrier may, by his defence, set up the title of a third person, who has claimed and retaken the goods. *Sheridan v. New Quay Co.*, 4 C. B. (N. S.) 649, 650; 28 L. J. C. P. 58. See *Clough v. L. & N. W. Ry.*, 41 L. J. Ex. 17; L. R. 7 Ex. 26.

Loss by plaintiff's own default.] It is questionable how far, and under what circumstances, it is a defence that a parcel was lost by the default of the plaintiff himself. It has been considered that, where the gist of the action is negligence and non-performance of duty, so as to be founded on tort rather than contract, this may be a defence. See *Webb v. Page*, 12 L. J. C. P. 327; 6 M. & Gr. 196; *Martin v. Gt. N. Ry.*, 16 C. B. 179; 24 L. J. C. P. 209; and *Burrows v. March Gas Co.*, 39 L. J. Ex. 33; 41 L. J. Ex. 46; L. R. 5 Ex. 67; L. R. 7 Ex. 96. Goods that are brittle, or liable to injury, must be safely packed by the consignor, or the carrier will not be liable for injury done to them in carriage, if he have used due care. *Hart v. Baxendale*, 16 L. T. 390. If the consignor have fraudulently concealed the value and risk from the carrier, in order to pay a lower rate of freight, he can maintain no action for a loss thus occasioned by his own fault. *Gibbon v. Paynton*, 4 Burr. 2298; *Bradley v. Waterhouse*, 3 C. & P. 318; M. & M. 154; *Batson v. Donovan*, 4 B. & A. 21; see *Sleat v. Fagg*, 5 B. & A. 347, *per* Abbott, C.J.; and *M'Cance v. L. & N. W. Ry.*, 31 L. J. Ex. 65; 34 L. J. Ex. 39; 7 H. & N. 477; 3 H. & C. 343. So, although the consignor is not in general bound to volunteer information as to the nature of the goods, yet, if he intentionally make false answers to the carrier's inquiries, there is fraud which avoids the contract. *Walker v. Jackson*, 10 M. & W. 168, 169. In cases where this is a defence, the fact should be specially pleaded, unless the particular issue taken be such as to make the evidence relevant to it.

As to the warranty by the consignor that the goods are fit to be carried, and not dangerous or not likely to entail delay, see *Bumfield v. Goole, &c., Transport Co.*, 79 L. J. K. B. 1070; [1910] 2 K. B. 94; and *Mitchell, Cotts & Co. v. Steel*, 85 L. J. K. B. 1747; [1916] 2 K. B. 610.

LETTER CARRIERS.

The Postmaster-General is not a common carrier, and he is not liable for the neglect or default of his subordinate officers. *Lane v. Cotton*, 1 Ld. Raym. 646; 1 Salk. 17; *Whitfield v. Le Despencer (Lord)*, Cowp. 754. But the postmaster and his servants are each of them liable for their own personal negligence. S. CC. His liability has not been extended by the Telegraph Act, 1868 (31 & 32 V. c. 110), and *Id.* 1878 (41 & 42 V. c. 76), under which the undertakings of the telegraph companies have been transferred to him. *Bainbridge v. Postmaster-General*, 75 L. J. K. B. 366; [1906] 1 K. B. 178.

When a postmaster detains letters until the payment to him of more than the legal postage, an action for money had and received, for the money so illegally extorted, may be maintained against him; *Smith v. Dennis*, Lofft, 753; *Barnes v. Foley*, 4 Burr. 2149; 5 *Id.* 2711; *Smith v. Powditch*, Cowp. 182; or an action on the case for such detention. *Rownting v. Goodchild*, 3 Wils. 443; 2 W. Bl. 906; *Stock v. Harris*, 5 Burr. 2709; see also *Hamilton v. Clancy*, [1914] 2 Ir. R. 514. As to the liability of a company which undertakes to carry letters, &c., see *Long v. District Messengers, &c., Co.*, 32 T. L. R. 596.

PASSENGER CARRIERS.

Carriers of passengers stand on a different footing from carriers of goods. They are not insurers of the person, and are responsible only for want of due care. *Christie v. Griggs*, 2 Camp. 81; 2 Kent, Com. 600; *E. Indian Ry. Co. v. Mukerjee*, 70 L. J. P. C. 63; [1901] A. C. 396; *Readhead v. Midland Ry.*, 38 L. J. Q. B. 169; L. R. 4 Q. B. 379. Hence they do not warrant that their carriages are roadworthy, and they are not liable to a passenger for an accident caused by hidden defect in the carriage, which could not be guarded against, in the process of construction, or by subsequent observation. S. C. They are, however, liable for defects in the carriage caused by the negligence of their sub-contractors. See *Francis v. Cockrell*, 39 L. J. Q. B. 291; L. R. 5 Q. B. 501. So where the defects are in the condition of the way. *Birmingham City Tramways Co. v. Law*, 80 L. J. K. B. 80; [1910] 2 K. B. 965. As to their liability for an accident, caused by the defects in a carriage of another company, sent for transit over their line, see *Richardson v. Gt. E. Ry.*, 1 C. P. D. 342. If a railway company choose to contract to carry passengers, not only over their own line, but also over the line of another company, either in whole or in part, the company so contracting incurs all the liability which would attach to them, if they had contracted solely to carry over their own line. *Per Cockburn, C.J.*, in *Gt. W. Ry. v. Blake*, 7 H. & N. 991; 31 L. J. Ex. 346; *Buxton v. N. E. Ry.*, 37 L. J. Q. B. 258; L. R. 3 Q. B. 549; *Thomas v. Rhymney Ry.*, 40 L. J. Q. B. 89; L. R. 6 Q. B. 266. See also *John v. Bacon*, 39 L. J. C. P. 365; L. R. 5 C. P. 437. The issuing by a railway company of a through ticket is evidence of such contract with the first company. S. CC. But they are not liable for the negligence, or wrongful act of third persons, over whom they have no control. *Wright v. Midland Ry.*, 42 L. J. Ex. 89; L. R. 8 Ex. 137. An adult passenger may contract to be carried at his own risk, and the carrier will not then be liable for injury, even though caused by negligence; *McCawley v. Furness Ry.*, 42 L. J. Q. B. 4; L. R. 8 Q. B. 57; *Gallin v. L. & N. W. Ry.*, 44 L. J. Q. B. 89; L. R. 10 Q. B. 212; and the condition will exonerate from liability any company on whose line the passenger is carried in the course of the journey. *Hall v. N. E. Ry.*, 44 L. J. Q. B. 164; L. R. 10 Q. B. 437. But a contract by an infant to be carried without right of claim for damage caused by negligence is so much to his detriment as to be void. *Flower v. L. & N. W. Ry.*, 63 L. J. Q. B. 547; [1894] 2 Q. B. 65. A passenger who has no notice of a

condition, printed on the back of a ticket, taken by him in the usual way, and which has no reference thereto on the face of it, is not bound thereby. *Henderson v. Stevenson*, L. R. 2 H. L. Sc. 470. Where the passenger knows generally that there are conditions on the back of the ticket, but does not know what they are, he is bound by the conditions. See *Parker v. S. E. Ry.*, 46 L. J. C. P. 768; 2 C. P. D. 416; *Grand Trunk Ry. v. Robinson*, 84 L. J. P. C. 194; [1915] A. C. 740. If the carrier takes all reasonable steps to bring the existence of conditions to the knowledge of the passenger, the latter is bound by them. *Hood v. Anchor Line*, 87 L. J. P. C. 156; [1918] A. C. 837. Cf. *Williamson v. North of Scotland, &c., Co.*, [1916] S. C. 554, where the smallness of the type in which the conditions were printed, and the absence of any device drawing attention to them, prevented the carrier from relying on the conditions. If he knew that there was writing on the ticket, but did not know or believe it contained conditions, the question for the jury is whether the defendants have done what was reasonably sufficient to give him notice of the conditions. *Parker's Case*, *supra*. *Richardson v. Rowntree*, 63 L. J. Q. B. 283; [1894] A. C. 217. Where, however, the ticket consisted of a book of paper coupons, with conditions inside, which would have been seen on opening the book, it was held that the whole book was the contract, and the plaintiff could not reject the conditions, although he did not know them. *Burke v. S. E. Ry.*, 49 L. J. C. P. 107; 5 C. P. D. 1. See also *Watkins v. Rymill*, 52 L. J. Q. B. 121; 10 Q. B. D. 178.

Where a master takes a ticket for his servant the contract is with the master: and he can sue the carrier for not carrying the servant within a reasonable time. *Jenning v. Gt. N. Ry.*, 35 L. J. Q. B. 15; L. R. 1 Q. B. 7. Where, however, the servant takes the ticket for a journey by himself, although on his master's service, the contract is with the servant and the master cannot sue thereon. *Alton v. Midland Ry.*, 19 C. B. (N. S.) 213; 34 L. J. C. P. 292; *Becher v. Gt. E. Ry.*, 39 L. J. Q. B. 122; L. R. 5 Q. B. 241. He can, however, sue the carrier for a tort independent of the contract. *Berringer v. Gt. E. Ry.*, 48 L. J. C. P. 400; 4 C. P. D. 163. See also *Meux v. Gt. E. Ry.*, 64 L. J. Q. B. 657; [1895] 2 Q. B. 387.

In the case of passengers a duty arises on the part of the carrier to convey them with due care, even although the contract of carriage was made with another person. *Austin v. Gt. W. Ry.*, 36 L. J. Q. B. 201; L. R. 2 Q. B. 442. So with respect to the luggage of the passenger. *Marshall v. York & Newcastle Ry.*, 11 C. B. 655; 21 L. J. C. P. 34; *Martin v. Gt. Indian Peninsular Ry.*, 37 L. J. Ex. 27; L. R. 3 Ex. 9; see also *Meux v. Gt. E. Ry. Co.*, 64 L. J. Q. B. 657; [1895] 2 Q. B. 387, and *White v. Steadman*, 82 L. J. K. B. 846; [1913] 3 K. B. 340.

The mere taking of a passenger's ticket from A. to B. is evidence of a contract to convey the passenger within a reasonable time from A. to B., but not that the train shall arrive at the time it is expected; *Hurst v. Gt. W. Ry.*, 19 C. B. (N. S.) 310; 34 L. J. C. P. 264; but the publication of the time bills of the company will amount to a promise that a train will leave A. for B. as advertised, for the conveyance of any person who regularly applies for a ticket and tenders the proper fare, although part of the line of railway belongs to a different company; such publication will also render the company liable for damages occasioned to the plaintiff by the representation, if such train do not in fact run; *Denton v. Gt. N. Ry. Co.*, 5 E. & B. 800; 25 L. J. Q. B. 129; or if there be not room in the train for the plaintiff to whom the company have issued a ticket. *Gt. N. Ry. v. Hawcroft*, 21 L. J. Q. B. 178. Where the time tables state that "every attention will be paid to insure punctuality so far as it is practicable; but the departure or arrival of the trains will not be guaranteed, nor will the company hold themselves responsible for delay or any consequences arising therefrom," there is a contract to use due attention to keep the times specified as far as reasonably possible, having regard to all the circumstances. *Le Blanche v. L. & N. W. Ry.*, 45 L. J. C. P. 521; 1 C. P. D. 286.

A passenger who has taken a ticket for a journey on the defendant's railway, under a condition to show and deliver it up when required, and on failure to do so to pay the fare from the station whence the train originally started, cannot on failure to produce the ticket to the company's servants lawfully be removed by them from the carriage in which he is travelling. *Butler v. Manchester, &c., Ry.*, 57 L. J. Q. B. 564; 21 Q. B. D. 207. And now see Regulation of Railways Act, 1889 (52 & 53 V. c. 57), s. 5; and *Ormiston v. G. W. R.*, 86 L. J. K. B. 759; [1917] 1 K. B. 598. If the company justify their breach of a contract to carry on the ground that the passenger has not complied with the conditions of a bye-law, they must show that they have strictly observed the bye-law on their part. *Jennings v. Gt. N. Ry.*, 35 L. J. Q. B. 15; L. R. 1 Q. B. 7.

A common carrier of passengers is bound, according to his profession, to carry all passengers who offer themselves in a fit and proper condition to be carried, provided there is accommodation for them and they are ready and willing to pay the published fare. He cannot impose a condition limiting his liability for negligence without giving passengers the option of travelling at a higher charge without such conditions. See *per* Farwell and Kennedy, L.J.J., in *Clarke v. West Ham Corporation*, 79 L. J. K. B. 56; [1909] 2 K. B. 858. The carrier may hold himself out as a common carrier in respect of part only of the route. *Baker v. Ellison*, 83 L. J. K. B. 1335; [1914] 2 K. B. 762. In that case omnibus proprietors were held not to have held themselves out as common carriers of passengers on the top of their omnibus on a part of the route.

Damages.] If in consequence of the wrongful delay or erroneous information of the carrier, a passenger is reasonably obliged to hire another conveyance, or stop a night on the road, the expenses may be recovered; but the jury cannot give *general* damages for consequent derangement or loss of business, trouble, or inconvenience. *Gt. N. Ry. v. Hawcroft*; *Denton v. Gt. N. Ry.*, *supra*; *Hamlin v. Gt. N. Ry.*, 1 H. & N. 408; 26 L. J. Ex. 20. See *Woodger v. Gt. W. Ry.*, 36 L. J. C. P. 177; L. R. 2 C. P. 318. To determine whether the expenditure so incurred by the plaintiff is reasonable, one test is to consider whether a person in the position of the plaintiff would have been likely to incur it if the delay had been occasioned by his own fault and not by that of the company. *Le Blanche v. L. & N. W. Ry.*, 45 L. J. C. P. 521, 530; 1 C. P. D. 286, 313, *per* Mellish, L.J. In this case the cost of a special train hired by the plaintiff was held not recoverable. Where a railway company instead of conveying the plaintiff to the station to which she had booked, turned her out on a wet night, where she could get no accommodation or conveyance, and in consequence she had to walk four miles home, whereby she was made ill and was hindered in her business, it was held that she was entitled to recover damages for the inconvenience she suffered; but not for the illness or its consequences, as these were too remote. *Hobbs v. L. & S. W. Ry.*, 44 L. J. Q. B. 49; L. R. 10 Q. B. 111. See, however, as to these damages being too remote, the observations in *McMahon v. Field*, 50 L. J. Q. B. 852; 7 Q. B. D. 591.

Passengers' luggage.] As respects a passenger's personal luggage given into the care of the company for carriage, under their control, it seems that a carrier of passengers is liable to the ordinary obligations of common carriers, though there may be no distinct contract for it. 2 Kent Com. 601; *Richards v. L., Brighton & S. C. Ry.*, 18 L. J. C. P. 251; 7 C. B. 839; *Macrow v. Gt. W. Ry.*, 40 L. J. Q. B. 300; L. R. 6 Q. B. 612; *Cohen v. S. E. Ry.*, 46 L. J. Ex. 417; 2 Ex. D. 253; *Gt. W. Ry. v. Bunch*, 57 L. J. Q. B. 361; 13 App. Cas. 31. In respect, however, of luggage which a railway passenger by his request takes in the carriage with him, the company are not liable as insurers for loss occasioned by the passenger's own default. *Talley v. Gt. W. Ry.*, 40 L. J. C. P. 9; L. R. 6 C. P. 44;

Gt. W. Ry. v. Bunch, *supra*, disapproving of *Bergheim v. Gt. E. Ry.*, 47 L. J. C. P. 318; 3 C. P. D. 221. But the company are bound, at the request of the passenger, to take charge of his personal luggage, and to convey it at their own risk. *Munster v. S. E. Ry. Co.*, 4 C. B. (N. S.) 676; 27 L. J. C. P. 308. Where the company provides servants to assist passengers to discharge their luggage on arrival, the liability of the company continues until the servants have done their duty; therefore, where a passenger took articles with him into a railway carriage, and on getting out put them in charge of a railway porter to carry to a cab for him, it was held that the company's duty as carriers continued until they were placed in a cab. *Richards v. L., Brighton & S. C. Ry.*, 18 L. J. C. P. 251; 7 C. B. 839. So, where the plaintiff held his bag in his hand and delivered it to a porter on the platform to take to a cab. *Butcher v. L. & S. W. Ry.*, 16 C. B. 13; 24 L. J. C. P. 137; *Soanes v. L. & S. W. Ry.*, 88 L. J. K. B. 524, where the defendants were held liable as having held out a porter as authorised to receive the plaintiff's luggage. See also *Steers v. Midland Ry.*, 36 T. L. R. 703. So where, on departure, luggage is given to a porter to be placed in the carriage with the passenger, the liability of the company as carriers continues until it is placed there; *Gt. W. Ry. v. Bunch*, *supra*; *secus*, where it has been given to a porter to take care of while the passenger's journey is suspended at his request. S. C. The company's duty is to have luggage given into their care for carriage, under their control, ready at the usual place of delivery till the passenger can, in the exercise of due diligence, call and receive it; the passenger's duty is to do so in a reasonable time. *Patscheidner v. Gt. W. Ry.*, 3 Ex. D. 153. But when the luggage has once been delivered to the passenger, the liability of the company ceases, although he afterwards left it in the care of the company's porter and it was lost. *Hodkinson v. L. & N. W. Ry.*, 14 Q. B. D. 228.

As to the right to sue for loss of luggage of a passenger when his ticket has been taken by another person, see *Marshall v. York and Newcastle Ry.*, 21 L. J. C. P. 34; 11 C. B. 655; *Martin v. Gt. Indian Peninsular Ry.*, 37 L. J. Ex. 27; L. R. 3 Ex. 9.

A carrier of passengers is liable only for the personal luggage of the passenger, and not for merchandise; and where a passenger by a railway carries merchandise as personal luggage, the company is not liable for the loss unless it be carried openly, so that its nature is obvious and no objection has been made by the company's servants. *Gt. N. Ry. v. Shepherd*, 8 Ex. 30; 21 L. J. Ex. 114, 286. In this last case there was no special contract, nor any limit imposed by the company's regulations except as to weight. If a passenger, knowing that the regulations of the company only entitle him to take personal luggage, take merchandise without notice to the company, he cannot afterwards claim to be compensated in respect of its loss; but if the company choose to take merchandise as luggage it does not lie in their mouth, if an article be lost, to say it is exempt from liability on the ground of the article being merchandise and not luggage. S. C.; *Cahill v. L. & N. W. Ry.*, 13 C. B. (N. S.) 818; 31 L. J. C. P. 271; *Belfast & Ballymena Ry. v. Keys*, 9 H. L. C. 556. The mere fact that a packet looks like merchandise, and is marked glass, is not enough to fix the company with knowledge that it is in fact merchandise, and so to make them responsible. S. CC. "Personal or ordinary luggage" means that class of articles which are ordinarily or usually carried by passengers as their luggage. *Hudston v. Midland Ry.*, 38 L. J. Q. B. 213; L. R. 4 Q. B. 366; *Macrow v. Gt. W. Ry.*, 40 L. J. Q. B. 300; L. R. 6 Q. B. 612. Sketches and drawings carried by an artist among his personal luggage are not within the term "ordinary luggage" of a certain weight, usually carried free of charge on railways; *Mytton v. Midland Ry.*, 4 H. & N. 615; 28 L. J. Ex. 385; nor are title deeds and money for use in certain causes in which the plaintiff was engaged as a solicitor; *Phelps v. L. & N. W. Ry.*, 19 C. B. (N. S.) 321; 34 L. J. C. P. 259; nor bedding for the use of the plaintiff's household when he shall have provided himself with a home;

Macrow v. Gt. W. Ry., *supra*; nor a loose bicycle. *Britten v. Gt. N. Ry.*, 68 L. J. Q. B. 75; [1899] 1 Q. B. 243. A revolver, binoculars, and flash lamps were held to be personal luggage of an army officer. *Jenkyne v. Southampton, &c., Co.*, 88 L. J. K. B. 965. Theatrical costumes were held not to be the "personal luggage" of a comedian in *Gilbey v. G. N. Ry.*, 36 T. L. R. 562. Where a servant takes as his ordinary luggage that of his master, the latter cannot sue for loss of it. *Becher v. Gt. E. Ry.*, 39 L. J. Q. B. 122; L. R. 5 Q. B. 241.

The Railway and Canal Traffic Act, 1854, s. 7, applies to passengers' luggage. *Cohen v. S. E. Ry.*, 46 L. J. Ex. 417; 2 Ex. D. 253, and *Wilkinson v. Lancashire, &c., Ry.*, 76 L. J. K. B. 801; [1907] 2 K. B. 222. So also does the Carriers Act, 1830, ss. 1, 2. *Casswell v. Cheshire Lines Committee*, 76 L. J. K. B. 734; [1907] 2 K. B. 449. If a passenger takes a ticket for carriage at a fare below the ordinary rate on condition that he take no luggage, he must pay for any luggage he takes, although the private Act of the company allows passengers to take a fixed amount. *Rumsey v. N. E. Ry.*, 14 C. B. (N. S.) 641; 32 L. J. C. P. 244.

The plaintiff, on arriving by a railway at the terminus, deposited her bag, value £20, in the cloak-room, and paid 2d., and received a ticket for it, on the back of which was printed, "The company will not be responsible for any package exceeding the value of £10"; it was held that the company were not liable for its loss, though caused by their negligence, as the plaintiff was bound by the condition. *Van Toll v. S. E. Ry.*, 12 C. B. (N. S.) 75; 31 L. J. C. P. 241; *Harris v. Gt. W. Ry.*, 45 L. J. Q. B. 729; 1 Q. B. D. 515; *Gibaud v. Great Eastern Ry.*, 90 L. J. K. B. 535; [1921] 2 K. B. 426. The condition protects the company from liability for delay in redelivering the package; *Pepper v. S. E. Ry.*, 17 L. T. 469; and also for damage, although occasioned by negligence of the company's servants. *Pratt v. S. E. Ry.*, 66 L. J. Q. B. 418; [1897] 1 Q. B. 718.

ACTIONS AGAINST COMMON INNKEEPERS.

This, like the action against carriers, may be treated as founded on tort or on contract. It is generally an action *ex contractu* for some breach of the contract, express or implied, which the innkeeper has entered into, or professes to be ready to enter into, with his guest, in relation to his personal entertainment. The action for refusing to receive a guest is founded on tort.

An inn is "a house where the traveller is furnished with everything which he has occasion for whilst upon his way." *Thompson v. Lacy*, 3 B. & A. 286, *per* Bayley, J. "A person who uses the inn either for a temporary or more permanent way is a guest." *Orchard v. Bush*, 67 L. J. Q. B. 650; [1898] 2 Q. B. 284. An innkeeper at common law is answerable for the safe keeping of the goods of a guest; *Calye's Case*, 8 Rep. 32; 1 Smith's Lead. Ca.; but it is only in respect of the goods of a guest that he is so liable. *Strauss v. County Hotel, &c., Co.*, 53 L. J. Q. B. 25; 12 Q. B. D. 27. The innkeeper's liability begins the moment the relation of guest and innkeeper arises; that relation arises as soon as the traveller enters the inn with the intention of using it as an inn, and is received on that basis by the innkeeper; and it is immaterial that some one other than the particular traveller is to pay for the accommodation received by him in the inn. *Wright v. Anderton*, 78 L. J. K. B. 165; [1909] 1 K. B. 209. Loss of a guest's goods is *prima facie* evidence of liability on the part of the innkeeper. *Dawson v. Chamney*, 13 L. J. Q. B. 33; 5 Q. B. 154; 2 Kent, Com. 592; Story on Bailment, ss. 470—1; *Morgan v. Ravey, infra*; *Medawar v. Grand Hotel Co.*, 60 L. J. Q. B. 209; [1891] 2 Q. B. 11. He may be exonerated by the negligence of the guest. S. C. Thus, where money is lost, the ostentatious display of it in a public room at an inn,

and leaving it there in an insecure box, is evidence of negligence conducing to the loss. *Armistead v. Wilde*, 17 Q. B. 261; 20 L. J. Q. B. 524. So where the guest has taken the goods into his own custody, and leaves the door of the room unlocked. *Burgess v. Clements*, 4 M. & S. 306. The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bedroom door at night, is not necessarily such negligence. *Morgan v. Ravey*, 6 H. & N. 265; 30 L. J. Ex. 131. The question for a jury will be whether the loss would or would not have happened if the guest had used the ordinary care that may reasonably be expected from a prudent man. *Oppenheim v. White Lion Hotel Co.*, 40 L. J. C. P. 231; L. R. 6 C. P. 515; *Cashill v. Wright*, 6 E. & B. 891. It is not enough to ask if the guest had been "grossly negligent." S. C. The obligation of the innkeeper extends to the horses and carriages of the guest. *Calye's Case*, *supra*; *Jones v. Tyler*, 3 L. J. K. B. 166; 1 Ad. & E. 522; *Bather v. Day*, 2 H. & C. 14; 32 L. J. Ex. 171. Where the guest, intending to return, had gone, leaving his horse, and, after the day of his intended return, his horse was injured by being driven in a carriage by the innkeeper's servant, it was held that the innkeeper was liable as such for the injury. S. C. But he is not liable for the injury to a horse by a kick from another horse if negligence in him and his servants is disproved. *Dawson v. Chamney*, *supra*. As to the care he is bound to exercise towards the goods of his guest of which he retains possession by virtue of his lien, see *Angus v. McLachlan*, 52 L. J. Ch. 587; 23 Ch. D. 330. The real innkeeper is the person liable, and not a manager in whose name the licences have been taken out. *Dixon v. Birch*, 42 L. J. Ex. 135; L. R. 8 Ex. 135.

By 26 & 27 V. c. 41, s. 1, no innkeeper shall be liable to make good to any guest any loss or injury to property brought to the inn (not being a horse or other live animal, or any gear appertaining thereto, or any carriage), to a greater amount than £30, except in the following cases: (1) Where the property shall have been stolen, lost, or injured, through the wilful act, default, or neglect of the innkeeper, or any servant in his employ; (2) Where the property shall have been deposited expressly for safe custody with the innkeeper. Provided that, in case of such deposit, the innkeeper may require as a condition to his liability that the property be deposited in a box or other receptacle, fastened and sealed by the person depositing the same. By sect. 2, if an innkeeper shall refuse to receive for safe custody any property of his guest, or if the guest shall, through any default of the innkeeper, be unable to deposit his property, the innkeeper shall not be entitled to the benefit of the Act in respect of such property. By sect. 3, every innkeeper is to cause at least one copy of sect. 1 of the Act, printed in plain type, to be exhibited in a conspicuous part of the hall or entrance of his inn, and is to be entitled to the benefit of the Act in respect of such property only as shall be brought to his inn while such copy is so exhibited. By sect. 4, "inn" means any hotel, inn, tavern, public-house, or other place of refreshment, the keeper of which is by law responsible for the property of his guest; "innkeeper" means the keeper of any such place.

It has been held that "wilful" in sect. 1, must be read with "act" only, and not also with "fault or neglect." *Squire v. Wheeler*, 16 L. T. 93. The guest must prove that the loss was occasioned by the wilful act, &c., of the innkeeper, to make him liable under sect. 1 (1). *Medawar v. Grand Hotel Co.*, 60 L. J. Q. B. 209; [1891] 2 Q. B. 11. Contributory negligence of the guest is still a defence. S. C. See further, *Whitehouse v. Pickett*, 77 L. J. P. C. 89; [1908] A. C. 357, where it was held that to prove an express deposit under sect. 1 (2), there must be evidence that the innkeeper received into his charge the guest's goods with the intention of being responsible for them. See also *O'Connor v. Grand International Hotel Co.* [1898] 2 I. R. 92. A material error in the copy exhibited under sect. 3 will exclude the innkeeper from the protection of the statute, e.g., where the copy omits the word "act" in sect. 1 (1). *Spice v. Bacon*, 46 L. J. Ex. 713; 2 Ex. D. 463.

An innkeeper by the common law is bound to receive travellers who present themselves as guests, if he have accommodation. *R. v. Ivens*, 7 C. & P. 213; *Lane v. Cotton*, 12 Mod. 484; *White's Case*, 2 Dyer, 158. See *Fell v. Knight*, 10 L. J. Ex. 277; 8 M. & W. 276. He is, however, at liberty to set up an inn for the reception of particular classes of people, and is then only bound to do what he publicly professes to do in this respect. See *per Parke, B., in Johnson v. Midland Ry.*, 18 L. J. Ex. 366, 369; 4 Ex. 371, 373. An innkeeper is not bound to provide a traveller B. with shelter and accommodation for the night if all the bedrooms be full; although B. demands to pass the night in the unoccupied coffee-room. *Browne v. Brandt*, 71 L. J. K. B. 367; [1902] 1 K. B. 696. Nor to receive persons who are not travellers. *R. v. Luellin*, 12 Mod. 445; *R. v. Rymer*, 46 L. J. M. C. 108; 2 Q. B. D. 136. Nor to retain them after they have ceased to be such. *Lamond v. Richard*, 66 L. J. Q. B. 315; [1897] 1 Q. B. 541. Nor to receive persons whose conduct on previous occasions has caused comment and complaint on the part of the other guests. *Rothfield v. North British Ry.*, [1920] S. C. 805. Keepers of coffee-houses and taverns (not professing to lodge their guests) are not common innkeepers; *R. v. Rymer, supra*; *Sealey v. Tandy*, 71 L. J. K. B. 41; [1902] 1 K. B. 296; nor are the keepers of lodging or boarding houses, for these do not profess to entertain and lodge all travellers; *Holder v. Soulbey*, 8 C. B. (N. S.) 254; 29 L. J. C. P. 246. If, however, they do so profess, they would be in the same position as a common innkeeper; *Thompson v. Lacy*, 3 B. & A. 283; and there is a duty upon keepers of lodgings or boarding houses to take reasonable care for the safety of property brought by guests in the house. *Scarborough v. Cosgrove*, 74 L. J. K. B. 892; [1905] 2 K. B. 805; following *Dansey v. Richardson*, 3 E. & B. 144; 23 L. J. Q. B. 217. So a restaurant keeper, N., is liable for the loss, through his negligence, of the coat of his guest who entrusted it to N.'s care. *Ultzen v. Nichols*, 63 L. J. Q. B. 289; [1894] 1 Q. B. 92. As to the right of an innkeeper to refuse a guest because he is accompanied by dogs, see *R. v. Rymer, supra*.

As to the innkeeper's warranty of the safety of his premises see *MacLennan v. Segar*, 86 L. J. K. B. 1113; [1917] 2 K. B. 325.

DEFENCES IN ACTIONS ON SIMPLE CONTRACTS.

Accord and Satisfaction.

Accord and satisfaction after breach must be specially pleaded, and the evidence required in support of it depends on the allegations in the defence, and the reply to it.

In order to be a good discharge of the cause of action, an accord must be executed, that is, performed by the defendant and accepted by the plaintiff, before it can be pleaded; but the plaintiff may accept a valid executory agreement in satisfaction: *Evans v. Powis*, 1 Ex. 601; *Hall v. Plockton*, 14 Q. B. 380; 16 Q. B. 1039; 20 L. J. Q. B. 208; and it will be a question for the jury whether the agreement, and not the performance of it, was accepted in lieu and satisfaction. S. C. The defendant pleaded the pendency of certain disputes, and an agreement respecting them between the plaintiff and defendant, entered into in satisfaction, &c.; the plaintiff denied the agreement: held, that the pendency of the disputes was admitted on the record. *Hey v. Moorhouse*, 6 Bing. N. C. 52; 9 L. J. C. P. 113. Where a cheque sent in full satisfaction of a claim is retained on account only, this is not conclusive evidence of accord and satisfaction, it is a question of fact on what terms the cheque was kept. *Day v. McLea*, 58 L. J. Q. B. 293; 22 Q. B. D. 610. Acceptance of a negotiable instrument by A. before

he knew that it was offered to him, may be presumed, when it is for his benefit. *London and County Banking Co. v. London and River Plate Bank*, 57 L. J. Q. B. 601; 21 Q. B. D. 535. Accord and satisfaction made by a stranger on behalf of the defendant, and adopted by the plaintiff, will be a defence. *Jones v. Broadhurst*, 9 C. B. 193; *Randall v. Moon*, 12 C. B. 261; 21 L. J. C. P. 226.

If one of several joint creditors accept a satisfaction from the debtor, this is a good defence to the action, without proof of any authority from the co-creditors to accept the satisfaction. *Wallace v. Kelsall*, 10 L. J. Ex. 12; 7 M. & W. 264; *Smith v. Lovell*, 10 C. B. 6; 20 L. J. C. P. 37. So, if satisfaction be accepted after breach, it is a good defence. *Blake's Case*, 6 Rep. 43 b; Bullen & Leake on Pleading, 3rd ed., p. 479. The acceptance in satisfaction, as well as the agreement to accept or the accord, must be shown. *Bayley v. Homan*, 3 Bing. N. C. 915, 920; 6 L. J. C. P. 309; *Hardman v. Bellhouse*, 11 L. J. Ex. 135; 9 M. & W. 596; *Nathans v. Ogdens*, 94 L. T. 126. It is not sufficient that the defendant was always ready and willing to carry out his part of the agreement. *Collingbourne v. Mantell*, 8 L. J. Ex. 251; 5 M. & W. 289; *Wray v. Milestone*, 9 L. J. Ex. 39; 5 M. & W. 21; *Allies v. Probyn*, 4 L. J. Ex. 227; 2 C. M. & R. 408. The acceptance by the creditor of satisfaction from one of several joint debtors operates as a release to all, unless the right against the co-debtors is reserved.

Where a sum of money has been paid to the plaintiff in satisfaction of unliquidated damages, and a discharge, not under seal, in full signed, the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed, and was he aware of its effect? If not, the discharge would not bind him. *Rideal v. Gt. W. Ry.*, 1 F. & F. 706, cited by Mellish, L.J., in *Lee v. Lancashire & Yorkshire Ry.*, L. R. 6 Ch. 527, 537, where the cases are collected. See further *N. British Ry. v. Wood*, 18 Rettie (H. L.) 27; *Ellen v. Gt. N. Ry.*, 17 T. L. R. 338, 453; *Huckle v. L. C. C.*, 27 T. L. R. 112.

An acceptance of a less sum in satisfaction of a debt of a larger liquidated amount is, by itself, no good accord; *Cumber v. Wane*, 1 Str. 426; *Foakes v. Beer*, 54 L. J. Q. B. 130; 9 App. Cas. 605; *Underwood v. Underwood*, 63 L. J. P. 109; [1894] P. 204; but if there be some additional benefit or legal possibility of benefit to the creditor thrown in, it may be a discharge. See notes to *Cumber v. Wane*, in 1 Smith's L. C. Thus, the acceptance of a negotiable security for a less amount, e.g., a cheque payable on demand, will be a good accord and satisfaction. *Goddard v. O'Brien*, 9 Q. B. D. 37; *Bidder v. Bridges*, 57 L. J. Ch. 300; 37 Ch. D. 406. So where the cheque or draft given by a third person is so accepted. S. C. *Hirachand Punamchand v. Temple*, 80 L. J. K. B. 1155; [1911] 2 K. B. 330. On this ground, compositions with creditors, accepted by them or by several of them under an agreement, are pleadable by way of accord; for in cases of doubtful solvency, the agreement of a creditor to give up a part in consideration that others will do so, is valid as against him, and will bind, although all the creditors have not consented. *Norman v. Thompson*, 19 L. J. Ex. 193; 4 Ex. 755. See also *Slater v. Jones*, 42 L. J. Ex. 122; L. R. 8 Ex. 186, and *West Yorkshire Darracq Agency v. Coleridge*, 80 L. J. K. B. 1122; [1911] 2 K. B. 326. But if the agreement is signed only as an escrow, and on the understanding that certain others are to sign it, it is no accord unless the others also agree. *Boyd v. Hind*, 1 H. & N. 938; 26 L. J. Ex. 164, where *Norman v. Thompson*, *supra*, is corrected and explained. Where the demand is not liquidated, as where it is claimed on a *quantum meruit*, acceptance of a less sum in satisfaction is an answer. *Cooper v. Parker*, 15 C. B. 822; 24 L. J. C. P. 68.

An oral agreement to accept something as a satisfaction, followed by performance and acceptance, is a good defence by way of accord and satisfaction, notwithstanding that the substituted agreement is not in writing, and could not, therefore, have been enforced by reason of the

Stat. of Frauds, s. 4. *Lavery v. Turley*, 6 H. & N. 239; 30 L. J. Ex. 49. *Case v. Barber*, T. Raym. 450, which laid down that there could not be an accord and satisfaction by taking an unenforceable agreement in substitution for one which was enforceable, cannot now be regarded as good law. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1.

An agreement to refer to arbitration is not an accord and satisfaction, nor will it oust the jurisdiction of the court, except where the reference is made by the contract itself a condition precedent to the right of action. *Scott v. Avery*, 5 H. L. C. 811; 6 H. & N. 239; 25 L. J. Ex. 308; *Elliott v. R. Exch. Assur. Co.*, 36 L. J. Ex. 129; L. R. 2 Ex. 237; *Edwards v. Aberayron, &c., Insur. Soc.*, 1 Q. B. D. 563; *Collins v. Locke*, 48 L. J. P. C. 68; 4 App. Cas. 674; and *Dawson v. Fitzgerald*, 45 L. J. Ex. 893; 1 Ex. D. 257; and *Babbage v. Coulburn*, 9 Q. B. D. 235; affirmed 52 L. J. Q. B. 50.

Alteration.

This defence must now be specially pleaded. Rules, 1883, O. xix. r. 15.

The leading case, *Pigot's Case*, *infra*, on this defence, was decided on a deed, and so also were some other of the cases cited below, for the law is the same in the case of a deed and of a simple contract; *Davidson v. Cooper*, *infra*; and both kinds of contracts are therefore here considered together.

In *Pigot's Case*, 11 Rep. 26 b, it was held (1) that an immaterial alteration by a stranger does not avoid a deed; but (2) if made by a party interested, the alteration will avoid it as against him, whether material or not; and (3) a material alteration by a stranger avoids it. Thus, a guarantee was held to be avoided by alteration while in the hands of the plaintiff by attaching seals, so as apparently to make it a deed, without the defendant's knowledge or assent, although the plaintiff sued on it as a simple contract only; *Davidson v. Cooper*, 13 M. & W. 343; 13 L. J. Ex. 276; and it will make no difference that the rights of the parties actually in dispute are not thereby affected. *Mollett v. Wackerbarth*, 17 L. J. C. P. 47; 5 C. B. 181. But an alteration, even though made by the plaintiff, which has no effect on the liability of either party, as stated in the contract, will not vitiate the instrument; *Aldous v. Cornwell*, 37 L. J. Q. B. 201; L. R. 3 Q. B. 573, dissenting from the second resolution in *Pigot's Case*, *supra*; see also *In re Howgate and Osborn's Contract*, 71 L. J. Ch. 279; [1902] 1 Ch. 451; unless it be proved that the part altered is material for the purposes for which the instrument was created, in which case the instrument will be avoided. *Suffell v. Bank of England*, 51 L. J. Q. B. 401; 9 Q. B. D. 555. Obligee sued obligor on a bond conditioned for performance of covenants in a deed of sale to the defendant, of certain trees which defendant was to cut down before August, 1684. Plaintiff afterwards altered the deed in his possession by erasing 1684, and writing 1685: held no answer, for the erasure was in a place not material, and to the advantage of the defendant. *Darcy v. Sharpe*, 1 Leon. 282. In *Adsetts v. Hives*, 33 Beav. 52, it was held that a mortgage deed was not made void by the fact that the date of the day of payment in the proviso for redemption, and the names of the tenants in the parcels, had been filled in by the mortgagee after the execution of the deed. See also *Andrews v. Lawrence*, 19 C. B. (N. S.) 768; and *Crediton (Bishop) v. Exeter (Bishop)*, 74 L. J. Ch. 697; [1905] 2 Ch. 455. It has also been denied that a material alteration by a stranger will avoid an instrument. See 2 Sugd. Powers, 193, citing *Henfree v. Bromley*, 6 East, 310; Alderson, B., in *Hutchins v. Scott*, 2 M. & W. 814; and Ld. Herschell in *Lowe v. Fox*, 56 L. J. Q. B. 480, 485; 12 App. Cas. 217. This would probably depend on whether or no the plaintiff was the person responsible for the safe custody of the instrument. If he were so, then the alteration by a stranger would vitiate the instrument, though it was

made without the knowledge of the plaintiff. *Croockewit v. Fletcher*, 1 H. & N. 893; 26 L. J. Ex. 153. See also *Bank of Hindostan v. Smith*, 36 L. J. C. P. 241. If, however, the alteration were made by a stranger at a time when the plaintiff was not responsible for its safe custody, it has never been held that it could be relied on as a defence.

As to the degree of diligence to be exercised by the person having the instrument in his custody there may be some doubt. It would seem from *Shep. Touch.* 69, *Argoll v. Cheney*, Palm. 402, and *Bolton v. Carlisle (Bishop)*, 2 H. Bl. 259, that he is not absolutely in the position of an insurer, and may show that the alterations arose from accident; but in *Croockewit v. Fletcher, supra*, Martin, B., makes use of language almost strong enough to make him so. The cancellation of the acceptance on a bill of exchange can be shown to have been done by mistake. *Raper v. Birkbeck*, 15 East, 17; *Wilkinson v. Johnson*, 3 B. & C. 428; *Novelli v. Rossi*, 2 B. & Ad. 757. See further as to the effect of alteration, notes to *Master v. Miller*, 1 Smith's L. Cases. The alleged alterations cannot be proved by the declarations of a deceased attesting witness. *Stobart v. Dryden*, 1 M. & W. 615; 5 L. J. Ex. 218. Where a deed appears to have erasures and interlineations, the presumption is that they were made before execution. *Doe d. Tatum v. Catmore*, 16 Q. B. 745; 20 L. J. Q. B. 364. The rule is different in wills. In a joint and several bond, an alteration made *bonâ fide* by one obligor, N., discharged his co-sureties, *Ellesmere Brewery Co. v. Cooper*, 65 L. J. Q. B. 173; [1896] 1 Q. B. 75; and N. was not bound, as he only executed it as a joint and several bond. S. C.

If both parties agree to an alteration, then, unless it be made simply for the purpose of correcting an error, the old contract is rescinded, and a new one substituted. The new agreement will in general require a fresh stamp, and if it is one that cannot be stamped after its execution, it cannot be used in evidence.

A material alteration does not avoid the instrument altogether, and where the plaintiff's claim arises on an instrument which the defendant has altered, the plaintiff must nevertheless sue on the instrument. *Pattinson v. Luckley*, 44 L. J. Ex. 180; L. R. 10 Ex. 330.

Counterclaim.

See *Set-off and Counterclaim, post*.

Coverture.

See *sub tit. Actions by and against married women, post*.

Fraud.

The proof of fraud in the party seeking to enforce a contract is a good defence; but it must be specially pleaded. Rules, 1883, O. xix. rr. 6, 15. The allegation of fraud must be specific. *Wallingford v. Mutual Society*, 50 L. J. Q. B. 49, 54; 5 App. Cas. 685, 697, *per* Ld. Selborne, C. As the law is the same whether the contract is under seal or not, the cases in reference to these two kinds of contract are for convenience here collected together. The fraud must be some concealment or deception, practised by the plaintiff with respect to the very transaction in question; the illegality of the transaction, by reason of usury or other causes, is not sufficient. *Green v. Gosden*, 11 L. J. C. P. 4; 3 M. & Gr. 446. Where a fraudulent representation constitutes the alleged fraud, it must be on a matter which, in a case of simple contract, was substantially the consideration for the

agreement. *Per Erle, J.*, in *Mallalieu v. Hodgson*, 16 Q. B. 712; 20 L. J. Q. B. 339; *Kennedy v. Panama, &c., Mail Co.*, 36 L. J. Q. B. 260; L. R. 2 Q. B. 580. But a false statement to the defendant of the state of accounts between the plaintiff and his debtor, will prove the allegation of fraud, in an action against the defendant as surety for the debtor. *Stone v. Compton*, 5 Bing. N. C. 142; but see *Mason v. Ditchbourne*, 1 M. & Rob. 460; 2 C. M. & R. 720, n.; *D'Aranda v. Houston*, 6 C. & P. 511; and *Way v. Hearn*, 13 C. B. (N. S.) 292; 32 L. J. C. P. 34. Where a surety, being sued on his bond, pleads that it was procured by the fraud and collusion of the plaintiff and the principal debtor, C., it is not enough to show fraud by C., unless the plaintiff was a party to it. *Spencer v. Handley*, 11 L. J. C. P. 250; 4 M. & Gr. 414. Where the owner of a house sued the defendant for not taking the house according to agreement, it was held that the plea of fraud was not supported by proof that the plaintiff's agent had denied the existence of a nuisance, of which he, the agent, was ignorant, but which the plaintiff himself knew of; for though this was a misstatement, it was no fraud. *Cornfoot v. Fowke*, 9 L. J. Ex. 297; 6 M. & W. 358. But, generally, the fraud of the agent, in the course of his principal's business, is the fraud of the principal; and whether the fraud is committed for the benefit of the principal or for the benefit of the agent. *Per Parke, B.*, *Murray v. Mann*, 17 L. J. Ex. 256; 2 Ex. 538; *Swire v. Francis*, 47 L. J. P. C. 18; 3 App Cas. 106; *Lloyd v. Grace, Smith & Co.*, 81 L. J. K. B. 1140; [1912] A. C. 716; even although the principal is a joint stock company; *Barwick v. English Joint Stock Bank*, 36 L. J. Ex. 147; L. R. 2 Ex. 259; *Mackay v. Commercial Bank of New Brunswick*, 43 L. J. P. C. 31; L. R. 5 P. C. 394. See also *W. Bank of Scotland v. Addie*, L. R. 1 H. L. Sc. 145, and *Central Ry. of Venezuela v. Kisch*, 36 L. J. Ch. 849; L. R. 2 H. L. 99; or is a municipal corporation. *Pearson v. Dublin Corporation*, 77 L. J. P. C. 1; [1907] A. C. 351. Where a defendant has made a statement untrue to his knowledge to induce another, whom he does not believe to know its untruth, to act upon it, and that other has acted upon it in ignorance and to his damage, the maker of the false representation cannot protect himself by proving that the agent of the other knew of the untruth. *Wells v. Smith*, 83 L. J. K. B. 1614; [1914] 3 K. B. 722. Any surreptitious dealing between one principal to a contract and the agent of the other principal is a fraud. *Panama, &c., Telegraph Co. v. India Rubber, &c., Co.*, 45 L. J. Ch. 121; L. R. 10 Ch. 515. It seems that a fraudulent misrepresentation as to the effect of a deed may be relied on as a defence to an action on the deed. *Hirschfeld v. L. Brighton & S. C. Ry.*, 46 L. J. Q. B. 94; 2 Q. B. D. 1; *Bagot v. Chapman*, 76 L. J. Ch. 523; [1907] 2 Ch. 222. See *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1. But if a man executes a deed knowing that it is one which purports to deal with his property, it is not sufficient for him, to support a plea of *non est factum*, to show that a misrepresentation was made to him as to the contents of the deed. *Howatson v. Webb*, 77 L. J. Ch. 32; [1908] 1 Ch. 1.

Fraud in this defence means moral fraud, and not merely an innocent misrepresentation. *Moens v. Heyworth*, 10 L. J. Ex. 177; 10 M. & W. 147; *Kennedy v. Panama, &c., Mail Co.*, 36 L. J. Q. B. 260; L. R. 2 Q. B. 580. But it should be observed that where a contract is based on a statement made by the plaintiff innocently, but which is in fact untrue, specific performance will not be ordered; *New Brunswick & Canada Ry. v. Muggeridge*, 1 Drew & Sm. 363; 30 L. J. Ch. 242; and the defendant is entitled to have the contract set aside. *Redgrave v. Hurd*, 51 L. J. Ch. 113; 20 Ch. D. 1. This remedy can, however, only be obtained where the contract has not been executed unless indeed there is a fiduciary relationship between the parties, in which case the contract can be set aside although it has been executed, if there can be *restitutio in integrum*. *Armstrong v. Jackson*, 86 L. J. K. B. 1375; [1917] 2 K. B. 822.

If the plaintiff had fraudulently represented a fact to be true of which

he knows nothing, and which is untrue, it will be a defence. *Evans v. Edmonds*, 13 C. B. 777; 22 L. J. C. P. 211; *Behn v. Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204. See also *Mostyn v. W. Mostyn Coal and Iron Co.*, 45 L. J. C. P. 401; 1 C. P. D. 145. See further generally, *Action for Deceit and Misrepresentation*, *post*. In an action by a vendee of a term against vendor for not assigning, it is a defence that the defendant's term was not assignable except by consent of the lessor, who was willing to accept a respectable assignee, and that defendant was induced to make the agreement by the false and fraudulent representation of the plaintiff that one J. M., for whose benefit the purchase was made was a respectable person, whereas he was not respectable. *Canham v. Barry*, 15 C. B. 597; 24 L. J. C. P. 100.

The fraud may consist in permitting a party to labour under error. Thus, where the defendant erroneously supposed that a picture had been in the possession of an eminent collector, and purchased it from the agent of the plaintiff, who was aware of the defendant's error, but did not undeceive him, *Ld. Ellenborough* held that the sale was void, the price being probably enhanced by the error. *Hill v. Gray*, 1 Stark. 434. See, however, the comment on this case by *Jervis, C.J.*, in *Keates v. Cadogan (Lord)*, 20 L. J. C. P. 78; 10 C. B. 600, where he said that there was something that "must be taken to amount to an aggressive deceit on the part of the agent of the seller"; see further *per Ld. Chelmsford* in *Peek v. Gurney*, 43 L. J. Ch. 34; L. R. 6 H. L. 391. So where a vendor knowingly permits the vendee to buy under a false representation by a stranger. *Pilmore v. Hood*, 8 L. J. C. P. 11; 5 Bing. N. C. 97. Mere concealment by the plaintiff of a defect in a chattel, will not avoid the contract, where he is under no obligation to divulge it. *Smith v. Hughes*, 40 L. J. Q. B. 221; L. R. 6 Q. B. 597. See *Turner v. Green*, 64 L. J. Ch. 539; [1895] 2 Ch. 205; *Seddon v. N. E. Salt Co.*, 74 L. J. Ch. 199; [1905] 1 Ch. 326; and in the Scottish case of *Patterson v. Landsberg*, 7 F. 675, the opinion was expressed that the offer of articles appearing to be, but which are not in fact, antiques is in itself a misrepresentation, and the seller is bound to displace the inferences which to his knowledge their appearance is calculated to suggest. Where the defendant S. was induced to contract with the plaintiff G. by G.'s fraudulent concealment of his identity, S. may repudiate the contract, within a reasonable time of his finding it out. *Gordon v. Street*, 69 L. J. Q. B. 45; [1899] 2 Q. B. 641. *Cf. Phillips v. Brooks*, 88 L. J. K. B. 953; [1919] 2 K. B. 243.

Where goods are falsely described as "the property of a gentleman deceased," or "to be sold by executors," it is fraud, for such property is likely to be sold without reserve. *Per Ld. Mansfield*; *Beauwell v. Christie*, *Cowp.* 395. So where, at a sale by auction, the owner of the goods employs puffers to bid for him, and the buyer has no notice of such employment, it is a fraud, and the seller cannot recover the price. *Crowder v. Austin*, 3 Bing. 368; *Wheeler v. Collier*, M. & M. 126. The employment of a single puffer when the sale is to be to the highest bidder, is evidence of fraud. *Green v. Baverstock*, 14 C. B. (N. S.) 204; 32 L. J. C. P. 181. Now see 30 & 31 V. c. 48, ss. 4, 5, 6, and the S. of G. Act, 1893, s. 58 (3, 4).

If the maker of a chattel make it with such a defect as to render it worthless, but the defect is patent, and the person for whom it is made have an opportunity of inspecting it before it is delivered, the maker is not guilty of a fraud if he do not point out the defect. *Horsfall v. Thomas*, 1 H. & C. 90; 31 L. J. Ex. 322. See, however, observations on this case in *Smith v. Hughes*, 40 L. J. Q. B. 226; L. R. 6 Q. B. 605, *per Cockburn, C.J.* Fraud will not avoid a contract whereby an estate in land has passed to the defendant, for the defendant must have disaffirmed the contract, in order to avail himself of the defence (see *Daves v. Harness*, 44 L. J. C. P. 194; L. R. 10 C. P. 166), and he cannot by such disaffirmance revert the estate in the plaintiff. See *Feret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185.

A bribe given to an agent to induce him to enter into a contract on behalf

of his principal, will render the contract so entered into voidable at the option of the principal. *Smith v. Sorby*, 3 Q. B. D. 552, n. See also *Harrington v. Victoria Graving Dock Co.*, 47 L. J. Q. B. 594; 3 Q. B. D. 549, and *Shipway v. Broadwood*, 68 L. J. Q. B. 360; [1899] 1 Q. B. 369.

As to frauds by companies or their directors, whereby persons have been induced to take shares, being a defence to an action for calls, see *Actions by and against Companies*, post.

Frauds, Statute of, and Sale of Goods Act, 1893.

The Rules, 1883, O. xix., r. 20, require that the insufficiency of any contract by reason of the Stat. of Frauds, should be pleaded specially. *Clarke v. Callow*, 46 L. J. Q. B. 53. The same principle applies to a contract within the Sale of Goods Act, 1893, s. 4.

Illegality.

Where a contract is illegal or immoral, it cannot be enforced; but such defence must in general be specially pleaded. *Potts v. Sparrow*, 1 Bing. N. C. 594. So a defence that the contract was a wagering one, and void by 8 & 9 V. c. 109, s. 18, should be pleaded specially. *Varney v. Hickman*, 5 C. B. 271. And see Rules, 1883, O. xix. r. 15. Where, however, it appears on the face of a contract that it is unlawful, or where it appears from the evidence that the contract sued on is illegal, the Court will not enforce it, even although the defence of illegality is neither pleaded nor insisted on by the defendant. *Holman v. Johnson*, 1 Cowp. 341. *Scott v. Brown*, and *Slaughter v. Brown*, 61 L. J. Q. B. 738; [1892] 2 Q. B. 724. See also *In re Robinson's Settlement*, 81 L. J. Ch. 393; [1912] 1 Ch. 717; *North Western Salt Co. v. Electrolytic Alkali Co.*, [1913] 3 K. B. 422, 424; *Montefiore v. Menday Motor, &c., Co.*, 87 L. J. K. B. 907; [1918] 2 K. B. 241. So in the case of a wagering policy, with the "P. P. I. clause," made illegal by 6 E. 7, c. 41, s. 4 (2 b). See *Gedge v. R. Exch. Assur. Co.*, 69 L. J. Q. B. 506; [1900] 2 Q. B. 214. A contract cannot be enforced where the consideration is, even in part only, illegal. *Featherston v. Hutchinson*, Cro. Eliz. 199; *Lound v. Grimwade*, 57 L. J. Ch. 725; 39 Ch. D. 605. Where, however, the consideration is a legal one, and the promises are some legal and some illegal, the former may be enforced, though not the latter. *Kearney v. Whitehaven Colliery Co.* 62 L. J. M. C. 129; [1893] 1 Q. B. 700. The test whether a claim connected with an illegal agreement can be enforced is whether the plaintiff requires any aid from the illegal agreement to establish his case. *Farmers' Mart v. Milne*, 84 L. J. P. C. 33; [1915] A. C. 106.

The maxim, "*In pari delicto potior est conditio defendentis*," is important to be observed when the defence or reply raises a question of illegality. The true test for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case, otherwise than through the medium and by the aid of the illegal transaction, to which he was himself a party. *Taylor v. Chester*, 38 L. J. Q. B. 225, 227; L. R. 4 Q. B. 309, 314; *Herman v. Jeuchner*, 54 L. J. Ch. 340, 341; 15 Q. B. D. 561, 564.

Some cases of illegality have been already noticed under the head of *Action for money had and received, ante*. The facts must be stated specially on the record, and the issues joined sufficiently point out the required evidence. Rules, 1883, O. xix. r. 15.

In an action for work and labour, the illegality of the transaction will be a defence. Thus, where a surveyor of highways employs his own horses for team work on the highways, for which he was liable to a penalty under 5 & 6 W. 4, c. 50, s. 46, it was held he could not recover for the value of

the work. *Barton v. Piggott*, 44 L. J. M. C. 5; L. R. 10 Q. B. 86. So officers and servants of local boards of health are prohibited from contracting with the board by the Public Health Act, 1875, s. 193, and if so contract they cannot recover on the contract. *Melliss v. Shirley, &c., Board of Health*, 55 L. J. Q. B. 143; 16 Q. B. D. 446. A contract by which a person is hired for money or valuable consideration to use his influence and position to procure a benefit from the government is illegal. *Montefiore v. Menday Motor Co.*, 87 L. J. K. B. 907; [1918] 2 K. B. 241. A party will not be permitted to recover either for work and labour done, or material provided, where the whole combined forms one entire subject-matter made in violation of the provisions of an Act of Parliament. *Bensley v. Bignold*, 5 B. & A. 335; *Houston v. Mills*, 1 M. & Rob. 325; *Stephens v. Robinson*, 2 C. & J. 209. The printer of an immoral and libellous book cannot maintain an action for his bill against the publisher who employed him. *Poplett v. Stockdale*, Ry. & M. 337; and see *Coates v. Hatton*, 3 Stark. 61, and *Clay v. Yates*, 1 H. & N. 73; 25 L. J. Ex. 237. A builder cannot sue for the contract price of a house built in contravention of the Building Acts. *Stevens v. Gourley*, 7 C. B. (N. S.) 99; 29 L. J. C. P. 1; *Brightman v. Tate*, 88 L. J. K. B. 921; [1919] 1 K. B. 463.

A promise to indemnify the plaintiff, in consideration of the plaintiff having published a libel, and defended an action brought against him for that libel at the defendant's request, is void. *Shackell v. Rosier*, 2 Bing. N. C. 634; *Smith v. Clinton*, 99 L. T. 840. A contract which amounts to maintenance is illegal, and cannot be enforced. "Maintenance is the officious assistance by money or otherwise, proffered by a third person to either party to a suit, in which he himself has no legal interest, to enable them to prosecute or defend it." See *Bradlaugh v. Newdegate*, 52 L. J. Q. B. 454; 11 Q. B. D. 1, 6; *Alabaster v. Harness*, 64 L. J. Q. B. 76; [1895] 1 Q. B. 339; *Greig v. National, &c., Union of Shop Assistants*, 22 T. L. R. 274; *Oram v. Hutt*, 83 L. J. Ch. 161; [1913] 1 Ch. 259, unless the assistance be given from charitable motives; *Harris v. Briscoe*, 17 Q. B. D. 504; *Holden v. Thompson*, 76 L. J. K. B. 889; [1907] 2 K. B. 489; or where the party has a real and *bonâ fide* interest, e.g., a pecuniary or commercial interest in the litigation. *British Cash, &c., Conveyors v. Lamson Store Service Co.*, 77 L. J. K. B. 649; [1908] 1 K. B. 1006. An action of maintenance will, however, not lie unless the action or defence maintained has failed. *Per* Ld. Shaw and Ld. Phillimore, in *Neville v. London Express Newspapers*, 88 L. J. K. B. 282; [1919] A. C. 368. A contract in the nature of champerty is illegal. See *Rees v. De Bernardy*, 65 L. J. Ch. 656; *Cole v. Booker*, 29 T. L. R. 295; [1896] 2 Ch. 437. As to marriage brokerage contracts, see *Hermann v. Charlesworth*, 74 L. J. K. B. 620; [1905] 2 K. B. 123.

A promise by a director of a railway company, A., that the company would indemnify the promoters of another railway company if they failed in obtaining a bill in Parliament is illegal, the company A. having no power by its Act so to apply their funds, and no action lies on such promise. *Macgregor v. Deal & Dover Ry.*, 18 Q. B. 618; 22 L. J. Q. B. 69. But an agreement by a railway company with a landowner to pay him a sum of money on the passing of a bill for extending the powers of the company, if he withdrew his opposition to it, is legal. *Taylor v. Chichester & Midhurst Ry.*, 39 L. J. Ex. 217; L. R. 4 H. L. 628. A person who has expended money for the purposes of an unlicensed theatre cannot recover against another at whose request he expended the money, and who participated in the profits. *De Begnis v. Armistead*, 10 Bing. 107. Where a contract with a company is *ultra vires*, it is absolutely void, whether the company be formed under the Companies Act, 1862; *Ashbury Ry. Carriage Co. v. Riche*, 44 L. J. Ex. 185; L. R. 7 H. L. 653; or by statute. *Wenlock v. River Dee Co.*, 54 L. J. Q. B. 577; 10 App. Cas. 354; *Mann v. Edinburgh N. Tramways Co.*, 62 L. J. P. C. 74; [1893] A. C. 69.

No action will lie in respect of services rendered in forming or carrying

out the objects of a company which by law ought to be registered but is not. *In re S. Wales Atlantic Steamship Co.*, 46 L. J. Ch. 177; 2 Ch. D. 763. A promissory note given to such a company as security for a loan made by it in the course of carrying on its business, is given for illegal consideration. *Shaw v. Benson*, 52 L. J. Q. B. 575; 11 Q. B. D. 563. A mutual marine insurance company, of which persons become members by effecting a mutual policy of insurance is within this section. *In re Padstow, &c., Assur. Assoc.*, 51 L. J. Ch. 344; 20 Ch. D. 137. So a mutual loan society. *Shaw v. Benson*, *supra*. See further hereon *Smith v. Anderson*, 50 L. J. Ch. 39; 15 Ch. D. 247; *In re Siddall*, 54 L. J. Ch. 682; 29 Ch. D. 1. A money club formed with less than 20 members becomes illegal when the number exceeds 20. *Ex pte. Poppleton*, 54 L. J. Q. B. 336; 14 Q. B. D. 379. As to the effect of registration on prior transactions, *vide S. C.* Such an association may, however, be the beneficial owner of property. *R. v. Tankard*, 63 L. J. M. C. 61; [1894] 1 Q. B. 548. An unregistered association constituted before Nov. 1st, 1862, in which there was a continuous change of members, was held not to be formed on each such change, within sect. 4. *Shaw v. Simmons*, 12 Q. B. D. 117. As to the illegality of a contract by a company in liquidation by reason of sect. 131, see *Hire Purchase Furnishing Co. v. Richens*, 20 Q. B. D. 387.

Money paid by the plaintiff as the price of a patent right, which he knew did not exist, but bought for the fraudulent purpose of reselling to a company to be formed by him, cannot be recovered. *Begbie v. Phosphate Sewage Co.*, 44 L. J. Q. B. 233; L. R. 10 Q. B. 491; 1 Q. B. D. 679. So money paid to a broker on an agreement with him to purchase shares, for the fraudulent purpose of deceiving the public into the belief that there is a market for the shares and that they are at a premium. *Scott v. Brown, Slaughter v. Brown*, 61 L. J. Q. B. 738; [1892] 2 Q. B. 724. So money deposited with an agent, and expended by him in illegal disbursements, cannot be recovered from him by his principal, if the principal was at the time aware of the illegal disbursements, or assented to them. *Bayntun v. Cattle*, 1 M. & Rob. 265. Payments made by an election agent or sub-agent, other than the expense agent of a parliamentary candidate, A., cannot be recovered from A., such payments being illegal under stat. 26 & 27 V. c. 29, s. 2. *In re Parker*, 52 L. J. Ch. 159; 21 Ch. D. 408. A London broker could not maintain an action for commission for buying and selling stock, &c., unless duly licensed by the mayor, &c., of the city of London, pursuant to 6 A. c. 68 (c. 16, Ruff.), until the repeal of sect. 4 by 50 & 51 V. c. 59; *Cope v. Rowlands*, 2 M. & W. 149; nor for sale of shares in a company, British or foreign. *Smith v. Lindo*, 4 C. B. (N. S.) 395; 5 C. B. (N. S.) 587; 27 L. J. C. P. 335. But he might recover money paid by him to the seller on account of his principal, for which the broker is, by usage, liable as a principal. S. C. Money won at a lottery is not recoverable. *Gorenstein v. Feldmann*, 27 T. L. R. 457; *Barclay v. Pearson*, 62 L. J. Ch. 636; [1893] 2 Ch. 154. A prize competition is a lottery where the result depends on chance alone, but not where it depends also on skill. S. C.; *Hall v. Cox*, 68 L. J. Q. B. 167; [1899] 1 Q. B. 198; see also *Scott v. Director of Public Prosecutions*, 83 L. J. K. B. 1025; [1914] 2 K. B. 868. Money lent for the express purpose of playing at an illegal game, such as hazard; *M'Kinnell v. Robinson*, 7 L. J. Ex. 149; 3 M. & W. 434; or for illegally settling stock-jobbing transactions; *Cannan v. Bryce*, 3 B. & A. 179; cannot be recovered back. See, however, *Pearce v. Brooks*, 35 L. J. Ex. 134, 135; L. R. 1 Ex. 213, 219; and *Bagot v. Arnott*, 1 C. L. 1. But money lent to enable the borrower to pay a bet already lost, is not lent on an illegal consideration within the stat. 5 & 6 W. 4, c. 41. *Ex pte. Pyke*, 47 L. J. Bk. 100; 8 Ch. D. 754. Money paid at the request of the defendant in fulfilment of a void contract may in general be recovered; in the case, however, of wagers this has now been altered by the Gaming Act, 1892, 55 & 56 V. c. 9, *vide ante*, p. 478. As to the validity of a bond given for racing

debts, see *Bubb v. Yelverton*, 39 L. J. Ch. 428; L. R. 9 Eq. 471. A broker cannot sue for commission in respect of the sale of stock, &c., of the value of £5 and upwards, unless he has sent his principal a contract note duly stamped, 54 & 55 V. c. 39, s. 53 (3); 61 & 62 V. c. 46, s. 7 (1); nor can an insurance broker recover brokerage or premiums in respect of an unstamped policy.

No action lies for the value of goods knowingly sold for illegal purposes—as brewers' drugs; *Langton v. Hughes*, 1 M. & S. 593; or, formerly, for bricks under statutable size; *Law v. Hodson*, 11 East, 300. See also *Gaslight & Coke Co. v. Turner*, 9 L. J. C. P. 75; 9 L. J. Ex. 336; 5 Bing. N. C. 666; 6 Bing. N. C. 324. A collateral security given for payment of the purchase-money of land, knowingly sold for the purpose of resale by lottery, is illegal; *Fisher v. Bridges*, 3 E. & B. 642; 22 L. J. Q. B. 270; and this though the security be by deed. S. C.

Where the party seeking to enforce the contract has been guilty of contravening a law made for the purposes of the revenue only, it has been held that this is not such an illegality as will prevent him from recovering at law on the contract; as where several partners sued the defendant for the price of spirituous liquors sold, it was held that the omission of the name of one of them in the licence to carry on the business of distillers was no answer. *Brown v. Duncan*, 10 B. & C. 93; 8 L. J. (O. S.) K. B. 60. The question is, whether the legislature has either expressly or by implication prohibited the contract? If not, a breach of the law regulating the vendor's trade may expose the firm to penalties, but does not necessarily avoid a contract of sale by him. *Smith v. Mawhood*, 15 L. J. Ex. 149; 14 M. & W. 452; *Bailey v. Harris*, 18 L. J. Q. B. 115; 12 Q. B. 905.

"Any contract or engagement having a tendency, however slight, to affect the administration of justice is illegal and void." *Egerton v. Brownlow (Earl)*, 4 H. L. C. 1, 161; 23 L. J. Ch. 348, 386, *per* Ld. Lyndhurst; *Lound v. Grimwade*, 57 L. J. Ch. 725; 39 Ch. D. 605. Thus an agreement not to prosecute for a criminal offence is illegal. S. C.; *Keir v. Leeman*, 15 L. J. Q. B. 359; 9 Q. B. 371; *Williams v. Bayley*, 35 L. J. Ch. 717; L. R. 1 H. L. 200. The rule extends even to a nuisance occasioned by the obstruction of a highway; *Windhill Local Board of Health v. Vint*, 59 L. J. Ch. 608; 45 Ch. D. 351; and the consent of the judge, who tried the case, to a compromise of the prosecution is immaterial. S. C.; *Keir v. Leeman*, *supra*. But securities given to a creditor, by a debtor whose debt has been contracted under circumstances that might have rendered him liable to a prosecution, may be enforced, unless they were given in pursuance of an agreement to stifle it. *Flower v. Sadler*, 10 Q. B. D. 572, following *Ward v. Lloyd*, 13 L. J. C. P. 5; 7 Scott, N. R. 449; 6 M. & Gr. 785. But such an agreement may be inferred from the circumstances. *Jones v. Merionethshire, &c., Building Soc.*, 61 L. J. Ch. 138; [1892] 1 Ch. 173. A contract to indemnify bail given on a criminal charge is illegal. *Consolidated Exploration, &c., Co. v. Musgrove*, 69 L. J. Ch. 11; [1900] 1 Ch. 37; *Rea v. Porter*, 79 L. J. K. B. 241; [1910] 1 K. B. 369. An agreement between the parties to an action before trial as to how the costs shall be borne is not illegal. *Prince v. Haworth*, 75 L. J. K. B. 92; [1905] 2 K. B. 768.

Where a contract is made for the performance of an illegal act, knowledge that the act is illegal is not material, and the contract is void; but where the contract is capable of being legally performed, it can only be avoided by showing a wicked intention to break the law; and for this purpose knowledge of what the law is becomes material. *Waugh v. Morris*, 42 L. J. Q. B. 57; L. R. 8 Q. B. 202.

A foreigner selling and delivering goods abroad to a British subject may recover the price, although he knows at the time of the sale and delivery that the buyer intends to smuggle them into this country, provided he takes no actual part in the illegal adventure, as by packing, &c. *Pellecat v. Angell*, 4 L. J. Ex. 326; 2 C. M. & R. 311. A brewer delivering beer to an unlicensed keeper of the public-house, may maintain an action against him

for the price. *Brooker v. Wood*, 5 B. & Ad. 1052. A municipal corporation may be sued for money lent, though for purposes which were *ultra vires*, and though secured by a covenant in a mortgage, which they had made without the consent of the Treasury, as required by stat. 5 & 6 W. 4, c. 76. *Payne v. Brecon (Mayor)*, 3 H. & N. 572; 27 L. J. Ex. 495. So if trustees lend their trust money to A. they may recover it from him, although such loan be *ultra vires*. *In re Coltman*, 19 Ch. D. 64.

No action will lie here on a contract made abroad to do an act legal there, but illegal in England. *Santos v. Illidge*, 6 C. B. (N. S.) 841; 28 L. J. C. P. 317 (reversed 8 C. B. (N. S.) 861; 29 L. J. C. P. 348, on the ground that the contract was not illegal here); *Rousillon v. Rousillon*, 14 Ch. D. 351, 369; see also *Moulis v. Owen*, 70 L. J. K. B. 396; [1907] 1 K. B. 746, and *Saxby v. Fulton*, 78 L. J. K. B. 781; [1909] 2 K. B. 208. Nor where it violates some moral principle which ought to be universally recognised. *Kaufman v. Gerson*, 73 L. J. K. B. 320; [1904] 1 K. B. 591, as where it has been obtained by strong moral coercion. S. C.

Illegality—Money Lenders Act, 1900.] This Act (63 & 64 V. c. 51), requires a moneylender to be registered under his own or usual trade-name, and in no other name, and with the address or addresses at which he carries on his business; he is to carry on his business in that name and at those places of business only; and he is not to enter into any agreement as a moneylender with respect to the advance or repayment of money or take any security except in his registered name. An agreement made or security taken by an unregistered moneylender is void, and cannot be enforced. *Victorian, &c., Syndicate v. Dott*, 74 L. J. Ch. 673; [1905] 2 Ch. 264; [1906] 1 Ch. 747 n.; *Bonnard v. Dott*, 75 L. J. Ch. 446; [1906] 1 Ch. 740. *In re Campbell*, 81 L. J. K. B. 154; [1911] 2 K. B. 992; *In re Robinson's Settlement*, 81 L. J. Ch. 393; [1912] 1 Ch. 717; *Edgelow v. MacElwee*, 87 L. J. K. B. 738; [1918] 1 K. B. 205; so where it is taken in other than the registered name. *In re Robinson*, 104 L. T. 712. A security taken in the registered name is not void although the name has been improperly registered. *Whiteman v. Sadler*, 79 L. J. K. B. 1050; [1910] A. C. 514. A slight immaterial variation in the description of the moneylender will not invalidate the security. *Wentworth Loan Co. v. Lefkowitz*, 105 L. T. 585; *Peizer v. Lefkowitz*, 81 L. J. K. B. 718; [1912] 2 K. B. 235. A *bonâ fide* holder for value without notice of a security given to a moneylender which is invalidated by reason of non-compliance with the Act is in no better position than the original holder of the security. *In re Robinson*, 80 L. J. Ch. 309; [1911] 1 Ch. 230.

A single transaction of lending money carried out at a place other than the registered address of the moneylender, may amount to the carrying on of a moneylending business at an address other than his registered address, and be void under the Act. *Cornelius v. Phillips*, 87 L. J. K. B. 246; [1918] A. C. 199. The Act was intended to apply only to persons who are really carrying on moneylending as a business, not to persons who lend money as an incident to another business, or to a few old friends by way of friendship. *Lichfield v. Dreyfus*, 75 L. J. K. B. 447; [1906] 1 K. B. 584. The fact that a pawnbroker has once lent £50 on the security of a bill of sale does not make him a moneylender. *Newman v. Oughton*, 80 L. J. K. B. 673; [1911] 1 K. B. 792.

Illegality—Weights and Measures Acts, 1878, 1889.] By 41 & 42 V. c. 49, s. 19, "every contract, bargain, sale or dealing, made or had in the United Kingdom for any work, goods, wares, or merchandise, or other thing which has been or is to be done, sold, delivered, carried, or agreed for by weight or measure, shall be deemed to be made and had according to one of the imperial weights or measures ascertained by this Act, or to some multiple or part thereof, and if not so made or had shall be void," and by sect. 25, any contract, bargain, sale, or dealing, made by any false weight, measures,

scale, &c., shall be void. See 52 & 53 V. c. 21, s. 6, which confers on the Board of Trade power to make new denominations of standards, for the measurement of electricity, temperature, pressure, or gravities. The 60 & 61 V. c. 46, s. 1, now allows sale, &c., by metric standards.

Illegality—Sale of spirituous liquors.] By the Tippling Act (24 G. 2, c. 40), s. 12, no person shall maintain any action for any sum, debt or demand whatsoever, for or on account of any spirituous liquors, unless such debt shall have been really and *bonâ fide* contracted at one time to the amount of 20s. or upwards; nor shall any item in any account or demand for such liquors be allowed where the liquors delivered at one time, and mentioned in such item, shall not amount to the full value of 20s., at the least, and that without fraud or covin, and where no part of the liquor so sold shall have been returned, or agreed to be returned, directly or indirectly. This statute is repealed by the 25 & 26 V. c. 38, as to "liquors to be consumed elsewhere than on the premises where sold, and delivered at the residence of the purchaser thereof, in quantities not less at any one time than a reputed quart." The Act extends to the case of a person who purchases liquors in small quantities to retail them again; as the keeper of an eating-house. *Hughes v. Done*, 1 Q. B. 294. And also to the case of a tavern-keeper's bill in which there are items for spirits supplied to the defendant's guests. *Burnyeat v. Hutchinson*, 5 B. & A. 241. And a bill of exchange, part of the consideration for which is spirituous liquor sold in less quantities than of 20s. value, was held to be wholly void. *Scott v. Gilmore*, 3 Taunt. 226; *Gaitskill v. Greathead*, 1 D. & Ry. 359. But where a bill for £6 had been accepted by an officer in payment of small quantities of spirits, under 20s., supplied for recruits under the defendant's command, the bill was held valid. *Spencer v. Smith*, 3 Camp. 9. Drunkenness being a punishable offence, a publican cannot recover for beer furnished to the defendant after he has become intoxicated by drinking in his public-house. *Brandon v. Old*, 3 C. & P. 440.

The County Courts Act, 1888 (51 & 52 V. c. 43), s. 182, provides that no action shall "be brought or be maintainable in any county or other court to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, which was consumed on the premises where sold or supplied, or in respect of any money or goods lent or supplied, or of any security given, for, in, or towards the obtaining of any such ale," &c.

Illegality—Sale on Sunday.] By the Sunday Observance Act, 1677, usually known as the Lord's Day Act (29 C. 2, c. 7), s. 1, "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of *their ordinary callings*, upon the Lord's day, or any part thereof, works of necessity and charity only excepted." An amusement caterer may be a "tradesman" within this section. *Hawkey v. Stirling*, 87 L. J. K. B. 112; [1918] 1 K. B. 63. Upon this statute it has been held that a horse-dealer cannot maintain an action upon a contract for the sale and warranty of a horse made by him upon a Sunday. *Fennell v. Ridler*, 5 B. & C. 408; 4 L. J. (O. S.) K. B. 207. But where A., not knowing that B. was a horse-dealer, made an oral bargain with him on a Sunday for the purchase of a horse, and the price, which was above £10, was then specified, and the horse warranted, but it was not delivered till the following Tuesday, when the money was paid, it was held that there was no complete contract till the delivery of the horse, and consequently that the contract was not void under the statute. *Bloxsome v. Williams*, 3 B. & C. 232; 2 L. J. (O. S.) K. B. 224; see *Norton v. Powell*, 11 L. J. C. P. 202; 4 M. & Gr. 42, and *Beaumont v. Brengeri*, 5 C. B. 301. Though the contract was made by an agent, and the objection is taken by the party at whose request it was entered into on the Sunday, it cannot be enforced. *Smith v. Sparrow*, 4 Bing. 84; 5 L. J. (O. S.) C. P. 80. But, where goods were bought on a Sunday, and the purchaser afterwards, while

the goods were in his possession, made a promise to pay for them, it was held that the seller was entitled to recover on a *quantum meruit*. *Williams v. Paul*, 6 Bing. 653; 8 L. J. (O. S.) C. P. 280. The statute does not make every work or business done on a Sunday illegal; but only carrying on trade and ordinary callings on that day. Therefore the hiring of a servant by a farmer on Sunday is good. *R. v. Whitnash*, 7 B. & C. 596; 6 L. J. (O. S.) M. C. 26; see also *Scarfe v. Morgan*, 7 L. J. Ex. 324; 4 M. & W. 270, and *Begbie v. Levi*, 1 C. & J. 180; 9 L. J. (O. S.) Ex. 51. So is a guarantee, given for the faithful services of a tradesman's traveller; *Norton v. Powell, supra*; and a contract for enlisting a soldier. *Wolton v. Garvin*, 16 Q. B. 48; 20 L. J. Q. B. 73. A farmer does not come within the provisions of this statute. *R. v. Silvester*, 33 L. J. M. C. 79. Nor does a barber. *Palmer v. Snow*, 69 L. J. Q. B. 356; [1900] 1 Q. B. 725. Nor does a chipped potato dealer, as his premises come within the exception in sect. 3 of the Act as a "cook's shop." *Bullen v. Ward*, 74 L. J. K. B. 916. See also *Amorett v. James*, 84 L. J. K. B. 563; [1915] 1 K. B. 124; *Slater v. Evans*, 85 L. J. K. B. 1686; [1916] 2 K. B. 403; *Fairburn v. Evans*, 85 L. J. K. B. 479; [1916] 1 K. B. 218; *Chivers v. Hand*, 84 L. J. K. B. 304.

Illegality—Contract by or concerning bankrupt.] Agreements in fraud of the bankruptcy law are void. A promissory note given by a third person to a creditor in order to induce him to forgo opposing an insolvent's petition, was held void. *Hills v. Mitson*, 8 Ex. 751; 22 L. J. Ex. 273; *Hall v. Dyson*, 17 Q. B. 785; 21 L. J. Q. B. 224. So a guarantee given to a creditor to induce him to accept a composition; *McKewan v. Sanderson*, 44 L. J. Ch. 447; L. R. 20 Eq. 65; see also *Ex parte Milner*, 54 L. J. Q. B. 425; 15 Q. B. D. 605; or to secure the payment of notes given for the like purpose, is void. *Clay v. Ray*, 17 C. B. (N. S.) 188; *Geere v. Mare*, 2 H. & C. 339; 33 L. J. Ex. 50. See also *Kearley v. Thomson*, 59 L. J. Q. B. 288; 24 Q. B. D. 742. An agreement of this kind, otherwise illegal, was not the less void because it had been made with the knowledge of the other creditors, and sanctioned by the Commissioners in Bankruptcy. *Humphreys v. Willing*, 1 H. & C. 7; 32 L. J. Ex. 33. See also *Blacklock v. Dobie*, 45 L. J. C. P. 498; 1 C. P. D. 265; *Rimini v. Van Praagh*, 42 L. J. Q. B. 1; L. R. 8 Q. B. 1. A promise to pay a debt released by bankruptcy is *nudum pactum*; *Heather v. Webb*, 46 L. J. C. P. 89; 2 C. P. D. 1; but may be enforced if founded on good consideration. *Jakeman v. Cook*, 41 L. J. Ex. 165; 4 Ex. D. 26; *In re Aylmer*, 1 Manson, 391; *Wild v. Tucker*, 83 L. J. K. B. 1410; [1914] 3 K. B. 36. See also *In re Bonacina*, 81 L. J. Ch. 674; [1912] 2 Ch. 394.

An agreement contrary to the policy of the Winding-up Acts is void *Elliott v. Richardson*, 39 L. J. C. P. 340; L. R. 5 C. P. 744.

Illegality—Contract in restraint of trade.] All restraints upon trade are bad as being in violation of public policy, unless they are not unreasonable for the protection of the parties in dealing legally with some subject-matter of contract. The principle is that, though every man is to remain at liberty to work for himself, yet when he has obtained something he wants to sell, he should be at liberty to sell it to the best advantage, and for this purpose, must be able to preclude himself entering into competition with the purchaser. In such case a stipulation, however restrictive, will be good if the restriction is not in the judgment of the court, unreasonable, having regard to the subject-matter of the contract. *Leather Cloth Co. v. Lorsche*, 39 L. J. Ch. 86; L. R. 9 Eq. 345; *Nordenfjelt v. Maxim Nordenfjelt, &c., Co.*, 63 L. J. Ch. 908; [1894] A. C. 535. Any contract in restraint of trade must be founded on good consideration; though the court will not inquire into the adequacy of the consideration. *Pilkington v. Scott*, 15 L. J. Ex. 329, 330; 15 M. & W. 657, 660, *per* Alderson, B.; *Collins v. Locke*, 4 App. Cas. 674, 686; and must be reasonable in reference to the interests both of the parties concerned and of the public. *Mason v. Provident Clothing, &c., Co.*, 82 L. J. K. B. 1153; [1913] A. C. 724. Where the restriction is greater

than the protection of the covenantee can possibly require the covenant is bad. *Ward v. Byrne*, 9 L. J. Ex. 14; 5 M. & W. 548, 561. If the restriction be divisible and be good as to part, and bad as to the rest, the court will give effect to the former part. *Price v. Green*, 16 L. J. Ex. 108; 16 M. & W. 346; *Robinson v. Hewer*, 67 L. J. Ch. 644; [1898] 2 Ch. 451; *Nevanas v. Walker*, 83 L. J. Ch. 380; [1914] 1 Ch. 413; *Bromley v. Smith*, 78 L. J. K. B. 745; [1909] 2 K. B. 235. In construing a covenant in restraint of trade, the true object of the prohibition must be discovered by looking at the whole contract and the particular clause in question. *Hadsley v. Dayer-Smith*, 83 L. J. Ch. 770; [1914] A. C. 979. A restrictive covenant in an apprenticeship deed made while the apprentice is an infant, which covenant is to come into operation after the termination of the apprenticeship is, if reasonable and for the apprentice's benefit, enforceable against him. *Gadd v. Thompson*, 80 L. J. K. B. 272; [1911] 1 K. B. 304. Numerous cases are reported as to what contracts have been adjudged to be reasonable; an enumeration of them would be beyond the scope of the present work: they will be found collected in the notes to *Mitchell v. Reynolds*, 1 Smith's L. C. 11th ed. 417 *et seq.*; see further *Dowden & Pook v. Pook*, 73 L. J. K. B. 38; [1904] 1 K. B. 45, and *Leetham v. Johnstone-White*, 76 L. J. Ch. 304; [1907] 1 Ch. 322; *Leng v. Andrews*, 78 L. J. Ch. 80; [1909] 1 Ch. 763; *Eastes v. Russ*, 83 L. J. Ch. 329; [1914] 1 Ch. 468; *Morris v. Sazelby*, 85 L. J. Ch. 210; [1916] 1 A. C. 688; *Horwood v. Millar's Timber, &c., Co.*, 86 L. J. K. B. 190; [1917] 1 K. B. 305. Evidence of persons in the same trade as to their views as to the reasonableness of the restrictions in the contract is not admissible. The question is to be decided by the judge alone. *Dowden & Pook v. Pook*, *supra*. A restrictive covenant entered into by a servant as a term in his contract of service ceases to be in force upon his wrongful dismissal. *General Bill Posting Co. v. Atkinson*, 78 L. J. Ch. 77; [1909] A. C. 118. A term in a contract of sale of goods by the manufacturer E. to C., a trade purchaser, that C. should not sell them below a fixed price, and that if C. sold them he should obtain a similar agreement from his sub-purchaser, is good. *Elliman v. Carrington*, 70 L. J. Ch. 577; [1901] 2 Ch. 275. See also *National Phonograph Co. v. Edison-Bell Consolidated Phonograph Co.*, 77 L. J. Ch. 218; [1908] 1 Ch. 335. As to the right to impose conditions on the sale of patented articles; see *National Phonograph of Australia v. Menck*, 80 L. J. P. C. 105; [1911] A. C. 336; with regard to non-patented articles; see *Taddy v. Sterious*, 73 L. J. Ch. 191; [1904] 1 Ch. 354; and *McGruther v. Pitcher*, 73 L. J. Ch. 653; [1904] 2 Ch. 306. See also *Evans v. Heathcote*, 87 L. J. K. B. 593; [1918] 1 K. B. 418.

A contract not to carry on a trade within 10 miles from a town I., means within 10 miles from the borough boundary of I., *Cattle v. Thorpe*, [1900] W. N. 83; and the distance is to be measured "as the crow flies," *i.e.*, by a straight line on a map, and not by the nearest mode of practicable access. *Mouflet v. Cole*, 42 L. J. Ex. 8; L. R. 8 Ex. 32.

As to trade unions, see stat. 34 & 35 V. c. 31, ss. 3, 4, 23, amended by 39 & 40 V. c. 22, s. 16, and *Rigby v. Connol*, 49 L. J. Ch. 328; 14 Ch. D. 482; *Wolfe v. Matthews*, 51 L. J. Ch. 833; 21 Ch. D. 194; *Swaine v. Wilson*, 59 L. J. Q. B. 76; 24 Q. B. D. 252; *Chamberlain's Wharf v. Smith*, 69 L. J. Ch. 783; [1900] 2 Ch. 605; *Yorkshire Miners Assoc. v. Howden*, 74 L. J. K. B. 511; [1905] A. C. 256; *Gozney v. Bristol, &c., Society*, 78 L. J. K. B. 616; [1909] 1 K. B. 901; *Russell v. Amalgamated Society of Carpenters*, 81 L. J. K. B. 619; [1912] A. C. 421; *Amalgamated Society of Railway Servants v. Osborne*, 79 L. J. Ch. 87; [1910] A. C. 87; *Osborne v. Amalgamated Society of Railway Servants*, 80 L. J. Ch. 315; [1911] 1 Ch. 540; *Baker v. Ingall*, 81 L. J. K. B. 553; [1912] 3 K. B. 106. See also *Evans v. Heathcote*, *supra*, decided thereon. See also the Trades Disputes Act, 1906, 6 E. 7, c. 47.

Illegality—Immorality.] One who is a party to an immoral contract

cannot enforce it. Thus the price of obscene and libellous prints cannot be recovered. *Fores v. Johnes*, 4 Esp. 97. And where an action was brought against the defendant for board and lodging, and it appeared that she was a prostitute, and had boarded and lodged with the plaintiff, who kept a house of ill-fame, and partook of the profits of her prostitution, it was held that such a demand could not be supported. *Howard v. Hodges*, 1 Selw. N. P. 13th ed. 80. But a person may recover for goods sold to a prostitute, not being evidently sold to enable her to carry on prostitution. *Bowry v. Bennet*, 1 Camp. 348. So where the plaintiff was employed to wash clothes for a prostitute, knowing her to be such, and the clothes consisting principally of expensive dresses and men's nightcaps, it was held that she was entitled to recover. *Lloyd v. Johnson*, 1 B. & P. 340. Rent cannot be recovered for premises knowingly let for an immoral purpose. *Upfill v. Wright*, 80 L. J. K. B. 254; [1911] 1 K. B. 506. So the hire for a brougham cannot be recovered from a prostitute where the coachmaker knew her to be such, and supplied the brougham knowing it was to be used by her as part of her display to attract men. *Pearce v. Brooks*, 35 L. J. Ex. 134; L. R. 1 Ex. 213. It is unnecessary that the plaintiff should have looked expressly to the proceeds of the defendant's prostitution for payment. S. C.; overruling, on this point, *Bowry v. Bennet*, *supra*. See *Taylor v. Chester*, 38 L. J. Q. B. 225; L. R. 4 Q. B. 309.

Where a bond has been given by a man to his concubine, it is not to be presumed from the subsequent continuance of the cohabitation, that it was given to secure such cohabitation, and therefore for an immoral consideration. *In re Vallance*, 26 Ch. D. 353.

Illegality—Alien Enemy.] Inasmuch as trading, without licence, with the King's enemies is illegal, contracts made before, but which remain unexecuted at the time war is declared between the countries of the contracting parties, are dissolved and both parties are absolved from further performance. *Esposito v. Bowden*, 27 L. J. Q. B. 17; 7 E. & B. 763; *Janson v. Driefontein, &c., Mines*, 71 L. J. K. B. 857, 870; [1902] A. C. 484, 509; *Ertel Bieber & Co. v. Rio Tinto Co.*, 87 L. J. K. B. 531; [1918] A. C. 260; *Fried. Krupp v. Orconera Iron Ore Co.*, 88 L. J. K. B. 304. Where, however, a claim under a contract made before the war has accrued before war was declared, the contract is not dissolved, but the remedy is suspended till the close of the war. *Janson v. Driefontein, &c., Mines*, 71 L. J. K. B. 857, 862; [1902] A. C. 484, 493, explained in *Karberg v. Blythe, Green, Jourdain & Co.*, 84 L. J. K. B. 1673; [1915] 2 K. B. 379. While a registered alien enemy resident here may enforce a personal right in the courts of this country—*Thurn & Taxis (Princess) v. Moffitt*, 84 L. J. Ch. 220; [1915] 1 Ch. 58—an alien enemy not resident here cannot do so. *Porter v. Freudenberg*, 84 L. J. K. B. 1001; [1915] 1 K. B. 857; nor can be heard in support of a motion to revise or alter the decision of a trustee in bankruptcy. *In re Wilson*, 84 L. J. K. B. 1893. *Seemle*, a company registered under the Companies Acts may sue here notwithstanding that some of its shareholders are alien enemies resident in the enemy state. *Daimler Co. v. Continental Tyre, &c., Co.*, 85 L. J. K. B. 1333; [1916] 2 A. C. 307. War does not suspend an action against an alien enemy. *Robinson v. Continental Insurance Co. of Mannheim*, 84 L. J. K. B. 238; [1915] 1 K. B. 155; nor does it extinguish or suspend his obligations under a lease made before the outbreak of war. *Halsey v. Lowenfeld*, 85 L. J. K. B. 1498; [1916] 2 K. B. 707; nor is his tenancy determined by an act of State prohibiting him residing in the demised premises. *London & Northern Estates Co. v. Schlesinger*, 85 L. J. K. B. 369; [1916] 1 K. B. 20.

Infancy.

An infant is a person under the age of 21 years, and in calculating age fractions of days are disregarded; thus if born on Sept. 3rd, he becomes of

age on Sept. 2nd, 21 years afterwards. *Anon.*, cited *per* Holt, C.J., Ld. Raym. 480; 1096; S. C.C., Salk. 695, 44. See also 1 Bl. Com. 463.

That the defendant was an infant at the time of the contract made, is a good defence, unless the action be for necessaries; the defence must be specially pleaded. Rules, 1883, O. xix. r. 15. By the Sale of Goods Act, 1893, s. 2, "Capacity to buy and sell is regulated by the general law concerning capacity to contract, and to transfer and acquire property. Provided that where necessaries are sold and delivered to an infant, or minor, or to a person who by reason of mental incapacity or drunkenness is incompetent to contract, he must pay a reasonable price therefor. Necessaries in this section mean goods suitable to the condition in life of such infant or minor or other person, and to his actual requirements at the time of the sale and delivery."

An infant is not liable upon a contract made in the course of a trade in which he is engaged, and money paid to him under such a contract cannot be recovered back. *Cowern v. Nield*, 81 L. J. K. B. 865; [1912] 2 K. B. 419.

Even though given for the price of necessaries, an infant is not bound by his penal bond. *Ayliff v. Archdale*, Cro. Eliz. 920; nor by his acceptance of a bill of exchange. *Ex pte. Margrett*, 60 L. J. Q. B. 339; [1891] 1 Q. B. 413. An infant apprentice, A., cannot be sued by his master for not serving him; *Gylbert v. Fletcher*, Cro. Car. 179; nor be restrained from serving another person, B., contrary to the apprenticeship agreement; nor can B. be restrained from employing A. *De Francesco v. Barnum*, 59 L. J. Ch. 151; 43 Ch. D. 165. See S. C. 60 L. J. Ch. 63; 45 Ch. D. 430. But after the period of apprenticeship has expired an action will lie against A. on the covenant. *Gadd v. Thompson*, 80 L. J. K. B. 272; [1911] 1 K. B. 304. As to the severance of void restrictive clauses from the rest of the contract see *Bromley v. Smith*, 78 L. J. K. B. 745; [1909] 2 K. B. 235.

Where the action, though in form *ex contractu*, is, in fact, founded upon *tort*, infancy will be no defence. *Burnard v. Haggis*, 14 C. B. (N. S.) 45; 32 L. J. C. P. 189. Thus an action for money had and received lies against an infant for money which he has appropriated by fraud or embezzlement. *Bristow v. Eastman*, 1 Esp. 172; *Cowern v. Nield*, *supra*. But if the action be founded on fraudulent representation in connection with a contract infancy is a defence. *Johnson v. Pye*, 1 Sid. 258; see also *Liverpool Adelphi v. Fairhurst*, 23 L. J. Ex. 163; 9 Ex. 422, the case of a *feme covert*; *Leslie v. Sheill*, 83 L. J. K. B. 1145; [1914] 3 K. B. 607, where the C. A. held that an infant was not liable to repay a loan which he had obtained by a fraudulent misrepresentation that he was of full age. Cf. *Stocks v. Wilson*, 82 L. J. K. B. 598; [1913] 2 K. B. 235, where Lush, J., held that where an infant has wrongfully sold property acquired by a fraudulent misrepresentation as to his age he must account for the proceeds of the sale to the party defrauded.

Where an infant has entered into a contract which is for his benefit, it is voidable only and not void, and he must repudiate it within a reasonable time after he comes of age, or he will be bound thereby. *Edwards v. Carter*, 63 L. J. Ch. 100; [1893] A. C. 360; *Carnell v. Harrison*, 85 L. J. Ch. 321.

What are necessaries.] An infant may bind himself for necessaries, that is, for meat, drink, apparel, lodging, medicines, &c., and also for his good teaching or instruction. Co. Litt. 172 a; Com. Dig. *Enfant* (B. 5). The question of what are necessaries is to be governed by the fortune and circumstances of the infant; and the proof of those circumstances lies on the plaintiff. *Ford v. Fothergill*, 1 Esp. 211; *Ryder v. Wombwell*, 38 L. J. Ex. 8; L. R. 4 Ex. 32; *Nash v. Inman*, 77 L. J. K. B. 626; [1908] 2 K. B. 1. They may be necessaries without being absolutely requisite for bare subsistence. *Peters v. Fleming*, 9 L. J. Ex. 81; 6 M. & W. 42. It is a mixed question of law and fact to be left to the jury, subject to the opinion of the court as to the manner in which the jury have exercised their judgment.

Harrison v. Fane, 1 M. & Gr. 550; *Wharton v. Mackenzie*, 13 L. J. Q. B. 130; 5 Q. B. 606. The judge must decide whether the case is such as to cast on the plaintiff the onus of proving that the articles are necessaries, and then whether there is any evidence to satisfy that onus; if the judge require such evidence, and the plaintiff do not produce any, the judge is bound to nonsuit, and ought not to leave the case to the jury. *Ryder v. Wombwell (supra)*. An infant, a captain in the army, has been held liable for a livery ordered by him for his servant; but not for cockades for the soldiers of his company. *Hands v. Slaney*, 8 T. R. 578; and see *Coates v. Wilson*, 5 Esp. 152. So an infant may contract to pay a fine due upon his admission to a copyhold estate; *Evelyn v. Chichester*, 3 Burr. 1717; or for necessaries supplied to his wife. *Turner v. Trisby*, 1 Str. 168; B. N. P. 155. Education for the purpose of learning a business suitable for the infant may be a necessary, and if so he may bind himself, even under seal, to pay a reasonable premium therefor. *Walter v. Everard*, 60 L. J. Q. B. 738; [1891] 2 Q. B. 369. But the plaintiff must prove his case in the same way as if there had been no deed. S. C. A fair contract for work and labour to be done by him is binding. *Wood v. Fenwick*, 11 L. J. M. C. 127; 10 M. & W. 195; *Cooper v. Simmons*, 7 H. & N. 707; 31 L. J. M. C. 138; *Leslie v. Fitzpatrick*, 47 L. J. M. C. 22; 3 Q. B. D. 229. But not if such contract be inequitable; S. C.; *R. v. Lord*, 17 L. J. M. C. 181; 12 Q. B. 757; as if his master reserve a right to stop wages at will; S. C.; or during a lock-out; *Corn v. Matthews*, 62 L. J. M. C. 61; [1893] 1 Q. B. 310; or if the master be not bound to supply work although the infant is restrained from working for any one else; *De Francesco v. Barnum*, 60 L. J. Ch. 63; 45 Ch. D. 430. *Secus*, where the master was not bound to teach or pay the apprentice while his business was at a standstill through an accident beyond his control. *Green v. Thompson*, 68 L. J. Q. B. 719; [1899] 1 Q. B. 1. In these cases the contracts must be considered as a whole, whether they are for the benefit of the infant or not. S. C.; *Corn v. Matthews, supra*; *Gadd v. Thompson*, 80 L. J. K. B. 272; [1911] 1 K. B. 304. See also *Evans v. Ware*, 62 L. J. Ch. 256; [1892] 3 Ch. 502; *Flower v. L. & N. W. Ry.*, 63 L. J. Q. B. 547; [1894] 2 Q. B. 65; *Clements v. L. & N. W. Ry.*, 63 L. J. Q. B. 837; [1894] 2 Q. B. 482. If the contract is for the infant's benefit it cannot be repudiated by him on the ground that it is to a large extent still executory. *Roberts v. Gray*, 82 L. J. K. B. 362; [1913] 1 K. B. 520. In that case the contract was for the tuition and employment of the infant as a billiard player.

In an action for a trousseau supplied to a female infant before her marriage, it was held that the true test whether the goods were necessaries, was the real position of the future husband in society, and not the apparent or assumed condition he might take upon himself. *Stacy v. Firth*, 16 L. T. 498. A female infant who has no property of her own to settle may contract with a solicitor for the expenses of a marriage settlement. *Helps v. Clayton*, 17 C. B. (N. S.) 553; 34 L. J. C. P. 1. So she may bind herself for the expenses of her husband's funeral though he left no assets. *Chapple v. Cooper*, 13 L. J. Ex. 286; 13 M. & W. 252. Where groceries were supplied to an infant trader, it was held that he was liable for the price of so much as had been consumed as necessaries, by him and his family. *Turberville v. Whitehouse*, 1 C. & P. 94.

It is not material to the defence whether the infant was in fact supplied by his friends with an allowance sufficient to buy all necessaries with ready money. *Burghart v. Hall*, 8 L. J. Ex. 235; 4 M. & W. 727. Nor is it a condition precedent to recovery that the plaintiff should have made inquiry as to the necessity of the articles sold before he supplied them. *Brayshaw v. Eaton*, 8 L. J. C. P. 153; 5 Bing. N. C. 231; *Dalton v. Gibb*, 8 L. J. C. P. 151; 5 Bing. N. C. 198. To rebut the evidence that the goods supplied to him were necessaries, the defendant may show that he was already supplied with a sufficiency of similar goods, although this was not known to the plaintiff. *Bainbridge v. Pickering*, 2 W. Bl. 1325; *Brayshaw v. Eaton*,

7 Scott. 183; *Foster v. Redgrave*, L. R. 4 Ex. 35 n; *Baines or Barnes v. Toye*, 53 L. J. Q. B. 567; 13 Q. B. D. 410; *Johnstone v. Marks*, 57 L. J. Q. B. 6; 19 Q. B. D. 509, dissenting on this point from *Ryder v. Wombwell*, L. R. 3 Ex. 90. In *Bainbridge v. Pickering*, *supra*, it was held that a female infant residing with her mother and supplied by her with necessaries could not be liable at all, as it was for the mother to decide what articles were necessaries for her daughter.

Payment for necessaries for an infant is a good payment to him. *Hedgley v. Holt*, 4 C. & P. 104. So money laid out in the purchase of necessaries for him is recoverable. *Ellis v. Ellis*, 5 Mod. 368. Money lent to an infant to be laid out in necessaries was, *if so laid out*, held to be recoverable from the infant. S. C. 12 Mod. 197; 3 Salk. 197; *secus Darby v. Boucher*, 1 Salk. 279, and *Probart v. Knauth*, 2 Esp. 472 n. This divergence of authority is not, however, now material, for, in equity, which now prevails (see J. Act, 1873, s. 25 (11)), money lent to an infant to pay a debt for necessaries, and so applied, was recoverable, the lender of the money standing in the place of the person paid: *Marlow v. Pitfield*, 1 P. Wms. 558, cited *Ex pte. Williamson*, L. R. 5 Ch. 313. See further 1 Salk. 279 n. (b).

What are not necessaries.] Although an infant may enter into a partnership he will not be liable for the contracts of the partnership made during his infancy; but he will be liable upon such contracts made after his full age unless he notifies his disaffirmance of the partnership. *Goode v. Harrison*, 5 B. & A. 147. An infant is not liable upon an account stated, even though it appears to be for necessaries; nor can the account stated be used as evidence by way of admission on the part of the defendant to show that necessaries have been supplied to that amount. *Ingledeu v. Douglas*, 2 Stark. 36; *Hedgley v. Holt*, 4 C. & P. 104. Nor is the advance of wages for the purchase of things not necessaries a good payment. S. C. Nor is he liable for money lent, unless it has been laid out in necessaries; *Ellis v. Ellis*, 12 Mod. 197; 3 Salk. 197. Now see Infants' Relief Act, 1874, s. 1, *infra*. He is not liable on a bill of exchange though given for necessaries. *Williamson v. Watts*, 1 Camp. 552. But he is liable on a bill accepted by him after 21, though drawn before. *Stevens v. Jackson*, 4 Camp. 164. Unless it be for a debt contracted while under age, 55 & 56 V. c. 4, s. 5. Where goods, not being necessaries, are delivered to a carrier for an infant, the infant cannot be charged though the goods do not reach him till after he is of age. *Griffin v. Langfield*, 3 Camp. 254. An infant cannot be sued on a warranty of a horse. *Howlett v. Haswell*, 4 Camp. 118. An infant lieutenant in the navy is not liable for the price of a chronometer, he being out of employment at the time of its being furnished. *Berolles v. Ramsay*, Holt. N. P. 77. Dinners, confectionery, and fruit, supplied to an undergraduate out of college, are not *primâ facie*, necessaries. *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, 13 L. J. Q. B. 130; 5 Q. B. 606. And articles supplied cannot be considered as suitable necessaries if they are merely of an ornamental character, as gold rings, &c.; see *Peters v. Fleming*, 9 L. J. Ex. 81; 6 M. & W. 42; or betting books. *Jenner v. Walker*, 19 L. T. 398. Cigars and tobacco cannot be necessaries in the absence of special circumstances rendering them necessary, medicinally or otherwise, for the infant. *Bryant v. Richardson*, L. R. 3 Ex. 98, n., and see *Ryder v. Wombwell*, 38 L. J. Ex. 8; L. R. 4 Ex. 32. Nor is a contract for the hire of a motor car where it contains onerous terms. *Fawcett v. Smethurst*, 84 L. J. K. B. 473.

If the issue be joined on the goods being necessaries, the plaintiff need not prove that *all* are necessaries, but may recover *pro tanto*. *Tapley v. Wainwright*, 5 B. & Ad. 399.

Ratification of promise after full age.] A contract by an infant, other than for necessaries, was formerly voidable only, not void, and was therefore capable of being ratified by him after he had attained his majority; but

now it is otherwise, by the Infants' Relief Act, 1874 (37 & 38 V. c. 62), s. 1, which provides that "all contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than contracts for necessities), and all accounts stated with infants shall be absolutely void, provided always that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of common law or equity, enter, except such as now by law are voidable." This section applies only to the three classes of contracts specified therein. *Duncan v. Dixon*, 59 L. J. Ch. 437; 44 Ch. D. 211. It does not apply to a contract in a marriage settlement. *Duncan v. Dixon*, *supra*. Where an infant had agreed to become tenant of a house and to pay £102 for the furniture therein, £68 of which sum he paid, and had occupied the house and used the furniture for some months, it was held he could not recover back the £68 under this section; *Valentini v. Canali*, 59 L. J. Q. B. 74; 24 Q. B. D. 166; though *semble*, having elected to avoid the contract, he was entitled to have the contract declared void, and a promissory note he had given for the balance of purchase money, delivered up. S. C. A mortgage given by an infant member of a building society to the society is void, although stat. 37 & 38 V. c. 42, s. 38, allows of such members and of their giving "all necessary acquittances." *Nottingham, &c., Bldg. Soc. v. Thurstan*, 72 L. J. Ch. 134; [1903] A. C. 6. Cf. *Gardner v. Wainfur*, 89 L. J. Ch. 98.

Sect. 2 of the Infants' Relief Act, 1874: "no action shall be brought whereby to charge any person upon any promise made after full age, to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age." This applies to a ratification after the passing of the Act, although the promise was made before its passing. *Ex pte. Kibble*, 44 L. J. Bk. 63; L. R. 10 Ch. 373. It applies to an infant's promise to marry. *Coxhead v. Mullis*, 47 L. J. C. P. 761; 3 C. P. D. 439. See also *Ditcham v. Worrall*, 49 L. J. C. P. 688; 5 C. P. D. 410. The defendant K., after he had attained 21, in settlement of a debt contracted to G. during infancy, and after action brought therefor, gave G. his acceptance, which G. indorsed to his solicitor, S., in the action, who had notice of all the circumstances; it was held that sect. 2 avoided the acceptance in the hands of S. *Smith v. King*, [1892] 2 Q. B. 543. It seems to extend to a set-off. See *Rawley v. Rawley*, 45 L. J. Q. B. 675; 1 Q. B. D. 460, decided on similar words in 9 G. 4, c. 14, s. 5, which required the ratification to be in writing, signed by the party to be charged.

The principle of this sect. 2, *supra*, has been extended by the Betting and Loans (Infants) Act, 1892, 55 & 56 V. c. 4, which, by sect. 5, enacts that: "If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever. For the purposes of this section any interest, commission, or other payment in respect of such loan shall be deemed to be a part of such loan."

Infant shareholders.] The liability to calls of infants holding shares in joint-stock and other companies is considered *sub tit. Actions by companies*, 2—*Special defences—Infancy, post*.

If the action be on a *contract for the sale* of shares by the plaintiff to the defendant, a simple defence of infancy is enough, for an infant is not compellable to complete an agreement to buy them.

Infancy—how proved.] Infancy must be proved by calling some person who can speak as to the time of the defendant's birth; or by the entry on the register of births, or a certified copy thereof. It cannot be proved by a certificate of baptism. Nor by declarations of deceased members of his family mentioning the time of his birth. *Haines v. Guthrie*, 53 L. J. Q. B. 521; 13 Q. B. D. 818. If the defendant were of age when the action was commenced the date of the contract must be shown as well as his non-age at that date. But where the defendant pleaded infancy to an action against him as acceptor of a bill, it was held that the acceptance not being dated, ought to be presumed to have been made shortly after the date of the bill itself according to the common practice, the drawer and acceptor not living far apart; therefore where a bill at four months was dated 9th November, 1850, and the defendant came of age in March, 1851, the jury rightly presumed that he was not of age when he accepted. *Roberts v. Bethell*, 12 C. B. 778; 22 L. J. C. P. 69.

Insanity.

It is not a good defence that the defendant, at the time of the contract entered into, was of unsound mind, unless he prove that the plaintiff knew him to be so insane as not to be capable of understanding what he was about. *Imperial Loan Co. v. Stone*, 61 L. J. Q. B. 449; [1892] 1 Q. B. 599. See also *Browne v. Joddrell*, M. & M. 105; *Levy v. Baker*, *Id.*, 106, n., where it was held that the plaintiff must also have taken advantage of the defendant's unsoundness of mind to impose on him. The rule is, that the contracts of a lunatic, entered into fairly and *bonâ fide* with a person ignorant of his incapacity, where the transaction is in the ordinary course (as the purchase of an annuity) and is wholly or in part executed, are valid. *Molton v. Camroux*, 18 L. J. Ex. 68, 356; 2 Ex. 487; 4 Ex. 17. Insanity, and the probable knowledge of it by the adverse party, may be proved by showing that it existed and was apparent, either shortly after or shortly before the alleged contract. *Beavan v. M'Donnell*, 9 Ex. 309; 23 L. J. Ex. 326. The mere existence of a delusion in the mind of the defendant, although connected with a contract made by him, is not sufficient to avoid such contract; it is a question for the jury whether the delusion affected the contract. *Jenkins v. Morris*, 14 Ch. D. 674. See further, *Action for recovery of land by devisee—Incapacity from idiocy or non-sane memory, post.*

By the Sale of Goods Act, 1893, s. 2, a lunatic is liable to pay a reasonable price for necessaries sold and delivered to him. But it would seem that he must have been supplied under such circumstances that an obligation to pay for them is to be implied. See *In re Rhodes*, 59 L. J. Ch. 298; 44 Ch. D. 94. A lunatic is liable for necessaries supplied to his wife; *Read v. Legard*, 6 Ex. 637; 20 L. J. Ex. 309; or moneys expended for her protection. *Williams v. Wentworth*, 5 Beav. 325. Thus, the inquiry as to the necessity of the goods supplied, and their suitability to the defendant's condition, may arise on this plea as in that of infancy. See *Baxter v. Portsmouth*, (*Earl*), 5 B. & C. 170. A person lending money to provide necessaries for a lunatic has an equitable right to stand in the shoes of the lunatic's creditors who have been paid out of the money lent. *In re Beavan*, 81 L. J. Ch. 113; [1912] 1 Ch. 196.

As to the liability of a principal on contracts entered into on his behalf, by an agent, after the principal has become insane, see *Drew v. Nunn*, 48 L. J. Q. B. 591; 4 Q. B. D. 661.

Intoxication.

A contract entered into by a person in a state of intoxication is in a similar position to one made by an insane person; see *Molton v. Camroux*, *supra*; it is voidable, not void. *Matthews v. Baxter*, 42 L. J. Ex. 73; L. R.

8 Ex. 132. See further as to this defence, *Gore v. Gibson*, 14 L. J. Ex. 151; 13 M. & W. 623. By the Sale of Goods Act, 1893, s. 2, he is liable to pay a reasonable price for necessaries sold and delivered to him.

Limitation, Statutes of.

The Statutes of Limitation must be specially pleaded; Rules, 1883, O. xix. r. 15; and upon issue joined thereon the burden of proof lies on the plaintiff. *Wilby v. Henman*, 4 L. J. Ex. 262; 2 Cr. & M. 658. The commencement of the action is the date of the issuing or the original writ of summons: Rules, 1883, O. ii. r. 1; this date is stated on the statement of claim; App. C., sect. 1; and would seem, subject to amendment, to be conclusive evidence thereof; see *Harper v. Phillips*, 7 M. & Gr. 397; *Whipple v. Manley*, 5 L. J. Ex. 191; 1 M. & W. 432; but after the lapse of six years, strict proof of the regular continuance by other writs was necessary in order to rebut this defence. *Pritchard v. Bagshaw*, 11 C. B. 459; 20 L. J. C. P. 161. But the original writ is now kept alive by renewal by judge's order under Rules, 1883, O. viii. r. 1. The renewal must be made within twelve months in the case of an original writ, and six months in the case of a renewed writ; the day of its date or of renewal being in each case included. A writ issued before the J. Act, 1875, is void unless renewed as prescribed by this rule. *Hume v. Somerton*, 59 L. J. Q. B. 420; 25 Q. B. D. 239. As it was held unnecessary to reply specially the issuing and return of successive writs under 2 W. 4, c. 39 (*Higgs v. Mortimer*, 1 Ex. 711), so it seems to be unnecessary to reply the renewal of the original writ under the new process now substituted. By Rules, 1883, O. viii. r. 2, the production of a writ, purporting to be marked with the seal of the court showing the same to have been renewed according to rule 1, shall be sufficient evidence of such renewal, and of the commencement of the action, as of the first date of such renewed writ for all purposes. It may be proved that the renewal was irregular, and that the writ is therefore void; see *Hume v. Somerton*, *supra*.

A misdated writ, with its indorsement, is amendable under Rules, 1883, O. xxviii. r. 12, according to the facts; though the effect may be to defeat the Statute of Limitations. See *Cornish v. Hockin*, 1 E. & B. 602; 22 L. J. Q. B. 142. But there is no power to alter the true date. *Clarke v. Smith*, 2 H. & N. 753; 27 L. J. Ex. 155.

The time of limitation is to be computed exclusively of the day on which the cause of action arose. *Hardy v. Ryle*, 9 B. & C. 603; 7 L. J. (O. S.) M. C. 118; *Freeman v. Read*, 4 B. & S. 178; 32 L. J. M. C. 226. See also *Gelmini v. Morrigia*, 82 L. J. K. B. 949; [1913] 2 K. B. 549.

Foreign Statutes of Limitation, which bar the remedy only, and not the right, have no operation here; *Huber v. Steiner*, 2 Bing. N. C. 202; *Alliance Bank of Simla v. Carey*, 49 L. J. C. P. 781; 5 C. P. D. 429; even after judgment for the defendant in the foreign court on a plea of the foreign statute. *Harris v. Quine*, 38 L. J. Q. B. 331; L. R. 4 Q. B. 653.

By the Limitation Act, 1623, 21 J. 1, c. 16, s. 3, actions of account, and on the case (other than concerning the trade of merchandise between merchants or their factors or servants, and other than for slander), actions of debt on lending or contract without specialty, or for rent in arrear, are to be brought within six years after the cause of action, and not after. Under the head "case" is here included assumpsit on promises, and the part of the statute above cited therefore includes all the causes of action founded on simple contract, whether expressed to be for a debt, or on a promise or contract, express or implied, formerly prosecuted in the form of debt or assumpsit.

The exception in this statute of merchants' accounts was held to apply only to actions of account, or, perhaps, for not accounting; or at all events only to cases in which account would lie. *Inglis v. Haigh*, 10 L. J. Ex. 406;

8 M. & W. 769; *Cottam v. Partridge*, 11 L. J. C. P. 161; 4 M. & Gr. 271. And by 19 & 20 V. c. 97, s. 9, this exception has been abolished, and all such actions shall be commenced within six years after the cause of action, and no claim in respect of a matter which arose more than six years before such action, shall be enforceable by action by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action.

An action of debt on the bye-law of a chartered company is an action on a contract without specialty; *Tobacco Pipe Co. v. Loder*, 16 Q. B. 765; 20 L. J. Q. B. 414; so is an action for calls by a company established under an act of a colonial legislature. *Welland Ry. v. Blake*, 6 H. & N. 410; 30 L. J. Ex. 161. But an action given by statute, as for calls on a shareholder in a company, under the Companies Clauses Consolidation Act, 1845, is found on specialty. *Cork & Bandon Ry. v. Goode*, 13 C. B. 826; 22 L. J. C. P. 198. The liability of a member or contributory of a joint stock company incorporated under the Companies Act, 1862, to pay calls, is, under sects. 16, 75, 76, a debt in the nature of a specialty debt; whereby the heirs are bound. *Buck v. Robson*, 39 L. J. Ch. 821; L. R. 10 Eq. 629. So, where an unregistered company is wound up under that Act. *In re Muggeridge*, 39 L. J. Ch. 620; L. R. 10 Eq. 629. Where the liability of the members of a non-corporate co-partnership is fixed by a deed of settlement, the liability is a specialty debt. *Helby's, Stokes', and Horsey's Cases*, L. R. 2 Eq. 167. An instrument under seal, executed in India, is here treated as a specialty, although by Indian law specialty debts have no greater efficacy than simple contract debts, and both are barred by the lapse of three years. *Alliance Bank of Simla v. Carey*, 49 L. J. C. P. 781; 5 C. P. D. 429.

21 J. 1, c. 16, s. 3, having been construed somewhat strictly, so as to exclude cases which were not, when it passed, regarded as contracts, the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 3, enacted that actions of debt on an award (where the submission is not by specialty), or for copyhold fines, or an escape, or money levied on a *fi. fa.*, should be brought within six years after the cause of action.

As to the application of the Statutes of Limitations in actions by and against executors, *vide sub tit.*, *Actions by and against Executors, post*.

A simple contract debt, though secured by a charge on land, is barred in six years by the Limitation Act, 1623. *Barnes v. Glenton*, 68 L. J. Q. B. 502; [1899] 1 Q. B. 885.

By the J. Act, 1873, s. 25 (2), "no claim of a *cestui que trust* against his trustees for any property held on an express trust, or in respect of any breach of such trust, shall be held to be barred by any Statute of Limitations." As to the meaning of "express trust," see *Banner v. Berridge, infra*; *Soar v. Ashwell*, [1893] 2 Q. B. 390, and cases cited therein, and *In re Robinson*, 80 L. J. Ch. 381; [1911] 1 Ch. 502. An agent who receives money for his principal may set up the statute notwithstanding the fiduciary relation between them. Unless by the express terms of his employment he is bound to keep the money separate from his own. *Friend v. Young*, 66 L. J. Ch. 737; [1897] 2 Ch. 421; *Henry v. Hammond*, 82 L. J. K. B. 575, 577; [1913] 2 K. B. 515, 521. A solicitor is not ordinarily in the position of trustee for his client in respect of moneys received for him; *Watson v. Woodman*, 45 L. J. Ch. 57; L. R. 20 Eq. 721; nor does a mortgagee hold the proceeds of the sale of mortgaged property on an express trust for the mortgagor; *Banner v. Berridge*, 50 L. J. Ch. 630; 18 Ch. D. 254; unless there be a special clause to that effect in the mortgage deed. *In re Bell*, 56 L. J. Ch. 307; 34 Ch. D. 462. An agent who receives money for investment for his principal, holds it in general on an express trust. *Burdick v. Garrick*, 39 L. J. Ch. 369; L. R. 5 Ch. 233; *N. American Land, &c., Co. v. Watkins*, 73 L. J. Ch. 626; [1904] 2 Ch. 233. Where a remedy in equity was consequential to the remedy at law, the Court of Equity acted by analogy to the Statute of Limitations, and imposed on the remedy it afforded, the same limitation that would

be imposed on the proceedings at law; *Knox v. Gye*, 42 L. J. Ch. 234, 238; L. R. 5 H. L. 656, 674; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319; *In re Robinson*, 80 L. J. Ch. 381; [1911] 1 Ch. 502; and the statutes now apply to actions for all such claims as fall within them in whatever division of the High Court the action may be brought. *In re Greaves*, 50 L. J. Ch. 817, 818; 18 Ch. D. 551, 554; *Gibbs v. Guild*, 51 L. J. Q. B. 313; 9 Q. B. D. 59.

Actions against trustees are now, however, in some cases, subject to Statutes of Limitations, for by the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8—“(1.) In any action or other proceeding” commenced after Jan. 1st, 1890 (sect. 8 (3)), “against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:— (a.) All rights and privileges conferred by any Statute of Limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him: (b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing Statute of Limitations applies, the trustee or person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession: (2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.”

By sect. 1 (3) the expression “trustee” includes an executor or administrator of a trustee whose trust arises by construction or implication of law as well as an express trustee, but not the official trustee of charitable funds.

The effect of sect. 8 is “that except in three specified cases (namely, fraud, retention by a trustee of trust money where an action is commenced against him, and conversion of trust money to his own use), a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitations, as if actions and suits for breaches of trust were enumerated in them.” *How v. Winterton*, 65 L. J. Ch. 832, 835; [1896] 2 Ch. 626, 640, 641. And except in those three cases it applies to directors of a company who have in their hands or under their control moneys of the company and who by mistake or carelessness misapply them. *In re Lands Allotment Co.*, 63 L. J. Ch. 291; [1894] 1 Ch. 616, 632.

Sect. 8 (1) (b) applies to an action against an executor for an account. *In re Richardson*, 88 L. J. Ch. 266; [1919] 2 Ch. 50; 89 L. J. Ch. 258; [1920] 1 Ch. 423.

Fraud to take the case out of the protection of this section “must be the fraud of or in some way imputable to the person who invokes the aid of” the section. *Thorne v. Heard*, 64 L. J. Ch. 652; [1895] A. C. 495. Sect. 8 does not apply to a trustee in bankruptcy. *In re Cornish*, 65 L. J. Ch. 106; [1896] 1 Q. B. 99. See further on this section *Moore v. Knight*, 60 L. J. Ch. 271; [1891] 1 Ch. 547; *Lacons v. Wormald*, 76 L. J. K. B. 914; [1907] 2 K. B. 350.

Claims chargeable against the separate estate of a married woman for her debts were, apart from the Trustee Act, 1888, *supra*, barred by analogy to the Statute of Limitations. *In re Hastings (Lady)*, 56 L. J. Ch. 631; 35 Ch. D. 94.

A company is not a trustee in respect of dividends, declared and become payable to a shareholder. *In re Severn, &c., Bridge Ry.*, 65 L. J. Ch. 400; [1896] 1 Ch. 559; *In re Artizans' Land, &c., Cor.*, 73 L. J. Ch. 581; [1904] 1 Ch. 796. Such dividends are in general specialty debts. S. C.

The Statutes of Limitations do not apply to a petition of right. *Rustomjee v. The Queen*, 45 L. J. Q. B. 249; 1 Q. B. D. 487.

To an action for an injunction by the Attorney-General, suing not *ex officio* but at the relation of an individual, lapse of time may be a sufficient defence. *Att.-Gen. v. Warren Smith*, 76 J. P. 253.

A pauper is liable to the guardians for maintenance for a period not exceeding 6 years notwithstanding stat. 12 & 13 V. c. 103, s. 16. *In re Clabbon*, 73 L. J. Ch. 853; [1904] 2 Ch. 465; *Islington Guardians v. Bigginden*, 79 L. J. K. B. 246; [1910] 1 K. B. 104.

When the statute begins to run.] The statute begins to run from the time when the plaintiff's right first accrued; *Reeves v. Butcher*, 60 L. J. Q. B. 619; [1891] 2 Q. B. 509; see *Coburn v. Colledge*, 66 L. J. Q. B. 462; [1897] 1 Q. B. 702; and from the time of the breach of the promise or of the contract, and not of the discovery of it. Therefore in an action against a solicitor for neglecting his duty six years before, the statute was held a bar, though the omission was only discovered within the six years; *Short v. M'Carthy*, 3 B. & A. 626; *Battley v. Faulkner*, *Id.* 288; *Colvin v. Buckle*, 11 L. J. Ex. 33; 8 M. & W. 680; and formerly, at law, this was the rule although the defendant had fraudulently concealed the cause of action. *Imperial Gas Co. v. London Gas Co.*, 10 Ex. 39; 23 L. J. Ex. 303. But the rule of equity which now prevails (see J. Act, 1873, s. 25 (11)) in a case in which a court of equity would have had concurrent jurisdiction, is that in the case of fraudulent concealment of the cause of action, the statute runs from its discovery only; *Brooksbank v. Smith*, 2 Y. & C. Ex. 58; 6 L. J. Ex. Eq. 34; *Metropolitan Bank v. Heiron*, 5 Ex. D. 319, and *Gibbs v. Guild*, 51 L. J. Q. B. 313; 9 Q. B. D. 59; see also *Oelkers v. Ellis*, 83 L. J. K. B. 658; [1914] 2 K. B. 139; even although the wrongdoer took no active steps to prevent detection; *Bull Coal Mining Co. v. Osborne*, 68 L. J. P. C. 49; [1899] A. C. 351; unless there has been laches on the part of the plaintiff. S. C.; but where the plaintiff had a right to rely on the representations of the defendant, *e.g.*, when they are partners together, the fact that he did so rely on them is not laches. *Betjemann v. Betjemann*, 64 L. J. Ch. 641; [1895] 2 Ch. 474. In a purely common law action for breach of contract it is no answer to a plea of the statute that the breach was fraudulently concealed. *Osgood v. Sunderland*, 111 L. T. 529. Where by the common mistake of both parties money has been paid in error the statute runs from the time of payment, not from the date of the discovery of the mistake or from the date when the plaintiff might have discovered it by the exercise of reasonable diligence. *Baker v. Courage*, 79 L. J. K. B. 313; [1910] 1 K. B. 56. The concealment, without fraud, by a solicitor of his negligence does not prevent the statute from running. *Armstrong v. Milburn*, 54 L. T. 723. See further, Story, Eq. Jur. § 1521a.

Where a contract to deliver goods is once broken, the statute runs, and a subsequent refusal to deliver after the loss of the goods, during an inquiry touching the first breach, will not revive the right. *E. India Co. v. Paul*, 7 Moo. P. C. 85. Upon promises to indemnify, the statute runs from the time of damnification. *Huntley v. Sanderson*, 1 Cr. & M. 467; 2 L. J. Ex. 204; *Reynolds v. Doyle*, 1 M. & Gr. 753. Where a bill of exchange is drawn, payable at a future time, for a sum of money lent by the payee to the drawer, at the time of drawing the bill, the payee may sue for money lent, at any time within six years from the time when the money was to be repaid; *i.e.*, when the bill became due, and not from the time of the loan. *Wittersheim v. Carlisle (Countess)*, 1 H. Bl. 631; *Wheatley v. Williams*, 5 L. J. Ex. 237; 1 M. & W. 533. Where a loan is made by the plaintiff to the defendant by a cheque, the statute does not begin to run till the

payment of the cheque by the plaintiff's bankers. *Garden v. Bruce*, 37 L. J. C. P. 112; L. R. 3 C. P. 300. Where a bill is not accepted, and the holder gives notice thereof to the drawer, the statute begins to run against him; and he does not acquire a fresh right of action against the drawer on the non-payment when due. *Whitehead v. Walker*, 11 L. J. Ex. 168; 9 M. & W. 506. The defendant drew a bill, due in May, 1843, payable to the plaintiff, who indorsed it for the acceptor's accommodation, to C.; C. sued the plaintiff on the dishonoured bill in 1847, and received the amount from him in 1850: the plaintiff then sued the defendant on the bill: it was held that the action was barred. *Webster v. Kirk*, 17 Q. B. 944; 21 L. J. Q. B. 159. The accommodation acceptor of a bill of exchange was sued upon it by the holder, whereupon he paid it and sued the person for whose accommodation he accepted, for money paid to his use; it was held that he might do this within six years after payment of the bill, though more than six years after the bill became due. *Angrove v. Tippett*, 11 L. T. 708. The time for payment of a promissory note expired on Saturday, September 22, 1906. The writ in an action upon the note against the makers was issued on Monday, September 23, 1912. Held, that the six years expired on Sunday, September 22, 1912, and the writ was issued too late. *Gelmini v. Moriggia*, 82 L. J. K. B. 949; [1913] 2 K. B. 549. Where a cause of action has arisen and the statute has begun to run, the subsequent bankruptcy of the debtor does not prevent the statute from continuing to run. *In re Benzon*, 83 L. J. Ch. 658; [1914] 2 Ch. 68.

A note, payable on demand, is payable immediately, and the six years begin to run from that date. *Christie v. Fonsic*, 1 Selw. N. P. 13th ed. 301; *Norton v. Ellam*, 6 L. J. Ex. 121; 2 M. & W. 461. But where a note is made payable so many months after demand, the cause of action does not accrue until that number of months after demand made. *Thorp v. Booth*, Ry. & M. 338. So where the note is payable after sight, the statute runs only from the time of presentment. *Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldren*, 2 Stark. 232. Where the cause of action does not arise until after request made, the statute will only run from the time of such request. *Gould v. Johnson*, 2 Salk. 422; 2 Wms. Saund. 63 c, d (6). So where S. gave a promissory note to a bank, payable on demand, together with a written agreement stating that the note was deposited with the bank as security for any balance due to them from C., who was about to open an account with them; it was held that the note and agreement must be construed together, and that the statute did not run on the mere existence of a debt from C. to the bank, without a balance having been struck or a demand made on S. *Hartland v. Jukes*, 1 H. & C. 667; 32 L. J. Ex. 162. Where the plaintiff, an attorney, was to look primarily for his costs to a fund in court, and if it were insufficient C. was to pay them, the statute was held not to run till the amount of the fund was ascertained. *Hunter v. Hunter*, 1 R. 3 C. L. 138. Where the defendant promised to pay a bill of exchange barred by the statute "when able," the statute was held to run from the time of his being able, though the plaintiff did not know when this was, and made no demand. *Waters v. Thanet (Earl)*, 11 L. J. Q. B. 87; 2 Q. B. 757; *Hammond v. Smith*, 33 Beav. 452. See also *In re Kensington Station Act*, L. R. 20 Eq. 197. Where Y. gave a guarantee to a bank for advances made to their customer M., and interest due from him, interest due within six years before may be recovered from Y. although the claim for advances may be barred. *Parr's Banking Co. v. Yates*, 67 L. J. Q. B. 851; [1898] 2 Q. B. 460.

Money paid to a banker on an ordinary banking account is money lent to him, and the statute runs from the payment; *Pott v. Clegg*, 16 L. J. Ex. 210; 16 M. & W. 321; see *Foley v. Hill*, 2 H. L. C. 28; but where money is deposited with a private person to be kept for his use, the statute does not begin to run until there has been a demand and refusal; see Poth. Contr. by Evans, vol. 2, p. 126, followed in *In re Tidd*, 62 L. J. Ch. 915; [1893] 3 Ch. 154. Where money is not repayable until the deposit pass-book is produced,

the statute does not run until after that event. *Atkinson v. Bradford, &c., Building Society*, 59 L. J. Q. B. 360; 25 Q. B. D. 377.

Where there is a promise to pay a collateral sum on demand, as in the case of a surety, then as a request for payment must be made before action, the statute runs from such request only. *Brown v. Brown*, 62 L. J. Ch. 695; [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, 88 L. J. K. B. 85; [1918] 2 K. B. 833. In the case of a surety, W., claiming contribution from a co-surety; *Wolmershausen v. Gullick*, 62 L. J. Ch. 773; [1893] 2 Ch. 514; or a trustee, W., from a co-trustee; *Robinson v. Harkin*, 65 L. J. Ch. 773; [1896] 2 Ch. 415; the statute does not run till W.'s liability is ascertained.

As to when the statute begins to run under 3 & 4 W. 4, c. 42, s. 3, in the case of a copyhold fine, see *Monckton v. Payne*, 68 L. J. Q. B. 951; [1899] 2 Q. B. 603.

In the case of a right of action falling within 51 & 52 V. c. 59, s. 8, the statute does not begin to run against a beneficiary until his interest is one in possession. When a trustee has invested the trust funds on an insufficient security, time runs against such a beneficiary from the time of the investment. *In re Somerset*, 63 L. J. Ch. 41; [1894] 1 Ch. 231; *How v. Winterton (Earl)*, 65 L. J. Ch. 832; [1896] 2 Ch. 626. So in the case of a director of a company who has by mistake or carelessness misapplied its money, time runs from the date of the misapplication. *In re Lands Allotment Co.*, 63 L. J. Ch. 291; [1894] 1 Ch. 616. In compensation cases under the Lands Clauses Act, the statute runs from the date of the award, not from the date of the claim or the execution of the works. *Turner v. Midland Ry.*, 80 L. J. K. B. 516; [1911] 1 K. B. 832.

Disabilities.] The Act 21 J. 1, c. 16, s. 7, provides that, if the plaintiff be an infant, covert, non compos, *in prison*, or *beyond seas* (as to which now *vide infra*), when the action accrues, the six years shall run from the removal of the disability, or from his return from beyond seas, as the case may be. In the case of a defendant beyond seas at the time of action accrued the action may be brought within six years after his return, by stat. 4 & 5 A. c. 3 (c. 16 Ruff.), s. 19. The operation of this section is not affected by Rules, 1883, O. xi., replacing C. L. P. Act, 1852, ss. 18, 19, allowing writs to be served, or notice of them given, out of the jurisdiction. *Musurus Bey v. Gadban*, 63 L. J. Q. B. 621; [1894] 2 Q. B. 352. In cases falling within either statute a special reply is necessary.

By 3 & 4 W. 4, c. 42, s. 4, if a person entitled to any action mentioned in that Act is, at the time of the accruing of the cause, under age, covert, non compos, or *beyond seas* (*vide infra*), he may bring it within six years after coming of age, &c.; and if a person against whom the action accrues shall then be beyond seas, the action may be brought within six years after his return. By sect. 7, no part of the United Kingdom, the Isle of Man, or the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within the meaning of this Act, or of the stat. 21 J. 1, c. 16.

But now, by the Mercantile Law Amendment Act, 1856 (19 & 20 V. c. 97), s. 10, no person shall be entitled to any further time by reason only that such person, or one or more of such persons, was beyond seas or was in prison when the cause accrued. This section is retroactive, and bars those causes of action falling within its provisions which accrued, but on which no action was commenced, prior to the passing of the Act. *Pardo v. Bingham*, 39 L. J. Ch. 170; L. R. 4 Ch. 735, following *Cornill v. Hudson*, 8 E. & B. 429; 27 L. J. Q. B. 8. By sect. 11, in the case of joint debtors, the statutes will now run as to such as are not beyond seas, though some of the debtors may be beyond seas; but a judgment recovered in such cases will not *per se* be a bar to another action against the absent debtor after his return. It would appear from the terms of this section that the case of a judgment recovered against one of the joint debtors, who was beyond the seas at the time the cause of action accrued, is not within its remedial operation, and that such a judgment would still be a bar to subsequent

action against any other of the joint debtors. Sect. 12 enacts that no part of the United Kingdom, nor the Isle of Man, nor the Channel Islands, being dominions of the Queen, shall be deemed beyond seas within either 4 & 5 A. c. 3, or of this Act. This section is not retroactive. *Flood v. Patterson*, 29 Beav. 295; 30 L. J. Ch. 496.

The proviso in case of persons beyond seas extends as well to persons resident abroad as to the natives of England, and the word "return" in the Acts does not imply that they must have been in this country before. *Lafond v. Ruddock*, 13 C. B. 813; 22 L. J. C. P. 217; *Pardo v. Bingham*, *supra*.

As to the meaning of "beyond the seas" in 21 J. 1, c. 16, s. 7, see *Ruckmaboys v. Mottichund*, 7 Moo. P. C. 4.

The ambassador of a foreign state and accredited to the sovereign, cannot be sued here till such reasonable time after he has presented his letters of recall as may be necessary to wind up his official business and prepare for his departure, even though his successor has been appointed before that time has elapsed, and during that time the statute does not begin to run. *Musurus Bey v. Gadban*, 63 L. J. Q. B. 621; [1894] 2 Q. B. 352.

When the statute once begins to run, no subsequent disability will prevent its operation. See *Cotterell v. Dutton*, 4 Taunt. 826; and *Rhodes v. Smethurst*, 9 L. J. Ex. 330; 6 M. & W. 351.

Subsequent acknowledgment.] The effect of the Statute of Limitations may be avoided by proof of an unqualified acknowledgment of the debt within six years, which is evidence of a new promise to pay the debt, and not a mere revival of the original promise. *Heyling v. Hastings*, 1 Ld. Raym. 421; *Hurst v. Parker*, 1 B. & A. 93. An oral promise was, before Ld. Tenterden's Act, held sufficient to revive even a written guarantee, not under seal. *Gibbons v. M'Casland*, 1 B. & A. 690. The rule was that a subsequent promise was admissible, under a denial of the plea, to defeat the statute, when it proved, or was evidence of, the promise or other contract of the defendant as stated in the declaration. It seems, however, that if the plaintiff rely on an acknowledgment to rebut a defence of the statute, he must state it in his claim or reply, as the omission would be calculated to take the defendant by surprise. See Rules, 1883, O. xix. r. 15.

By Ld. Tenterden's Act (9 G. 4, c. 14), s. 1, in actions of debt or upon the case, grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract whereby to take any case out of the operation of the stat. 21 J. 1, c. 16, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by, or in some writing to be signed by, the party chargeable thereby; and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, &c., shall lose the benefit of the said enactments, so as to be chargeable in respect or by reason only of any written acknowledgment or promise, made and signed by any other or others of them; provided always, that nothing herein contained shall alter, or take away, or lessen the effect of any payment of any principal or interest made by any person whatsoever; provided also, that in actions against two or more such joint contractors, &c., if it shall appear at the trial, or otherwise, that the plaintiff, though barred by the stat. 21 J. 1, c. 16, or this Act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment, or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiffs.

Sect. 3, "no indorsement or memorandum of any payment," . . . "upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment so as to take the case out of the operation of either of the said statutes."

By sect. 4, the stat. 21 J. 1, c. 16, "and this Act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off, on the part of any defendant, either by plea, notice, or otherwise."

The most material change in the law made by this Act is the requiring of an acknowledgment or promise in writing signed by the party chargeable. No alteration is introduced in the language of the required acknowledgment or promise, or with regard to the party to whom it is to be made. See *Haydon v. Williams*, 9 L. J. (O. S.) C. P. 16; 7 Bing. 163, 166. No particular form is specified: a paper signed by the defendant, though without date, address, or amount due, may be sufficient; *Hartley v. Wharton*, 9 L. J. Q. B. 209; 11 Ad. & E. 934; and although it was formerly held that it must appear on the face of the writing what debt is intended; *Kennett v. Milbank*, 8 Bing. 38; 1 L. J. C. P. 8; this principle is now disregarded. See *Green v. Humphreys*, 53 L. J. Ch. 625; 26 Ch. D. 474. But an acknowledgment, to take the case out of the statute, must still be such as implies a definite promise to pay. *Brigstocke v. Smith*, 1 Cr. & M. 483.

An oral statement of an account within six years, and a promise to pay the balance, takes the original debt out of the statute by giving a new cause of action on the account stated, provided there are really items of account on both sides. *Smith v. Forty*, 4 C. & P. 126; *Ashby v. James*, 12 L. J. Ex. 295; 11 M. & W. 542. See *per* Alderson, B., in *Hopkins v. Logan*, 8 L. J. Ex. 218, 222; 5 M. & W. 248. But a mere oral statement of an antecedent debt without any new contract or consideration, made within six years, does not constitute a sufficient new cause of action to prevent the operation of the statute. *Jones v. Ryder*, 7 L. J. Ex. 216; 4 M. & W. 32.

Acknowledgment by part payment.] Part payment of the debt is an acknowledgment of its existence, and as such, has always been held to take a case out of the statute, as evidence of a fresh promise to pay the debt; and, as *Ld. Tenterden's Act*, leaves the effect of payment as before, the cases relating to part payment are still to be considered as authority. The payment must be such as to warrant the jury in inferring an intention to pay the rest; thus, if the defendant, on paying a part, say that "he owes the money; but will not pay it," this will not entitle the plaintiff to a verdict, unless the jury think that the latter words were spoken in jest. *Wainman v. Kynman*, 16 L. J. Ex. 232; 1 Ex. 118. It must appear that the payment was on account of the debt for which the action was brought, and that it was made as part payment of a greater debt. *Tippets v. Heane*, 3 L. J. Ex. 281; 1 C. M. & R. 252. Therefore, payment of a dividend by the inspectors of the debtor's inspectorship deed does not take the debt out of the statute; *Ex pte. Topping*, 34 L. J. Bky. 44; nor payment under a judgment in a defended county court action. *Morgan v. Rowland*, 41 L. J. Q. B. 187; L. R. 7 Q. B. 493. As to payment by the receiver of a business appointed by the mortgagee thereof, see *In re Hale*, 68 L. J. Ch. 517; [1899] 2 Ch. 107. In the case of a trustee investing the trust funds on an insufficient security, payment to the tenant for life of the interest he received thereon, is not an admission or acknowledgment to take the case out of sect. 8 of the Trustee Act, 1888. *In re Somerset*, 63 L. J. Ch. 41; [1894] 1 Ch. 231. So in the case of any other innocent breach of trust. *In re Fountaine*, 78 L. J. Ch. 648; [1909] 2 Ch. 382.

It has been said that a part payment where there are two debts, without any appropriation of it, is insufficient to take either out of the statute. *Burn v. Boulton*, 15 L. J. C. P. 97; 2 C. B. 476; *Mills v. Fowkes*, 8 L. J. C. P. 276; 5 Bing. N. C. 455. *Sed secus per* Martin, B., in *Collinson v. Margesson*, 27 L. J. Ex. 305. And it is otherwise if the debts consist of supplies of the same nature; and even where the debts are unconnected, it may be proper to leave the payment to the jury as evidence of a payment on account of all of them. *Walker v. Butler*, 6 E. & B. 506; 25 L. J. Q. B. 377; and see *Friend v. Young*, 66 L. J. Ch. 737; [1897] 2 Ch. 421.

An appropriation of one payment by the creditor, without the debtor's knowledge or assent, is not *per se* enough to take any particular debt out of the statute; S. C.; and it seems that where a debtor on two separate notes pays interest on account generally, after one had been barred by the statute, it ought to be taken *primâ facie* as paid on account of the note not barred, and not to be applied exclusively by the creditor to the note that is barred. *Per Ld. Cranworth, Nash v. Hodgson*, 6 D. M. & G. 474, 482; 25 L. J. Ch. 186, 188. See further *In re Boswell*, 75 L. J. Ch. 234, 658; [1906] 2 Ch. 359. Payment into court as to part of a debt will not, it would seem, take the case out of the statute raised as a defence to the rest. See *Long v. Greville*, 3 B. & C. 10; 2 L. J. (O. S.) K. B. 205; *Reid v. Dickens*, 5 B. & Ad. 499. Part payment in goods taken as money will be an answer to the statute. *Hart v. Nash*, 2 C. M. & R. 337; *Hooper v. Stephens*, 4 Ad. & E. 71; 5 L. J. K. B. 4. Payment of interest on a note, due more than six years ago, will take the note out of the statute. *Bealy v. Greenslade*, 2 C. & J. 61; 1 L. J. Ex. 1; *Purdon v. Purdon*, 12 L. J. Ex. 3; 10 M. & W. 562. Part payment may be by bill or note, and this will rebut the statute if so made as to imply a promise to pay the rest, although the bill or note may never be in fact paid. *Turney v. Dodwell*, 3 E. & B. 136; 23 L. J. Q. B. 137. And the delivery of a bill in part payment operates from the delivery, and not from the falling due of the bill. *Irving v. Veitch*, 7 L. J. Ex. 25; 3 M. & W. 90. So, too, in the case of a cheque given in part payment where by arrangement it is not cashed till a later date. In that case the date of part payment is the date when the cheque was in fact handed to the creditor, not the date when it was in fact paid. *Marreco v. Richardson*, 77 L. J. K. B. 859; [1908] 2 K. B. 584. To constitute a payment of interest sufficient to take a debt out of the statute, it is not necessary that money should pass between the debtor and creditor, provided the transaction amounts to such a payment. *Maber v. Maber*, 36 L. J. Ex. 70; L. R. 2 Ex. 153; and see in the case of husband and wife, *Amos v. Smith*, 1 H. & C. 238; 31 L. J. Ex. 423; *In re Dixon*, 69 L. J. Ch. 609; [1900] 2 Ch. 561. Payment of a statute-barred debt will not necessarily take the interest thereon out of the statute. *Collyer v. Willock*, 4 Bing. 313; 5 L. J. (O. S.) C. P. 181.

Where a payment of part is made as and for a payment of the whole that the defendant admits to be due, such payment will not take the rest out of the statute. *Waugh v. Cope*, 10 L. J. Ex. 145; 6 M. & W. 824. A payment made to the creditor to the use of his debtor by a third party cannot be appropriated by the creditor so as to bar the statute. *Waller v. Lacy*, 1 M. & Gr. 54; 9 L. J. C. P. 217. Where the defendant authorized an agent to offer the plaintiff a part of his debt in discharge of the whole, and, on the plaintiff's refusal so to accept it, the agent exceeded his authority and paid the sum offered in part discharge, it was held that this was not a part payment to bar the statute. *Linsell v. Bonsor*, 5 L. J. C. P. 40; 2 Bing. N. C. 241. But, generally, payment by an authorized agent is payment by the principal. Where an agent acting within the scope of his authority makes a payment on account of his principal, and nothing more is said or done, a promise to pay the balance will be inferred so as to take the case out of the statute. *In re Hale*, 68 L. J. Ch. 587; [1899] 2 Ch. 107. Payment to the guardians by a receiver of the income of a lunatic W., under an order in lunacy, on account of the maintenance of W. by them, is part payment to bar the statute. *Wandsworth Guardians v. Worthington*, 75 L. J. K. B. 285; [1906] 1 K. B. 420.

Where A., B., and C., overseers, borrowed money for the parish, and gave promissory notes, signed by them as overseers, for the amount, payment of interest by the vestry or overseers for the time being was held to bar the statute in a suit on the notes against the drawers. *Rew v. Pettet*, 1 Ad. & E. 196; *Jones v. Hughes*, 5 Ex. 104; 19 L. J. Ex. 200. The trustees of certain legatees lent to the defendant part of the trust money upon a promissory note, describing themselves as such trustees; a payment of the

principal and interest to one of the legatees within six years was held to take the case out of the statute. *Mégginson v. Harper*, 2 Cr. & M. 322; 4 Tyr. 94; 3 L. J. Ex. 50. A. gave B. a promissory note in order to get an advance upon it from B.'s banker; B. indorsed it to his banker, who credited him with the amount; it was held that a payment of interest by B. to his banker within six years did not keep alive the liability of A. to the banker on the note. *Harding v. Edgecumbe*, 28 L. J. Ex. 313. As to the effect of payment on account of, or of interest on, simple contract debts of testator, A., by devisee for life of A.'s freehold estates, see *In re Hollingshead*, 57 L. J. Ch. 400; 37 Ch. D. 651, and *In re Chant*, 74 L. J. Ch. 542; [1905] 2 Ch. 225. Payment on a note to an administrator, who had neglected to take out administration in the diocese in which the note was *bonum notabile*, was held sufficient to bar the operation of the statute as against a subsequent administrator *de bonis non*. *Clark v. Hooper*, 10 Bing. 480; 3 L. J. C. P. 159. This decision may, it has been said, be supported under the particular circumstances of the case. *Stamford, &c., Banking Co. v. Smith*, 61 L. J. Q. B. 405, 407; [1892] 1 Q. B. 765, 769, 771. But, in general, a payment to a third party will not bar the operation of the statute: thus part payment by the maker, S., of a promissory note to the payee, K., after K. had indorsed away the note to B., was held to be no bar to the statute, in an action by B. against S., K. having no authority to receive payment on behalf of B. S. C.

A part payment within six years, though proved only by an oral or unsigned admission of the defendant, will take a case out of the statutes. *Cleave v. Jones*, 6 Ex. 573. But such admission cannot be proved by the production of a book by the plaintiff, confidentially entrusted to him as the defendant's attorney in the course of business, in which book payment of interest by the defendant to the plaintiff within six years was entered. S. C., 7 Exch. 421; 20 L. J. Ex. 238. An answer to a bill in chancery against the defendant, admitting the payment of certain sums, but denying that they were paid as interest on the alleged debt due to the plaintiff, is enough to take the debt out of the statute, if the jury be satisfied by other evidence that they were in fact so paid. *Baildon v. Walton*, 17 L. J. Ex. 357; 1 Ex. 617. As to the use of admissions made in the book of a testator or the receipt of interest by him, to rebut the statute when set up against his executor, see *Bradley v. James*, 13 C. B. 822; 22 L. J. C. P. 193.

9 G. 4, c. 14, s. 1, prevents an acknowledgment or promise by one of several co-contractors from taking the case out of the statutes, but part payment was unaffected by that Act. *Whitcomb v. Whiting*, 2 Doug. 652; 1 Smith's L. C. But by the Mercantile Law Amendment Act, 1856, s. 14, when there are several co-contractors or co-debtors bound or liable jointly only, or jointly and severally, or executors, &c., of any contractor, no such co-contractor, &c., shall lose the benefit of the Statute of Limitations, so as to be chargeable by reason only of payment of any principal, interest, or other money, by any other co-contractor, &c. This section is not retroactive, and payment by a co-contractor before the Act prevented the operation of the Statute of Limitations. *Jackson v. Woolley*, 8 E. & B. 784; 27 L. J. Q. B. 448. The section applies even if the payment be made with the knowledge and consent of the defendant, the co-debtor. *Per Crompton, J.*, S. C., 8 E. & B. 783, 784; 27 L. J. Q. B. 182. Payment by a continuing partner, B., does not bar the statute as against one, A., who has retired; *Watson v. Woodman*, 45 L. J. Ch. 57; L. R. 20 Eq. 721; *semble, contra* as to an existing partner. S. C. So if made by B. on behalf of A. as his agent. *Tucker v. Tucker*, 63 L. J. Ch. 737; [1894] 3 Ch. 429.

Acknowledgment—By whom.] An acknowledgment signed by an agent in the name of the principal, and with his assent, was held insufficient in *Hyde v. Johnson*, 2 Bing. N. C. 776; 5 L. J. C. P. 291. But now, by 19 & 20 V. c. 97, s. 13, an acknowledgment or promise made in a writing, signed by an agent of the party chargeable thereby, duly authorized to make

it, has the same effect as if signed by the party himself. An acknowledgment made by an agent since the passing of this last Act is sufficient to bar the statute in the case of a debt contracted before the Act. *Leland v. Murphy*, 16 Ir. Ch. Rep. 500.

Even before *Ld. Tenterden's* Act it was held that, as against an executor, a mere acknowledgment is not sufficient to take the case out of the statute, but there must be an express promise. *Tullock v. Dunn*, Ry. & M. 416; *Scholey v. Walton*, 13 L. J. Ex. 122; 12 M. & W. 510. An admission by a bankrupt in his balance-sheet will not take the debt out of the statute as against his trustee. *Pott v. Clegg*, 16 L. J. Ex. 210; 16 M. & W. 321; *Ex pte. Topping*, 34 L. J. Bky. 44. An acknowledgment by an infant under age, of a debt for necessities supplied to him, is an answer to a defence of the statute. *Willins v. Smith*, 4 E. & B. 180; 24 L. J. Q. B. 62.

As to acknowledgment of debt on behalf of a joint-stock company, see *Lowndes v. Garnett, &c., Gold Mining Co.*, 33 L. J. Ch. 418.

9 G. 4, c. 14, s. 1, expressly provided that in future a promise by one of several debtors shall not deprive the rest of the benefit of the statute.

An agreement stamp is not necessary on instruments given in evidence as acknowledgments; 9 G. 4, c. 14, s. 8; but an unstamped promissory note cannot be used for this purpose, for the section does not exempt such an instrument from requiring a note stamp. *Jones v. Ryder*, 4 M. & W. 32; *Parmiter v. Parmiter*, 2 D. F. & J. 526; 30 L. J. Ch. 508.

Acknowledgment—To whom.] The acknowledgment must be made to the creditor or his agent. *Stamford, &c., Banking Co. v. Smith*, 61 L. J. Q. B. 405; [1892] 1 Q. B. 765. See also *Everett v. Robertson*, 28 L. J. Q. B. 23; 1 E. & E. 16; *Ex pte. Topping*, 34 L. J. Bky. 44; *In re Beavan*, 81 L. J. Ch. 113; [1912] 1 Ch. 196; *Lloyd v. Coote & Ball*, 84 L. J. K. B. 567; [1915] 1 K. B. 242; *Howcutt v. Bonser*, 18 L. J. Ex. 262; 3 Ex. 491; and *Forsyth v. Bristowe*, 22 L. J. Ex. 255; 8 Ex. 716; *Wilby v. Elgee*, 44 L. J. C. P. 254; L. R. 10 C. P. 497.

Acknowledgment—What sufficient.] "The legal effect of an acknowledgment of a debt barred by the Statute of Limitations is that of a promise to pay the old debt, and for this purpose the old debt is a consideration in law. In that sense and for that purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it; for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the old debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him." *Per Wigram, V.-C., Philips v. Philips*, 3 Hare, 281, 299, 300; 13 L. J. Ch. 445. This was in effect the law laid down in *Tanner v. Smart*, 6 B. & C. 603; 5 L. J. (O. S.) K. B. 218, which overruled many previous cases. *Accord. Buckmaster v. Russell*, 10 C. B. (N. S.) 745, *per Williams, J.*; *Chesmore v. Turner, infra*. See also *Mitchell's Claim*, L. R. 6 Ch. 822, 828.

But the reports still show considerable difference of opinion as to the effect of the words on which the creditor relies for proof of the supposed promise. A mere admission of the debt without any expressions as to the intention or ability to pay may be sufficient. See the observations in *Hart v. Prendergast*, 14 M. & W. 741, 742, 746; 15 L. J. Ex. 741. But if the admission be so qualified as to show present inability to pay, and only the hope of coming to "some satisfactory arrangement," in event of increased means, it is insufficient, though coupled with a disclaimer of any wish to rely on the statute. *Rackham v. Marriott*, 2 H. & N. 196; 26 L. J. Ex. 315; see *Cassidy v. Firman*, I. R. 1 C. L. 9. An acknowledgment otherwise sufficient is not done away with by the mere subsequent expression of

a hope to pay. *Whitcombe v. Steere*, 19 T. L. R. 697. Such expressions in a letter as "you will certainly be repaid," "wait a little and all will be right," amount to a promise, though the letter may also explain the source from which the writer expects to obtain funds. *Collis v. Stack*, 1 H. & N. 605; 26 L. J. Ex. 138. So "I will try to pay you a little at a time if you will let me; I am sure I am anxious to get out of your debt. I will endeavour to send you a little next week"; *Lee v. Wilmot*, 35 L. J. Ex. 175; L. R. 1 Ex. 364; and "the old account between us which has been standing over so long has not escaped our memory, and as soon as we can get our affairs arranged we will see you are paid"; *Chasemore v. Turner*, 45 L. J. Q. B. 66; L. R. 10 Q. B. 500; were held to be sufficient promises. See also *Godwin v. Culley*, 4 H. & N. 373; *Cooper v. Kendall*, 78 L. J. K. B. 580; [1909] 1 K. B. 405; *Brown v. Mackenzie*, 29 T. L. R. 310; *Parson v. Nesbitt*, 85 L. J. K. B. 654; *Cornforth v. Smithard*, 5 H. & N. 13; 29 L. J. Ex. 228, where Pollock, C.B., intimates that stronger words would be required to re-establish a debt already barred than to keep alive a debt before it is barred. It has been held that a letter containing a request "to send in your account" is sufficient; *Quincey v. Sharpe*, 45 L. J. Ex. 347; 1 Ex. D. 72; *Curwen v. Milburn*, 42 Ch. D. 424, affirmed on another ground in C. A.; see also *Banner v. Berridge*, 50 L. J. Ch. 630; 18 Ch. D. 254; even though coupled with a denial of the correctness of the amount. *Sheet v. Lindsay*, 46 L. J. Ex. 249; 2 Ex. D. 314; see, however, *Spong v. Wright*, 12 L. J. Ex. 144; 9 M. & W. 629. A general admission of some debt being due, coupled with evidence to prove the amount, is sufficient. *Cheslyn v. Dalby*, 10 L. J. Ex. Eq. 21; 4 Y. & C. 238; *Waller v. Lacy*, 9 L. J. C. P. 217; 1 M. & Gr. 54; *Langrish v. Watts*, 72 L. J. K. B. 435; [1903] 1 K. B. 636. But without such evidence damages can only be nominal. *Dickinson v. Hatfield*, 1 M. & Rob. 141.

There are many reported cases in which particular letters and other written communications have been held sufficient to prove a promise; but the language in each varies, and is not likely to be exactly repeated in other cases, so that a collection of them is of little use as a guide to the decision of such points when they arise at N. P. A promise to pay a proportion of a joint debt has been held sufficient to entitle the plaintiff to such proportion, though no sum is specified; the plaintiff may prove the amount by other evidence. *Lechmere v. Fletcher*, 2 L. J. Ex. 219; 1 Cr. & M. 623; 3 Tyr. 450; *Bird v. Gammon*, 3 Bing. N. C. 883; 6 L. J. C. P. 258. Where a promissory note given to two payees, A., and B., his wife, was barred by the statute, and the maker, after the death of A., indorsed his name and the date on the note, this has been held a sufficient acknowledgment. *Bourdin v. Greenwood*, 41 L. J. Ch. 73; L. R. 13 Eq. 281.

Acknowledgment—What not sufficient.] A paper admitting the debt, and signed by the defendant on the occasion of an agreement that it should be extinguished by an existing set-off, cannot be used to show a promise to pay; for it did not, in fact, contemplate any future payment at all. *Cripps v. Davis*, 13 L. J. Ex. 217; 12 M. & W. 159. Where, in answer to a letter from the plaintiff's solicitor, the defendant wrote, "As soon as I am able to attend to my concerns, I will wait on Captain C. (the plaintiff), whom I shall be able to satisfy respecting the misunderstanding which has occurred between us," Gibbs, C.J., thought it not sufficient to take the case out of the statute. *Craig v. Cox*, Holt, N. P. 380. So, where, in answer to a demand for charges relative to the grant of an annuity, the defendant said he thought it had been settled at the time the annuity was granted; that he had been in so much trouble since that he could not recollect anything about it. *Hellings v. Shaw*, 1 B. Moore, 340; 7 Taunt. 611. So, where the defendant, having denied the existence of the debt, said, on being requested to look at documents in proof of it, "It is no use for me to look at them, for I have no money to pay; it now." *Snook v. Mears*, 5 Price, 636. So, where the defendant referred the plaintiff to his

attorney, "who was in possession of his determination and ability." *Bicknell v. Keppel*, 1 Bos. & P. N. R. 20. Where A. admits a debt due to B. only on the understanding that a cross-claim is to be also allowed, and the arrangement goes off, this is no admission by A. to bar the statute. *Francis v. Hawkesley*, 1 E. & E. 1052; 28 L. J. Q. B. 370; *Goate v. Goate*, 1 H. & N. 29. See also *Mitchell's Claim*, L. R. 6 Ch. 822.

Where the debtor stated in writing that arrangements had been making to enable him to discharge the account, that funds had been appointed of which B. was trustee, to whom he had handed the account, and that B. had authorized him to refer the plaintiff to him, this was held not sufficient to take the case out of the statute, the debtor not charging *himself* by the acknowledgment. *Whippy v. Hillary*, 3 B. & Ad. 399; 1 L. J. K. B. 178. So, if the debtor merely refer the creditor to certain funds in the hands of others, and tell him to "pay himself" out of them, this is no promise charging himself. *Routledge v. Ramsay*, 8 Ad. & E. 221; 7 L. J. Q. B. 156.

Where the acknowledgment was, "I cannot afford to pay my new debts, much less my old ones," it was held to be insufficient. *Knott v. Farren*, 4 D. & Ry. 179; 2 L. J. (O. S.) K. B. 122. So, "I will see my attorney, and tell him to do what is right." *Miller v. Caldwell*, 3 D. & Ry. 267. So, where the defendant, on being arrested, said, "I know that I owe the money, but the bill I gave was on a 3d. receipt stamp, and I will never pay it," the acknowledgment was held insufficient. *A'Court v. Cross*, 3 Bing. 329; 4 L. J. (O. S.) C. P. 79. The following letter from the defendant to plaintiff's attorney was held not sufficient: "Since the receipt of your letter (and indeed for some time previously), I have been in almost daily expectation of being enabled to give a satisfactory reply to your application respecting the demand of Messrs. M. against me. I propose being in Oxford to-morrow, when I will call upon you on the matter." *Morrell v. Frith*, 3 M. & W. 402; 7 L. J. Ex. 172. "Send me your bill, and, if just, I will not give you the trouble of going to law," is not sufficient, as it contains no admission of any debt. *Spong v. Wright*, 12 L. J. Ex. 144; 9 M. & W. 629; see, however, *Quincey v. Sharpe*, 45 L. J. Ex. 347; 1 Ex. D. 72; and *Skeet v. Lindsay*, 46 L. J. Ex. 249; 2 Ex. D. 314. The writing must import a distinct and unqualified acknowledgment of a debt, from which a promise may be inferred by the court. *Fearn v. Lewis*, 8 L. J. (O. S.) C. P. 95; 6 Bing. 349; *Williams v. Griffith*, 18 L. J. Ex. 210; 3 Ex. 335; *Green v. Humphreys*, 53 L. J. Ch. 625; 26 Ch. D. 474. Mere general expressions of a hope that the debtor may be in a condition to pay at a future day are not sufficient. *Hart v. Prendergast*, 15 L. J. Ex. 223; 14 M. & W. 741; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J. Q. B. 199; *Fettes v. Robertson*, [1921] W. N. 136.

Where the defendant acknowledges the debt, but insists that it is paid or discharged, the whole of his admission must be taken together, and the case will not be taken out of the statute. Where the defendant said, "I have paid the debt, and will send you a copy of the receipt," but such a copy was never sent, Lord Ellenborough held the acknowledgment insufficient. *Birk v. Guy*, 4 Esp. 184; *Anon.*, cited Holt, N. P. 381. Where the acknowledgment was, "You owe me more money; I have a set-off against it," it was held not sufficient. *Swann v. Sowell*, 2 B. & A. 759. "I acknowledge the receipt of the money, but the testatrix gave it me," was also held not sufficient. *Owen v. Wolley*, B. N. P. 148.

Where the defendant, in his acknowledgment, rests his discharge upon a written instrument to which he refers with precision, evidence of that instrument has been admitted to show that it does not operate as a legal discharge. *Partington v. Butcher*, 6 Esp. 66; *Hellings v. Shaw*, 1 B. Moore, 344; 7 Taunt. 608. But the doctrine is adverted to by the court with expressions of doubt in *Beale v. Nind*, 4 B. & A. 568, and can only be supported on the assumption that such an acknowledgment amounts to a conditional promise.

The following acknowledgment, "I have sent you a note for the money

due to you, which your mother left for you," sent with a promissory note, on a receipt stamp, was held insufficient without the promissory note, and that not being properly stamped, could not be looked at. *Parmiter v. Parmiter*, 2 D. F. & J. 526; 30 L. J. Ch. 508.

Where the expressions of the defendant are ambiguous, it was formerly held to be a question of fact for the jury whether they amounted to an acknowledgment of the debt. *Lloyd v. Maund* 2 T. R. 760; and see *Linsell v. Bonsor*, 2 Bing. N. C. 241. But it has been since decided that the construction of a doubtful document, given in evidence to defeat the statute, is for the court and not for the jury; though, if intrinsic facts are adduced in explanation, these facts are for the consideration of the jury. *Morrell v. Frith*, 7 L. J. Ex. 172; 3 M. & W. 402; *Routledge v. Ramsay*, 7 L. J. Q. B. 156; 8 Ad. & E. 221; *Smith v. Thorne*, 18 Q. B. 134; 21 L. J. Q. B. 199.

An acknowledgment since action brought is not sufficient. *Bateman v. Pinder*, 11 L. J. Q. B. 281; 3 Q. B. 574, overruling *Yea v. Fouraker*, 2 Burr. 1099.

A. and B. were joint and several makers of a promissory note, and A. having made an assignment for the benefit of his creditors, B. gave to the payee of the note the following memorandum:—"I hereby consent to your receiving the dividend under A.'s assignment, and do agree that your doing so shall not prejudice your claim on me for the same debt." This was held insufficient as against B. *Cockrill v. Sparkes*, 1 H. & C. 699; 32 L. J. Ex. 118. Where there were disputed accounts, and the parties agreed to refer them to an arbitrator "to ascertain the amount due," the amount to be paid "at such times and in such proportions as the arbitrator may appoint," it was held to be insufficient. *Hales v. Stevenson*, 11 W. R. 33; 11 W. R. 952. In *Bush v. Martin*, 2 H. & C. 311; 33 L. J. Ex. 17, the claim was for work and labour as an attorney against commissioners under a local improvement Act. The commissioners appointed a committee to inquire into the state of their finances, and the committee delivered a signed report, in which the sum claimed was shown to be due to the plaintiff. The commissioners adopted the report, and ordered a rate to be levied in accordance with the recommendation of the committee to defray the sums therein found to be due. This was held not to be sufficient; *Pollock, C.B.*, relying on *Emery v. Day*, 1 C. M. & R. 245; 3 L. J. Ex. 307, where a somewhat similar acknowledgment was attempted to be set up; but no decision was there given as to whether or no the acknowledgment was sufficient, because the plaintiff failed to produce it.

Where the defendant had presented a petition for arrangement with his creditors under the 7 & 8 V. c. 70, and had inserted in his accounts the debt on which the action was brought, and thereby proposed to assign all his property to trustees "for the future payment or compromise of such debts and engagements," this was held to be insufficient. *Everett v. Robertson*, 1 E. & E. 16; 28 L. J. Q. B. 23. So the insertion of a debt in the schedule to a deed of inspectorship for administering the estate of the debtor will not take the debt out of the statute, though the schedule be verified by the debtor's oath. *Ex pte. Topping*, 34 L. J. Bky. 44, overruling *Eicke v. Nokes*, 1 M. & Rob. 359. So in the case of the executor's affidavit for probate. *In re Beavan*, 81 L. J. Ch. 113; [1912] 1 Ch. 196; *Lloyd v. Coote & Ball*, 84 L. J. K. B. 567; [1915] 1 K. B. 242.

A letter written "without prejudice" cannot be relied on when the terms it proposes have not been accepted. *Mitchell's Claim*, L. R. 6 Ch. 822.

Acknowledgment—conditional.] When the promise relied upon is conditional, the plaintiff must show the condition performed; *Mitchell's Claim*, *supra*; *Fettes v. Robertson*, [1921] W. N. 136; thus where the defendant promised to pay the debt when he was able, it was ruled that the plaintiff was bound to show that the defendant was then of sufficient ability to pay. *Davies v. Smith*, 4 Esp. 36; *Besford v. Saunders*, 2 H. Bl. 116. So where

the promise was, "I cannot pay the debt at present; but I will pay it as soon as I can," it was held necessary for the plaintiff to show the defendant's ability to pay. *Tanner v. Smart*, 6 B. & C. 603; 5 L. J. (O. S.) K. B. 218. See also *Lusher v. Hassard*, 20 T. L. R. 563. If the debtor promises to pay the old debt "when he is able," or "by instalments," or "in two years," or out of a certain fund, the creditor can claim nothing more than the new promise gives him. *Philips v. Philips*, 3 Hare, 281, 299, cited in *Smith v. Thorne*, 18 Q. B. 139; 21 L. J. Q. B. 199. See also *Chasemore v. Turner*, 45 L. J. Q. B. 66; L. R. 10 Q. B. 500, and *Meyerhoff v. Froehlich*, 48 L. J. C. P. 43; 4 C. P. D. 63. And the statute runs from the time of becoming able to pay, though the plaintiff had no notice of the ability, and made no demand. *Waters v. Thanet (Earl)*, 2 Q. B. 757; 11 L. J. Q. B. 87; *Hammond v. Smith*, 33 Beav. 452.

A doubt has existed whether the plaintiff is bound to claim specially on such qualified promise, or can show, under the reply taking issue on the defence of the statute, that the promise has become absolute by the performance of the condition; but it seems to be now settled that the conditional promise may, after performance of the condition, be shown under issue taken on a defence of the statute; *Hart v. Prendergast*, 14 M. & W. 743, 745; 15 Ex. 223, 225; *Smith v. Thorne*, 18 Q. B. 134, 143; 21 L. J. Q. B. 199; and such is the practice, though cases may occur of a promise so qualified as to require a special claim, as to pay in a particular manner.

Whether the promise be qualified or not is a question of construction for the court and not for the jury, except where extrinsic evidence affects the construction. *Routledge v. Ramsay*, 8 Ad. & E. 221; 7 L. J. Q. B. 156.

Mutual accounts, &c.] Before 9 G. 4, c. 14, it was held that, where there had been mutual current and unsettled accounts between the parties, and any of the items were within six years, such items were evidence (under the replication that the defendant did promise, &c.) as an admission of an open account so as to take the case out of the statute, like any other acknowledgment. *Catling v. Skoulding*, 6 T. R. 189; 2 Wms. Saund. 127 (6). But since that statute, there must be part payment, or something equivalent to it, or a distinct written acknowledgment, to have this effect. *Williams v. Griffiths*, 2 C. M. & R. 45; 4 L. J. Ex. 129; *Mills v. Fowkes*, 8 L. J. C. P. 270; 5 Bing. N. C. 455; *Cottam v. Partridge*, 11 L. J. C. P. 161; 4 M. & Gr. 271.

Limitation of actions in special cases.] There are certain cases in which the limitation of actions is governed by special Acts. The following are some of these. Thus 35 G. 3, c. 125, ss. 7, 8, 9, prescribes the formalities required before a debt becomes recoverable from an heir-apparent to the Crown, who has a separate establishment, and limits the period for its recovery.

By the Public Authorities' Protection Act, 1893 (56 & 57 V. c. 61), s. 1, where an action is brought against any person for anything done in pursuance or execution or intended execution of any statute, or of any public duty or authority, it must be brought within six months of the act complained of. This section and the cases relating thereto are collected, *sub tit. Actions against constables, &c., post.*

22 & 23 V. c. 49, s. 1, prohibits the payment after a certain time by guardians of debts contracted by them. See *Midland Ry. v. Edmonton Union*, 64 L. J. Q. B. 710; [1895] A. C. 485; *W. Ham Union v. S. Matthew, Bethnal Green*, 65 L. J. M. C. 201; [1896] A. C. 477; *Manchester, &c., Ry. v. Doncaster Union*, 66 L. J. Q. B. 75; [1897] 1 Q. B. 117; *Sharpington v. Fulham Guardians*, 73 L. J. Ch. 777; [1904] 2 Ch. 449. But the Public Health Act, 1875 (38 & 39 V. c. 55), s. 9, does not extend this provision to them when acting as the local sanitary authority. *Dearle v. Petersfield Union*, 21 Q. B. D. 447.

Merger.

Where a debtor gives his creditor a higher security for the debt due, and co-extensive with it, the debt is merged by operation of law, irrespectively of the intention of the parties. *Price v. Moulton*, 10 C. B. 561; 20 L. J. C. P. 102. But it is doubtful if the merger will take place, where the deed contains a proviso against it. See *Commrs. of Stamps v. Hope*, 60 L. J. P. C. 44, 48; [1891] A. C. 476, 483. And if the security so given is not co-extensive with the debt, the latter will exist as a collateral security, and there will be no merger. *Holmes v. Bell*, 3 M. & Gr. 213; *Bell v. Banks*, *Id.* 258; *Norfolk Ry. Co. v. M'Namara*, 3 Ex. 628; *Ansell v. Baker*, 15 Q. B. 20; *Boaler v. Mayor*, 19 C. B. (N. S.) 76; 34 L. J. C. P. 230.

In an action for the price of goods, if the plaintiff has recovered judgment against a stranger to the contract, he is not thereby debarred from bringing an action for the price of the same goods against the real party to the contract, although the judgment is still in force and unsatisfied, for the contract with the latter has not merged in the judgment. *Isaacs v. Salbstein*, 85 L. J. K. B. 1433; [1916] 2 K. B. 139.

If a bond be given for rent due, even on a parol demise, this does not operate as a merger, for rent is a debt of equal degree with a debt by speciality. *Newport v. Godfrey*, 2 Vent. 184; 3 Lev. 267; 4 Mod. 44; *Gage v. Acton*, 1 Salk. 325; *Davis v. Gyde*, 2 Ad. & E. 623; 4 L. J. K. B. 84; 1 Roll. Abr. Dett. (Extinguishment), A. pl. 2, p. 605, l. 1.

Payment.

Payment must be specially pleaded; Rules, 1883, O. xix. r. 15; and without a defence of payment it cannot be given in evidence, though only for the purpose of showing that interest is not due on the debt demanded, the debt itself being admitted by payment into court. *Adams v. Palk*, 11 L. J. Q. B. 185; 3 Q. B. 2.

Payment cannot be shown under a set-off. *Linley v. Polden*, 3 Dowl. 780; and see *Lewis v. Samuel*, 15 L. J. Q. B. 218; 8 Q. B. 685. It is, however, sometimes difficult to say whether a receipt or retainer of money by a creditor amounts to a payment or a set-off. See *Thomas v. Cross*, 7 Ex. 728; 21 L. J. Ex. 251. In an action against one of two joint and several guarantors, the reduction of the defendant's liability by the payment by the other guarantor of part of the amount, cannot be set up without a defence of payment pleaded. *Laurie v. Scholefield*, 38 L. J. C. P. 290; L. R. 4 C. P. 622. In this case the court allowed the plea to be added upon terms.

Where, in answer to a claim for £10 13s. 4d., the defendant sent a bank bill for £10, which the plaintiff said he should not accept in discharge of his claim, but nevertheless retained, it was held that there was evidence of payment. *Gaine v. Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97. See *Ackroyd v. Smithies*, 54 L. T. 130. But the mere retention and cashing by the payee of a cheque sent in settlement of outstanding accounts, does not preclude him from treating the cheque as a payment on account only, and suing for the balance. S. C.

Where a creditor directs his debtor to transmit money or a bill in payment by the post, and it is lost (without default of the debtor), the creditor must bear the loss; *Warwicke v. Noakes*, 1 Peake, 98; and where no directions are given about the mode of remittance, yet if this be done in the usual way of business between the parties, it seems that the debtor is discharged. *Id.*, per Ld. Kenyon, C.J. A request to send money by post, without specifying in what form, is a request to send it in such an ordinary way as is appropriate to a sum of the amount in question. *Mitchell-Henry v. Norwich Union, &c., Society*, 87 L. J. K. B. 695; [1918] 2 K. B. 67.

There, sending £48 in Treasury notes, was held not to be a usual method of transmitting money, and as the notes did not reach the creditor, the debtor was held not to have paid the debt. So in the Scottish case of *Robb v. Gow*, 8 F. 9, the sending of an uncrossed bearer cheque was held not to be a remittance in the ordinary course of business. The mere fact that the debtor has sent cheques to the plaintiff by post and the creditor has not objected to being paid in that way does not raise the inference that the creditor requested the debtor to send cheques by post. *Pennington v. Crossley*, 77 L. T. 43.

A usual way of proving payment is by the production of a receipt signed by the plaintiff or his agent. *Vide Admissions; Receipts.*

Payment to agent.] Payment to an authorized agent is sufficient. *Goodland v. Blewith*, 1 Camp. 477; *Coates v. Lewes*, *Id.* 444; *Owen v. Barrow*, 1 B. & P. N. R. 101. Thus, payment to the solicitor, while an action subsisting, is good; *Anon.*, 1 Dowl. 173; but not to his clerk, who shows no other authority than his master's order to receive it; *per* Ld. Kenyon, C.J., *Coore v. Callaway*, 1 Esp. 115. The solicitor's authority to receive seems to continue as long as the retainer; and this is presumed to continue after judgment until payment, voluntarily, or under execution. *Bevins v. Hulme*, 15 M. & W. 88, 96. Payment to the solicitor's agent in the country is not good. *Yates v. Freckleton*, 2 Doug. 623. But payment to a person found in a merchant's counting-house, and appearing to be entrusted with the conduct of the business there, is a good payment to the merchant, though the person was, in fact, not employed by him. *Barrett v. Deere*, M. & M. 200; and see *Wilmott v. Smith*, *Id.* 238. But, this is on the assumption that the payment relates to the merchant's business; for if it be payment in respect of a private debt due to him, as a mortgage debt, or a legacy, it will not be sufficient. *Sanderson v. Bell*, 2 Cr. & M. 304, 313; 3 L. J. Ex. 66. If a shopman, authorized to receive cash over the counter, obtain payment elsewhere in another way, and does not pay over the amount to his principal, this is not a discharge. *Kaye v. Brett*, 19 L. J. Ex. 346; 5 Ex. 269. As to the implied authority of an agent for sale to receive payment in cash, see *International Sponge Importers v. Watt*, 81 L. J. P. C. 12; [1911] A. C. 279. An agent employed to sell land has no authority, as such, to receive payment. *Mynn v. Joliffe*, 1 M. & Rob. 326. So, an auctioneer, though he is authorized to receive the deposit, has no general authority to receive the purchase-money; *Sykes v. Giles*, 9 L. J. Ex. 106; 5 M. & W. 645; and, generally, an agent for taking a bond, or for negotiating or concluding a contract, has no implied authority to receive money due under it. *Story on Agency*, § 98. Even the possession of the instrument, as the possession by the agent, of a conveyance to secure a loan of money negotiated by the agent, is no authority to receive the principal, although the creditor may have sometimes permitted the agent to receive interest. *Wilkinson v. Candlish*, 19 L. J. Ex. 166; 5 Ex. 91. So possession of an executed conveyance, with a receipt indorsed by vendor or mortgagor, was no sufficient authority to the solicitor of vendor or mortgagor to receive the purchase-money or loan. *Viney v. Chaplin*, 2 De.G. & J. 468; 27 L. J. Ch. 434; *Ex pte. Swinbanks*, 48 L. J. Bky. 120; 11 Ch. D. 525, distinguished in *Gordon v. James*, 30 Ch. D. 249. This is now otherwise by the Conveyancing and Law of Property Act, 1881, 44 & 45 V. c. 41, s. 56; even where the vendor is a trustee. *Trustee Act*, 1893, 56 & 57 V. c. 53, s. 17. It seems that under these sections, in the absence of anything to suggest the contrary, the person paying the money must assume that the solicitor producing the deed is acting for the person having power to give a discharge. *King v. Smith*, 69 L. J. Ch. 598, 600; [1900] 2 Ch. 425, 432, *per* Farwell, J., doubting the decision of North, J., in *Day v. Woolwich, &c., Building Soc.*, 58 L. J. Ch. 280; 40 Ch. D. 491.

Possession of a negotiable security is evidence of authority to receive payment. *Story on Agency*, § 104, citing *Owen v. Barrow*, 1 Bos. & P.

N. R. 101, 103. Payment to the factor who sold the goods, and who was known to sell as such, is good against the principal, though made prematurely. *Fish v. Kempton*, 18 L. J. C. P. 206; 7 C. B. 687. A special defence of payment to agent D., of whom the plaintiff bought the goods, believing him to be the principal, must state that D. was ostensible owner of the goods by permission of the plaintiff. *Drakeford v. Piercy*, 7 B. & S. 515.

As a general rule, when a creditor C. employs an agent A. to receive a debt, A. must receive it in money, and if he set it off against a debt from himself, C. is not bound to treat this as payment; *Barker v. Greenwood*, 2 Y. & C. Ex. 418; *Scott v. Irving*, 1 B. & Ad. 605; 9 L. J. (O. S.) K. B. 89; *Sweeting v. Pearce*, 7 C. B. (N. S.) 449; 29 L. J. C. P. 265; 9 C. B. (N. S.) 534; 30 L. J. C. P. 109; *Pearson v. Scott*, 9 Ch. D. 198; *Crossley v. Magniac*, [1893] 1 Ch. 594; though if C. knew that there was a general usage of the trade or market in which the transaction took place that debts should be set off in this way, and he did not object to it, he would be taken to be bound by the usage. *Stewart v. Aberdeen*, 7 L. J. Ex. 292; 4 M. & W. 211, and *Sweeting v. Pearce*, *supra*. So where goods are bought through a broker, and the purchaser pays for them by an advance on his general account with the broker before the delivery of the goods, it is a question for the jury whether, by the custom of the trade, such payment is good as against the principal. *Catterall v. Hindle*, L. R. 2 C. P. 368. So payment to a clerk or servant by cheque, bill, or note, is good, if it be in the usual course of business; *Thorold v. Smith*, 11 Mod. 87, 88; or if the cheque, &c., be subsequently paid; *Bridges v. Garrett*, 39 L. J. C. P. 251; L. R. 5 C. P. 451; and see *Williams v. Evans*, 35 L. J. Q. B. 111; L. R. 1 Q. B. 352, 354; even though the payment was by cheque payable to order, which the clerk cashed at the banker's by forging the indorsement; for the payment by the banker is protected by 16 & 17 V. c. 59, s. 19, and Bills of Exchange Act, 1882, s. 60. *Charles v. Blackwell*, 46 L. J. C. P. 368; 2 C. P. D. 151. The cheque must, however, be in such form that the agent can hand it over to his principal. *Papè v. Westacott*, 63 L. J. Q. B. 222; [1894] 1 Q. B. 272. The defendant, having purchased copyhold land, was admitted by his solicitor, C. who had been appointed by the steward of the manor as his deputy to admit the defendant. The defendant gave C. a cheque, crossed by C.'s request to C.'s bankers, for the amount of the lord's fine, steward's fees, and C.'s charges as his solicitor. The amount of the cheque was duly paid to C.'s bankers, who retained the money in discharge of a debt due to them by C. It was held a good payment of the fine by the defendant as against the lord. *Bridges v. Garrett*, 39 L. J. C. P. 251; L. R. 5 C. P. 451. This decision turns on the cheque having been paid, the transaction being the same as if the amount had been paid to C.'s bankers. But payment to a particular agent, e.g., an auctioneer, must not be made by bill. *Williams v. Evans*, *supra*; and see *Sykes v. Giles*, 9 L. J. Ex. 106; 5 M. & W. 645. It seems, however, that payment of the deposit at an auction may, in accordance with the usage, be made by cheque. *Farrer v. Lacy*, 55 L. J. Ch. 149; 31 Ch. D. 42. Where an agent is employed to hand over a document of title, his duty is, unless there is any usage to the contrary, to receive payment in cash and not by cheque. *Papè v. Westacott*, *supra*. As to the form in which a cheque or bill given to an agent should be drawn, see S. C., and *Hogarth v. Wherley*, 44 L. J. C. P. 330; L. R. 10 C. P. 630. As to the payment of dividend to a shareholder by dividend warrant, see *Thairwall v. Gt. Northern Ry.*, 79 L. J. K. B. 924; [1910] 2 K. B. 509.

A payment to one of several persons who have deposited money in a bank, and who are not partners, is not good as against the others. *Innes v. Stephenson*, 1 M. & Rob. 145; *Stewart v. Lee*, M. & M. 158. But a payment to one partner of a debt due to the partnership is payment to all; and a receipt by one is *prima facie* evidence of payment against all; but it may be rebutted by proof that it was given in fraud of the other partners in

order to defeat the action. *Farrar v. Hutchinson*, 8 L. J. Q. B. 107; 9 Ad. & E. 641. But in case of a separate debt to a partner, payment to his firm is insufficient unless he authorized the firm to receive it. *Powell v. Brodhurst*, 70 L. J. Ch. 587; [1901] 2 Ch. 160.

Payment by agent.] Payment by an agent will support an averment of payment by the principal, though the latter has not in fact repaid the agent. *Adams v. Dansey*, 6 Bing. 506.

Payment by one of several partners is payment for all; but where one of several partners paid a sum of money to a creditor in consideration that the creditor would assign the debt to a trustee for the partner, it was held that, in an action brought by the trustee in the name of the creditor against the partnership, the above facts did not support a plea of payment. *M'Intyre v. Miller*, 13 M. & W. 725. Where it was agreed between A., B., and C., that A. should advance money to B. in anticipation of money of B. that was coming into A.'s hands, and on receiving in the meantime the security of C.'s acceptance, which was to be satisfied out of such money; it was held that, on receipt of B.'s money by A., it might be relied on by C. as payment by him in an action against him by A. on the acceptance. *Hills v. Mesnard*, 10 Q. B. 266. In an action against the surety of A., a bankrupt, there was a plea of payment by A., and acceptance in satisfaction by the plaintiff: held, on issue taken on the plea, that a payment by A. to the plaintiff, which was recovered back by A.'s assignees as a fraudulent preference, would not support the plea, and that the verdict and judgment of the assignees was evidence, but not conclusive, for the plaintiff to show that the payment was illusory. *Pritchard v. Hitchcock*, 6 M. & Gr. 151. See also *Petty v. Cooke*, L. R. 6 Q. B. 790.

Payment by a third person, if made on behalf of the defendant, accepted by the plaintiff, and adopted by the defendant, is a good defence. *Simpson v. Eggington*, 10 Ex. 845; 24 L. J. Ex. 312; *Belshaw v. Bush*, 11 C. B. 191; 22 L. J. C. P. 24; *Kemp v. Balls*, 10 Ex. 607; 24 L. J. Ex. 47. But where payment is made by an unauthorized agent, the creditor and agent may, before the debtor has affirmed the payment, rescind the transaction, and the creditor repay the money, and the payment is then at an end. *Walter v. James*, 40 L. J. Ex. 104; L. R. 6 Ex. 124. So payment by a third person without the debtor's knowledge, and not on behalf of the defendant, but as an advance for the creditor's convenience, is no payment, though pleaded as such by defendant. *Lucas v. Wilkinson*, 1 H. & N. 420; 26 L. J. Ex. 13.

Appropriation of payments.] In general, the party who pays money has, at the time of payment, a right to direct the application of it; *Anon.*, Cro. Eliz. 68; *The Mecca*, 66 L. J. P. 86, 90; [1897] A. C. 286, 293, *per* Ld. Macnaghten; but where money is paid to a creditor generally, without any specific appropriation by the party paying, and the creditor has several demands against the party paying, he may, "up to the very last moment," elect to apply the money paid to whichever of those demands he pleases. S. C.; *Seymour v. Pickett*, 74 L. J. K. B. 413; [1905] 1 K. B. 715.

The appropriation by the debtor need not be express; it may be inferred from conduct or circumstances indicating his intention. *Newmarch v. Clay*, 14 East, 239. The intention of the debtor ought to be notified at or before the time of payment. *Mayfield v. Wadsley*, 3 B. & C. 357; 3 L. J. (O. S.) K. B. 31. But the creditor may unless he has previously determined his right of election, make the appropriation at any subsequent period, even while he is being examined as a witness in an action by him against the debtor. *Seymour v. Pickett*, 74 L. J. K. B. 413; [1905] 1 K. B. 715; nor will an entry in his private books applying it to a particular demand, but not communicated to the party paying, preclude him from applying it afterwards to another demand. *Simson v. Ingham*, 2 B. & C. 65; 1 L. J. (O. S.) K. B. 234. The creditor may apply it to a debt barred by the Statute of

Limitations; though we have seen that part payment, so appropriated by the payee only, will not *per se* take the whole debt out of the statute. *Mills v. Fowkes*, 8 L. J. C. P. 276; 5 Bing. N. C. 455, and *Friend v. Young*, 66 L. J. Ch. 737; [1897] 2 Ch. 421. Where the party paying was indebted to the party receiving, for a sum due from his wife *dum sola*, and also on another demand, the party receiving might apply the money to the first demand. *Goddard v. Cox*, Str. 1194. And this would apply to cases in which a husband is still liable for his wife's ante-nuptial debts, as to which *vide sub tit.*, *Actions against Husband and Wife, post*.

In some instances, and in the absence of any proof of special appropriation, the law will direct or presume the application of money paid generally. Of this nature are accounts current with bankers and others, where there are various items of debt on one side and credit on the other, occurring at different times, and no special appropriation is made by the parties; successive payments will then be applied to the discharge of antecedent debts in the order of time in which they stand. Story, Eq. Juris. § 459, b.; *Kinnaird v. Webster*, 48 L. J. Ch. 348; 10 Ch. D. 139. Such cases stand on the presumed intention of the debtor, or of both parties arising out of the nature of the dealings between them. Thus, where one of several partners dies while the partnership is in debt, and the surviving partners continue their dealings with a particular creditor, who joins the transactions of the old and new firms in one entire account, the payments made from time to time by the surviving partners will be applied to the old debts. *Per Bayley, J.*, *Simson v. Ingham*, 2 B. & C. 64, 72; 1 L. J. (O. S.) K. B. 234; *Clayton's Case*, 1 Mer. 572, 608; *Brooke v. Enderby*, 2 B. & B. 70; *Hooper v. Keay*, 1 Q. B. D. 178; *L. & County Bank v. Ratcliffe*, 51 L. J. Ch. 28; 6 App. Cas. 722; *Deeley v. Lloyds Bank*, 81 L. J. Ch. 697; [1912] A. C. 756; *Galula v. Pintus*, 16 Com. Cas. 185. So payments by a debtor, from time to time, to surviving partners, upon one general account, including an old debt due to the former firm, will be applied in the first place to such old debt. *Bodenham v. Purchas*, 2 B. & A. 39. But where the old debts are not brought into the new account, general payments on the account are not to be considered as made in discharge of an old debt. *Simson v. Ingham, supra*. Where the circumstances rebut the presumption as to the intention of the debtor the rule above laid down as to appropriation of payments will not apply. Thus, where a person in a fiduciary capacity, draws out, for his own private purposes, sums from a mixed fund of his own and of trustee moneys, it is presumed that he draws out his own moneys only, as otherwise he would commit a breach of trust. *In re Oatway*, 72 L. J. Ch. 575; [1903] 2 Ch. 356, following *In re Hallett's Estate*, 49 L. J. Ch. 415; 13 Ch. D. 696. *Secus*, as between *cestuis que trust*, whose money the trustee has paid into his account at his bankers, for in such case the principle in *Clayton's Case, supra*, applies. S. C.; *In re Stenning*, [1895] 2 Ch. 433. Specific appropriation by the creditor excludes the principle. *Mutton v. Peat*, 68 L. J. Ch. 668; [1899] 2 Ch. 556; reversed on the facts, 69 L. J. Ch. 484; [1900] 2 Ch. 79. Where there are distinct demands, one against persons in partnership, and another against one only of the partners, if the money paid be the money of the partners, the creditor is not at liberty to apply it to the debt of the individual. *Thompson v. Brown, M. & M.* 40. Where goods are from time to time supplied to a mining company, conducted on the cost-book principle, and a payment is made on account of these goods to the seller generally, he is entitled to apply these payments in satisfaction of items of his claim, which accrued due before a fresh partner entered the firm, although the payment was made after that event. *Geake v. Jackson*, 36 L. J. C. P. 108. The general rule that interest is presumed to be paid before principal does not apply to the case of interest on an overdrawn banking account, which, according to the practice of bankers, has from time to time been converted into principal. *Parr's Banking Co. v. Yates*, 67 L. J. Q. B. 851; [1898] 2 Q. B. 460.

In the absence of special application by either party, there is no rule

by which a general payment is applied on any principle, grounded on the comparative burden of different debts, or with reference to the interest of the debtor or of his sureties. *Mills v. Fowkes*, 8 L. J. C. P. 276; 5 Bing. N. C. 455. Thus the law will not, in favour of a surety, direct the application of money, paid generally, to the discharge of the debt secured, without some circumstances to show that it was so intended; *Plomer v. Long*, 1 Stark. 153; *Williams v. Rawlinson*, 3 Bing. 71; 3 L. J. (O. S.) C. P. 164; *In re Sherry*, 53 L. J. Ch. 404; 25 Ch. D. 692; and where a surety joined in a money bond to secure advances by a bank to his principal, and it appears that the security was intended, though not expressed, to be a continuing one, payments will not be applied to the extinction of the bond in preference to later debts. *Henniker v. Wigg*, 4 Q. B. 792; *City Discount Co. v. McLean*, 43 L. J. C. P. 344; L. R. 9 C. P. 692. The case of *Marryatts v. White*, 2 Stark. 101, occasionally cited in proof of the doctrine that payment will be applied in favour of sureties, is one in which the evidence tended to show that the payments were, *in fact*, made by the debtor in relief of the surety, and not on account of an earlier debt, to which creditor claimed to apply it. See also *Kinnaird v. Webster*, 48 L. J. Ch. 348; 10 Ch. D. 139. The surety, on a promissory note given to secure a loan to a member of a money club, cannot rely on the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability on the note. *Wright v. Hickling*, 36 L. J. C. P. 40; L. R. 2 C. P. 199.

Where there are two demands, one legal and the other illegal, and a general payment is made, the law will apply it to the discharge of the legal demand. *Wright v. Laing*, 3 B. & C. 165. But the party receiving money may himself apply it to a demand for spirituous liquors supplied in quantities not amounting to 20s. at a time, for the stat. 24 G. 2, c. 40, only prevents the seller from maintaining an action therefor. *Cruickshanks v. Rose*, 1 M. & Rob. 100. In such a case the creditor may apply the payment to the demand for spirituous liquors, although his particulars claim the whole demand; and he may make the appropriation at any time before the matter comes before the jury. *Philpott v. Jones*, 4 L. J. K. B. 65; 2 Ad. & E. 41. The same principle would seem to apply to a demand for beer, &c., falling within the provisions of the County Courts Act, 1888 (51 & 52 V. c. 43), s. 182. So an unregistered dentist may apply a payment to professional fees which he cannot recover. *Seymour v. Pickett*, 74 L. J. K. B. 413; [1905] 1 K. B. 715.

A suspense account opened by A. and B. with a bank by deposit of a sum of money, with power to the bank to appropriate the sum in payment of a liability of A., B., and C. to them, does not, until appropriation, operate in favour of C., as payment. *Commercial Bank of Australia v. Wilson*, (*Official Assignee*), 62 L. J. P. C. 61; [1893] A. C. 181.

Payment by a bill or note.] If a bill or note payable to bearer be delivered without indorsement, a distinction has been drawn between the cases in which it has been given in exchange for goods or other securities, sold at the time, and those in which it has been given in payment of a pre-existing debt. The former transactions amount, it is said, to a barter of the bill, with all its risks. *Fenn v. Harrison*, 3 T. R. 757, 759; *Ex pte. Shuttleworth*, 3 Ves. 368; *Camidge v. Allenby*, 6 B. & C. 373, 381; 5 L. J. (O. S.) K. B. 95. But when the security is delivered in payment of a pre-existing debt, the delivery does not operate as payment, unless the transferee makes the security his own by laches. *Ward v. Evans*, 2 Ld. Raym. 928; *Camidge v. Allenby*, *supra*. Bank notes, other than those of the Bank of England, seem to fall within this rule. S. CC.; *Moore v. Warren*, 1 Str. 415; *Turner v. Stones*, 12 L. J. Q. B. 303; 1 D. & L. 122; *Robson v. Olliver*, 16 L. J. Q. B. 437; 10 Q. B. 704; *Timmins v. Gibbins*, 18 Q. B. 722; 21 L. J. Q. B. 403; *Lichfield Union v. Greene*, 1 H. & N. 884; 26 L. J. Ex. 140; see Byles on Bills, 17th ed., pp. 182 *et seq.*

The legal effect of accepting, on account of a debt, a bill, or note, not treated as cash, is that of a conditional payment. It implies an agreement to suspend the remedy on the original demand during the currency of the bill or note; *Griffiths v. Owen*, 13 M. & W. 58, 64; 13 L. J. Ex. 345; *Belshaw v. Bush*, *infra*; except in the case of specialty debts, or rent, in which last cases no such implication is held to arise; *Davis v. Gyde*, 4 L. J. K. B. 84; 2 Ad. & E. 623; *Worthington v. Wigley*, 3 Bing. N. C. 454; *Belshaw v. Bush*, 11 C. B. 191, 204; 22 L. J. C. P. 24, 29; *Bramwell v. Eglinton*, 5 B. & S. 39; 33 L. J. Q. B. 130; even in these cases, however, an agreement seems implied, not to enforce another remedy, e.g., distress, during the currency of the bill. *Palmer v. Bramley*, 65 L. J. Q. B. 42; [1893] 2 Q. B. 405. A bill given by a stranger and received by the creditor on account of the debt has the same effect as one given by the debtor, if such payment be adopted by him. *Belshaw v. Bush*, *supra*; *Constable v. Andrew*, 3 L. J. Ex. 55; 2 Cr. & M. 298. Taking a bill "for and on account, and in payment of the price," is not a satisfaction of the debt, but only a conditional payment. *Bottomley v. Nuttall*, 5 C. B. (N. S.) 122; 28 L. J. C. P. 119; *Keay v. Fenwick*, 1 C. P. D. 745. So even although the cheque given has been initialled by the drawee bank to certify that it has funds in hand for payment. See *Gaden v. Newfoundland Savings Bank*, 68 L. J. P. C. 57; [1899] A. C. 281. When the bill or cheque has been paid, the payment relates back to the time when it was given. *Felix Hadley & Co. v. Hadley*, 67 L. J. Ch. 694; [1898] 2 Ch. 680. Where a purchaser gives the seller an order upon a third person entitling him to receive cash, instead of which the vendor elects to take a bill, in such case, though the bill is dishonoured, the purchaser is discharged. *Vernon v. Boverie*, 2 Show. 296; *Smith v. Ferrand*, 7 B. & C. 19; 5 L. J. (O. S.) K. B. 355. But it is otherwise if the order is upon the purchaser's agent, and the seller takes from him a cheque which is dishonoured. *Everett v. Collins*, 2 Camp. 515. Where the master of a vessel took from the freighter's agent abroad, who was furnished with funds to pay him the freight, a bill upon a third person, which was dishonoured, it was held by Gibbs, C.J., that the freighter was not thereby discharged. *Marsh v. Pedder*, 4 Camp. 257.

Proof that bills have been given for a debt (and *qy.* that the bills are due) is *primâ facie* evidence of payment, without showing that such bills were in fact paid, and it is for the plaintiff in an action for goods sold to show that they have been dishonoured. *Hebden v. Hartsink*, 4 Esp. 46; *Stedman v. Gooch*, 1 Esp. 4. So, if a cheque be received as cash, this is evidence of payment at the time it was so received without showing that it was subsequently honoured. *Carmarthen & Cardigan Ry. v. Manchester & Milford Ry.*, 42 L. J. C. P. 262; L. R. 8 C. P. 685. The vendor of goods received an acceptance of the vendee, and returned it with a request to make it payable at a banker's; but the vendee kept the bill; it was held that there was no defence to an action for goods sold. *Widders v. Gorton*, 1 C. B. (N. S.) 576; 26 L. J. C. P. 165. Where a cheque given in payment of a debt has been stopped, the rights of the parties are the same as if it had not been given. *Cohen v. Hale*, 47 L. J. Q. B. 496; 3 Q. B. D. 371.

As to payment by a crossed cheque, see the Bills of Exchange Act, 1882, s. 80.

Where a negotiable bill or note has been received by the creditor and afterwards lost, this is an answer to an action on the original consideration. *Croue v. Clay*, 9 Ex. 604; 23 L. J. Ex. 150. See also *Charles v. Blackwell*, 46 L. J. C. P. 368; 2 C. P. D. 151.

If the value of the security be diminished by the creditor's laches or misconduct, it is made his own, and operates as payment of the debt. *Alderson v. Langdale*, 3 B. & Ad. 660, 663; *Camidge v. Allenby*, 6 B. & C. 373; 5 L. J. (O. S.) K. B. 95; *Lichfield Union v. Greene*, 26 L. J. Ex. 140; 1 H. & N. 884. A vendor took from his vendee, as collateral security, a bill accepted by a third person, indorsed by the drawer and payee to the

vendee; the bill was dishonoured, but no notice thereof was given by the vendor; it was held, in an action for goods sold, that the laches of the plaintiff operated so as to make the bill payment *pro tanto*. *Peacock v. Purssell*, 14 C. B. (N. S.) 728; 32 L. J. C. P. 266. See also *Yglesias v. River Plate Bank*, 3 C. P. D. 60, 330. So, a creditor who takes from his debtor's agent on account of the debt, the cheque of the agent, is bound to present it for payment within a reasonable time, and if he fail to do so, and by his delay alter for the worse the position of the debtor, the debtor is discharged, although the latter was not a party to the cheque. *Hopkins v. Ware*, 38 L. J. Ex. 147; L. R. 4 Ex. 268. See also *Smith v. Mercer*, 37 L. J. Ex. 24; L. R. 3 Ex. 51. The defendant gave the plaintiff a cheque on his bankers in payment of a claim, and the cheque was duly presented by post by the plaintiff's bankers to the defendant's bankers, who neither remitted the amount nor returned the cheque till after their stoppage: it was held that there was no payment. *Heywood v. Pickering*, 43 L. J. Q. B. 145; L. R. 9 Q. B. 428.

Other kinds of payment.] A payment may be made by the mere transfer of figures in an account without any money passing. *Eyles v. Ellis*, 4 Bing. 112; 5 L. J. (O. S.) C. P. 110; *Bodenham v. Purchas*, 2 B. & A. 39.

In an action on a bill of exchange the defendant pleaded payment. It appeared that the plaintiff had sold shares for A. on credit, but that A., being in the want of money, obtained an advance from the plaintiff of the amount due for the shares, the defendant giving his acceptance also for the amount as further security; but it was agreed between the plaintiff and defendant and A., that the plaintiff should apply the proceeds of the sale of the shares when paid in payment of the bill. The plaintiff received the proceeds: it was held that these facts constituted payment. *Hills v. Mesnard*, 16 L. J. Q. B. 306; 10 Q. B. 266.

If a debtor pay a sum of money to a third person by direction or with the assent of his creditor in discharge of a liability of the creditor, it is the same as if the money were paid into the creditor's own hands. *Waller v. Andrews*, 7 L. J. Ex. 67; 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11; 5 L. J. (O. S.) C. P. 13.

If goods be accepted in satisfaction of a debt this constitutes payment. *Cannan v. Wood*, 6 L. J. Ex. 112; 2 M. & W. 465; *Hooper v. Stephens*, 5 L. J. K. B. 4; 4 Ad. & E. 71. In neither of these cases did the question arise upon a plea of payment, but it seems that giving goods in satisfaction might be proved under that defence.

Release.

A release must be specially pleaded, Rules, 1883, O. xix. r. 15; and the evidence depends on the reply. After breach, a contract can only be discharged by a release under seal, or by accord and satisfaction; but before breach it may be discharged by parol. Even although the defence merely alleges a release, it must be supported by proof of a deed. *Thames Haven Dock v. Brymer*, 5 Ex. 696, 711, 712; 19 L. J. Ex. 321, 328. See also *Young v. Austen*, 38 L. J. C. P. 233; L. R. 4 C. P. 553; and *Abrey v. Cruz*, 39 L. J. C. P. 9; L. R. 5 C. P. 37. As to the special rule as to bills and notes, see sect. 62 of the Bills of Exchange Act, 1882.

Where there were cross debts, and the plaintiff sued for the whole of his debt, and defendant pleaded a release of the whole, it appeared that plaintiff had signed a composition deed releasing the defendant from any debt owing to the plaintiff; the deed left the amount of debt released in blank; and the blank had, after execution, but without the plaintiff's authority, been filled up with the *whole* amount of the debt sued for; held that, on a finding by the jury, that the debt meant to be released was the difference between the plaintiff's debt and a set-off of less amount, the plaintiff was entitled to a

verdict on the issue of *non est factum* replied to the release. *Fazakerly v. McKnight*, 6 E. & B. 795; 26 L. J. Q. B. 30. *Semb.* the defendant should have pleaded the set-off and a release of the difference. See Bullen & Leake on Pleading, 3rd ed. 671.

A release of one of two joint, or joint and several debtors, is a discharge of all. *Nicholson v. Revill*, 5 L. J. K. B. 129; 4 Ad. & E. 675; even from a joint judgment debt. *In re E. W. A.*, 70 L. J. K. B. 810; [1901] 2 K. B. 642. But although a release of the whole debt given to one of two joint, or joint and several, contractors enures to the benefit of both, yet receiving a portion of a debt and putting an end to an action against one of them is not a release of the other. *Watters v. Smith*, 1 L. J. K. B. 31; 2 B. & Ad. 889. And a release to one of several contractors if qualified—as a release reserving the right to join the releasee in a suit for the purpose of recovering against the others—is not pleadable as a release of all. *Solly v. Forbes*, 2 B. & B. 38. So a release of one co-debtor; *Willis v. De Castro*, 4 C. B. (N. S.) 216; 27 L. J. C. P. 243; or joint tortfeasor, *Rice v. Reed*, 69 L. J. Q. B. 33; [1900] 1 Q. B. 54; reserving remedies against the other; or a release of the principal debtor, reserving rights against a surety; *Kearsley v. Cole*, 16 L. J. Ex. 115; 16 M. & W. 128; *Price v. Barker*, 4 E. & B. 760; 24 L. J. Q. B. 130; *Green v. Wynn*, 38 L. J. Ch. 220; L. R. 4 Ch. 204; *Bateson v. Gosling*, 41 L. J. C. P. 53; L. R. 7 C. P. 9; amount only to a covenant not to sue, and not to a release, and are not pleadable by the co-debtor. So where the original contract reserves to the creditor the right of giving a release to the principal debtor without discharging the surety, a release granted to the debtor is not pleadable by the surety. *Cowper v. Smith*, 4 M. & W. 519; *Union Bank of Manchester v. Beech*, 3 H. & C. 672; 34 L. J. Ex. 133. But where the right is not reserved in the original contract or release itself, oral evidence of the reservation cannot be given. *Cocks v. Nash*, 2 L. J. C. P. 17; 9 Bing. 341.

An unqualified covenant not to sue has the effect of a release on the ground of avoiding circuity of action; 2 Wms. Saund. 47 *gg*; *Id.* 150 (2); *Ford v. Beech*, 17 L. J. Q. B. 114; 11 Q. B. 852; but a covenant by one of several joint creditors not to sue the defendant is not pleadable as a release to an action by all. *Walmesley v. Cooper*, 10 L. J. Q. B. 49; 11 Ad. & E. 216. And a covenant not to sue for a certain time was at law inoperative as a bar. 2 Wms. Saund. 47 *gg*, 48; *Id.* 150 (2); *Thimbleby v. Barron*, 7 L. J. Ex. 128; 3 M. & W. 210; *Ford v. Beech*, 17 L. J. Q. B. 114; 11 Q. B. 852. When, however, such a covenant is founded on valuable consideration, it now forms on equitable principles a bar to an action brought within the time. See *Edwards v. Walters*, 65 L. J. Ch. 557, 561; [1896] 2 Ch. 157, 168. And it was so, even at common law, if there were a proviso that it should be pleadable in bar to any action brought within the time. *Gibbons v. Vouillon*, 19 L. J. C. P. 74; 8 C. B. 483; *Walker v. Nevill*, 3 H. & C. 403; 34 L. J. Ex. 73; *Corner v. Sweet*, 35 L. J. C. P. 151; L. R. 1 C. P. 456.

It may be observed that the same principles apply in the case of joint tortfeasors, A. and B., viz., that while the unqualified release of A. will release B.; *Cocke v. Jennor*, Hob. 66; a covenant not to sue A. will not do so. *Duck v. Mayeu*, 62 L. J. Q. B. 69; [1892] 2 Q. B. 511.

The discharge in bankruptcy of A. does "not release any person who at the date of the receiving order was a partner or co-trustee with the bankrupt, or was jointly bound, or had made any joint contract with him, or any person who was surety, or in the nature of a surety for him"; Bankruptcy Act, 1914, s. 28 (4). And "the acceptance by a creditor of a composition or scheme shall not release any person who under [the Bankruptcy Act, 1914] would not be released by an order of discharge if the debtor had been adjudged bankrupt"; *Id.* s. 16 (20). So in the case of a joint and several liability, a composition accepted by the joint creditors does not affect the several liability. *Simpson v. Henning*, 44 L. J. Q. B. 143; L. R. 10 Q. B. 406.

Fraud practised on the releasor must be replied, if relied upon; *Wild v. Williams*, 6 M. & W. 490; and where the clerk of the defendant's attorney procured a cunningly-worded release from an illiterate plaintiff, this was held evidence of fraud. *Sargent v. Wedlake*, 11 C. B. 732.

Fraud can only be relied on in reply to a release, contained in a contract, when the plaintiff can disaffirm the contract, and remit the defendant to his former state. *Urquhart v. Macpherson*, 3 App. Cas. 821.

Rescission.

Before breach, a simple contract may be rescinded and discharged by a mutual oral agreement. *Milton v. Edgeworth*, 6 Bro. P. C. 587. To a declaration on a general breach of contract to deliver goods weekly for a year, it was pleaded that the contract was rescinded before breach. It was held that, if there were a single breach before rescission, the plea failed *in toto*. *Burgess v. De Lane*, 27 L. J. Ex. 154.

Where there is an agreement good under the Statute of Frauds, an invalid oral agreement cannot vary its terms; *Noble v. Ward*, 36 L. J. Ex. 91; L. R. 2 Ex. 135; but may rescind it *in toto*. *Morris v. Baron*, 87 L. J. K. B. 145; [1918] A. C. 1.

The defence is sometimes pleaded in the form of exoneration and discharge, but the defendant must prove a proposition to exonerate on the part of the plaintiff acceded to by himself, which is to effect a rescinding of the contract previously made. *King v. Gillett*, 10 L. J. Ex. 164; 7 M. & W. 55, 59.

As to rescission of contract of marriage, see *Davis v. Bomford*, 6 H. & N. 245; 20 L. J. Ex. 139.

Set-off and Counter-claim.

By O. xix. r. 3, a defendant may set off, or set up by way of counter-claim against the plaintiff's claims, any right or claim whether sounding in damages or not, and such set-off or counter-claim shall have the same effect as a cross-action. But the court or a judge may, on the application of the plaintiff before trial, if such set-off or counter-claim cannot be conveniently disposed of in the pending action, or ought not to be allowed, refuse permission to the defendant to avail himself thereof. By O. xxi. r. 10, "Where any defendant seeks to rely upon any grounds as supporting a right of counter-claim, he shall, in his statement of defence, state specifically that he does so by way of counter-claim." By r. 16, although the action of the plaintiff is stayed, discontinued, or dismissed, the counter-claim may nevertheless be proceeded with; and by r. 17 the court may give judgment for the defendant for any balance found in his favour. Under O. xix. rr. 15 *et seq.*, all matters in answer to a counter-claim or set-off must be pleaded in the same way as if it were a statement of claim. O. xvi. r. 3, provides that the improper or unnecessary joinder of a co-plaintiff shall not defeat a set-off or counter-claim, if the defendant prove it against the other plaintiffs. The nature of a counter-claim was much considered by the C. A. in *McGowan v. Middleton*, 52 L. J. Q. B. 355; 11 Q. B. D. 464.

A counter-claim must contain a specific statement of the facts on which relief is claimed, and it is not sufficient that those facts are stated in the defence, which forms with it one document in consecutive paragraphs, unless they are incorporated in the counter-claim by reference. *Holloway v. York*, 25 W. R. 627; *Crowe v. Barnicot*, 46 L. J. Ch. 855; 6 Ch. D. 753. In these cases leave to amend the counter-claim was refused. It is sufficient, however, if the counter-claim refer to facts previously stated in the pleadings, without repeating them *in extenso*. *Birmingham Estates Co. v. Smith*, 49 L. J. Ch. 251; 13 Ch. D. 506. And it is not necessary

that the counter-claim should be separately headed as such. *Lees v. Patterson*, 47 L. J. Ch. 616; 7 Ch. D. 866.

The distinction between a set-off and counter-claim is still material for some purposes, and especially with reference to costs. A set-off alleges a liquidated demand due from the plaintiff to the defendant, which balances the liquidated claim of the plaintiff, and shows that on the whole account, between the plaintiff and the defendant, nothing is due to the plaintiff. A set-off to an amount equal to the plaintiff's claim is therefore a defence to the action. A counter-claim, which is a creature of the J. Acts, is, on the other hand, in the nature of a cross-action by the defendant, which may be made, although in respect of or against a claim for unliquidated damages. *Stooke v. Taylor*, 49 L. J. Q. B. 857, 861; 5 Q. B. D. 569, 576; *Baines v. Bromley*, 50 L. J. Q. B. 465; 6 Q. B. D. 691, 694. See also *Stumore v. Campbell*, 61 L. J. Q. B. 463; [1892] 1 Q. B. 314; *Gathercole v. Smith*, 50 L. J. Q. B. 681; 7 Q. B. D. 626. Matters are sometimes raised by counter-claim which amount to a defence to the action. See *Lowe v. Holme*, 52 L. J. Q. B. 270; 10 Q. B. D. 286. And as to the converse case, see *Bankes v. Jarvis*, 72 L. J. K. B. 267; [1903] 1 K. B. 549.

Where the defendant has been obliged to finish work which the plaintiff had contracted to do, and for which he seeks to recover a general money claim, the amount laid out by the defendant is not a set-off, but matter of deduction on a denial of the debt. *Turner v. Diaper*, 2 M. & Gr. 241. So, if the defendant finds materials for work done by the plaintiff for him, he may deduct the value of such materials in an action for the work, without a set-off. *Newton v. Forster*, 12 M. & W. 772. So, where there are no cross-demands, but the nature of the employment or dealings necessarily constitutes an account consisting of receipts and payments, debts and credits, the balance only is the debt. See *Green v. Farmer*, 4 Burr. 2221; *Le Loir v. Bristow*, 4 Camp. 134.

If the defendant put in evidence to prove a set-off an account rendered by the plaintiff, he must take both sides of the account, even where the plaintiff was an attorney, and the other side of the account consisted of the plaintiff's bill of costs, and no signed bill had been delivered by the plaintiff under the statute. *Harrison v. Turner*, 16 L. J. Q. B. 295; 10 Q. B. 482. It has been held that a solicitor's bill may be set off without any previous delivery of a signed bill, for 6 & 7 V. c. 73 only prevents a solicitor from bringing "any action" before such delivery. *Brown v. Tibbits*, 11 C. B. (N. S.) 855; 31 L. J. C. P. 206. See, however, *Rawley v. Rawley*, 45 L. J. Q. B. 675; 1 Q. B. 460, decided on similar words in 9 G. 4, c. 14, s. 5.

In *Original Hartlepool Collieries Co. v. Gibb*, 46 L. J. Ch. 311; 5 Ch. D. 713, Jessel, M.R., held that a cross-claim, on a counter-claim, must have been complete at the date of the writ, on the ground that such proceeding was in lieu of a cross-action brought at the same time as the plaintiff's action. In *Beddall v. Maitland*, 50 L. J. Ch. 401; 17 Ch. D. 174, however, Fry, J., gave relief on a counter-claim in respect of a cause of action accrued to the defendant after writ issued; and in *Toke v. Andrews*, 51 L. J. Q. B. 281; 8 Q. B. D. 428, the plaintiff was allowed, in answer to such a counter-claim, to claim a debt which accrued due after writ issued. And a pecuniary set-off, which has arisen since action brought, may be so pleaded under Rules 1883, O. xxiv. r. 1. *Ellis v. Munson*, 35 L. T. 585. A set-off must continue due up to the time of trial. *Eyton v. Littledale*, 18 L. J. Ex. 369; 4 Ex. 159. Until judgment the two debts remain separate and distinct. In *re Hiram Maxim Lamp Co.*, 72 L. J. Ch. 18; [1903] 1 Ch. 70; see also *In re G. E. B.*, 72 L. J. K. B. 712; [1903] 2 K. B. 340. Where a counter-claim is founded on a continuing cause of action, damages are now, under Rules 1883, O. xxxvi. r. 58, assessed down to the time of assessment. In order to reply the Statute of Limitations with affect, it must appear that the set-off was barred before action. *Walker v. Clements*, 15 Q. B. 1046. This principle will apply to a counter-claim.

By the Truck Act, 1831 (1 & 2 W. 4, c. 37), s. 5, extended by the Truck Amendment Act, 1887 (50 & 51 V. c. 46), in an action for wages of an artificer or workman in certain trades, a set-off for goods supplied by the employer cannot be relied on. See also 37 & 38 V. c. 48, s. 5. But a special reply of these statutes would be necessary. See on these Acts, *Hewlett v. Allen*, 63 L. J. Q. B. 608; [1894] A. C. 383.

As to the plaintiff's right to reserve his evidence until the set-off has been proved, see *Williams v. Davies*, 9 L. J. Ex. 102; 1 Cr. & M. 464.

Where the issues in the claim and counter-claim are the same, the plaintiff is not entitled to adduce fresh evidence to contradict the defendant's evidence. *Green v. Sevin*, 49 L. J. Ch. 166; 13 Ch. D. 589.

Nature of the debt set off, and of the debts against which it is set off.] As it is still sometimes necessary to determine whether the defendant has a strict right of set-off as distinguished from a counter-claim, the following principles and decisions may be found useful. The debt set off may be either a legal or an equitable debt. *Agra and Masterman's Bank v. Leighton*, 36 L. J. Ex. 33; L. R. 2 Ex. 56. So the defendant can set off a bond given by the plaintiff to a third party and assigned to the defendant. *Cochrane v. Green*, 9 C. B. (N. S.) 448; 30 L. J. C. P. 97; so in the case of any other debt. *Bennett v. White*, 79 L. J. K. B. 1133; [1910] 2 K. B. 643. So a set-off may be met by a reply that the plaintiff is suing as trustee only, and that the defendant had notice of the assignment of the debt. *Watson v. Mid Wales Ry. Co.*, 36 L. J. C. P. 285; L. R. 2 C. P. 593; and see *Wilson v. Gabriel*, 4 B. & S. 243; *Christie v. Taunton, &c., Co.*, 62 L. J. Ch. 385; [1893] 2 Ch. 175; and *Richardson v. Stormont, Todd & Co.*, 69 L. J. Q. B. 369; [1900] 1 Q. B. 701. Thus where a company issues bonds, with the intention that they should be negotiable, it cannot, as against the equitable assignee of the bond, set off a debt due to the company from the obligee of the bond in whose name the action is brought. *Dickson v. Swansea Vale, &c., Ry. Co.*, 38 L. J. Q. B. 17; L. R. 4 Q. B. 44; *Higgs v. Northern Assam Tea Co.*, 38 L. J. Ex. 233; L. R. 4 Ex. 387; *In re Northern Assam Tea Co.*, 39 L. J. Ch. 829; L. R. 10 Eq. 458; *In re Imperial Land Co. of Marseilles*, L. R. 11 Eq. 478; *In re Hercules Insur. Co.*, 44 L. J. Ch. 450; L. R. 19 Eq. 302. See further as to the principles on which a set-off was allowed in equity, *Middleton v. Pollock*, L. R. 20 Eq. 29. See also *Manley v. Berkett*, 81 L. J. K. B. 1232; [1912] 2 K. B. 329. Where a trustee T. sues to recover a debt due to his *cestui que trust* B., the defendant may, as a defence thereto, counter-claim for unliquidated damages due to him from B. to the amount of T.'s claim. *Bankes v. Jarvis*, 72 L. J. K. B. 267; [1903] 1 K. B. 549. A joint and several note of the plaintiff and others to defendant may be set off against a debt due from defendant to plaintiff alone. *Owen v. Wilkinson*, 5 C. B. (N. S.) 526; 28 L. J. C. P. 3. But a debt due from the plaintiff to the defendant and another jointly, cannot be set off against a debt due to the plaintiff from the defendant alone. *Bowyear v. Pawson*, 50 L. J. Q. B. 495; 6 Q. B. D. 540. The two debts must be mutual and due in the same right. *Arnold v. Bainbrigg*, 9 Ex. 153; 23 L. J. Ex. 59; *Stumore v. Campbell*, 61 L. J. Q. B. 463; [1892] 1 Q. B. 314. Where on A.'s death, a banker, B., transferred the balance of A.'s account to the account "of C. executor of A." C. being also residuary legatee; held that this balance might be set off against other overdrawn accounts of C. with B., the legatees not having given B. any notice of claim on the balance. *Bailey v. Finch*, 41 L. J. Q. B. 83; L. R. 7 Q. B. 34. See also *Taylor v. Taylor*, 44 L. J. Ch. 718; L. R. 20 Eq. 155. But where A. had a separate account with a banker, C., which was overdrawn, and A. and B. had also, as executors of D., a joint account with C., A. being residuary legatee of D., and A. and B. jointly liable for some unpaid claims; it was held that one account could not be set off against the other, because a court would not, without any terms, or any further inquiry, compel B. to transfer the joint account to A. alone. *Ex pte. Morier*, 49 L. J. Bk. 9;

12 Ch. D. 491. A set-off is not an equity which runs with a bill or note indorsed when overdue; and therefore a set-off between the maker and indorser of such a note cannot be set up against the indorsee. *Whitehead v. Walker*, 12 L. J. Ex. 28; 10 M. & W. 696; *Oulds v. Harrison*, 10 Ex. 572; 24 L. J. Ex. 66; *Ex pte. Swan*, L. R. 6 Eq. 344. An antecedent debt cannot be set off against an instalment of a pension which is by statute not transferable. *Gathercole v. Smith*, 50 L. J. Ch. 671; 17 Ch. D. 1; 50 L. J. Q. B. 681; 7 Q. B. D. 626.

A judgment might be pleaded by way of set-off though a writ of error were pending thereon; *Reynolds v. Beerling*, cited 3 T. R. 188; see *Curling v. Innes*, 2 H. Bl. 372; and where, in an action on a promissory note for £30, the plaintiff took a verdict for the whole sum, and the defendant had at the same sittings an action against the plaintiff for £11, to which there was a set-off of the note, the court held that, notwithstanding the verdict, the note might be set off. *Baskerville v. Brown*, B. N. P. 180; 2 Burr. 1229; *Evans v. Prosser*, 3 T. R. 186. A debt cannot be set off till it is actually due; *Rogerson v. Ladbroke*, 1 Bing. 99; 1 L. J. (O. S.) C. P. 6; but where it has become due after action brought, it may now be so pleaded. *Ellis v. Munson*, 35 L. T. 585. A debt barred by the Statute of Limitations cannot be set off; and if pleaded the plaintiff may reply the statute; B. N. P. 180; *Francis v. Dodsworth*, 17 L. J. C. P. 185, 188; 4 C. B. 202, 220; and it must be replied if relied on. Rules, O. xix. r. 15.

Where A. sues B. for money deposited by him with B. for a special purpose which has failed, B. cannot set-off a debt due to him from A.; it is matter for counter-claim only. *Stumore v. Campbell*, 61 L. J. Q. B. 463; [1892] 1 Q. B. 314, following *Brandao v. Barnett*, 12 Cl. & F. 787.

A defendant may counter-claim a several claim against one of two joint plaintiffs and another several claim against the other plaintiff. *Manchester, &c., Ry. Co. v. Brooks*, 46 L. J. Ex. 244; 2 Ex. D. 243.

By factors and agents.] An agent employed to recover a sum of money is entitled to retain a just allowance for his labour and service therein, and as such allowance is not in the nature of a cross-demand or mutual debt, he may give it in evidence under a denial of the debt in an action for money had and received. *Dale v. Sollet*, 4 Burr. 2133.

Where a factor sells goods as his own, and the buyer A., knows nothing of any principal, A. may, in an action by the principal for the price, set off a debt due to himself from the factor. *George v. Clagett*, 7 T. R. 359; *Carr v. Hinchliff*, 4 B. & C. 547; 4 L. J. (O. S.) K. B. 5. So if, on a sale of goods to defendant, an agent hold himself out as owner, and the plaintiff, the real owner, ostensibly allowed him to do so, then the plaintiff's claim is subject to any right of set-off existing between the agent and defendant. *Ramozotti v. Bowring*, 7 C. B. (N. S.) 851; 29 L. J. C. P. 30; *Borries v. Imperial Ottoman Bank*, 43 L. J. C. P. 3; L. R. 9 C. P. 38; *Ex pte. Dixon*, 46 L. J. Bk. 20; 4 Ch. D. 133. So where an agent is allowed as principal to collect a debt for the plaintiff, the real principal. *Montagu v. Forwood*, [1893] 2 Q. B. 350. But this principle only applies where "the agent has been permitted by the principal to hold himself out as the principal," and the person dealing with the agent has believed that the agent was the principal, and has acted on that belief. *Cooke v. Eshelby*, 56 L. J. Q. B. 505, 507; 12 App. Cas. 271, 275. If the factor were known to be such, and to sell in that character, no such set-off can be pleaded against the principal; *Fish v. Kempton*, 18 L. J. C. P. 206; 7 C. B. 687; even though the defendant did not know who the principal was; *Semenza v. Brinsley*, 18 C. B. (N. S.) 467; 34 L. J. C. P. 161. See *Mildred v. Maspons*, 53 L. J. Q. B. 33; 8 App. Cas. 874; and if, before the goods are all delivered, and before any part is paid for, the purchaser is informed that they belong to the plaintiff, it has been ruled that the purchaser cannot set off a debt due to him by the factor. *Moore v. Clementson*, 2 Camp. 22; see *Warner v. M'Kay*, 5 L. J. Ex. 276; 1 M. & W. 591; on this last case see *Fish v.*

Kompton, 18 L. J. C. P. 206, 207, 209; 7 C. B. 687, 693. Where the buyer has no belief on the subject as to whether his seller is principal or agent, there can be no set-off against the principal. *Cooke v. Eshelby*, *supra*. If the purchaser buy through an agent, the knowledge of the agent that the apparent seller is an agent will affect the purchaser and exclude the set-off. *Dresser v. Norwood*, 17 C. B. (N. S.) 466; 34 L. J. C. P. 48. Where A.'s agent, B., by A.'s authority, employs a sub-agent C., to sell A.'s goods in B.'s name, there is no privity between A. and C., and if C. has, before notice of A.'s title, sold them, and with B.'s assent blended the proceeds in his general account with B., A. can only recover the proceeds from C., subject to the deduction of any sum due from B. to C. *New Zealand, &c., Land Co. v. Watson*, 50 L. J. Q. B. 433; 7 Q. B. D. 374; explained in *Kaltenbach v. Lewis*, 55 L. J. Ch. 58; 10 App. Cas. 617. But where C. had sold the goods for B., and before delivery or payment B. died, and after the sale, but before receiving the proceeds, C. had notice of A.'s title, it was held that C. could not set off a debt due from B. to him. S. C. So in the case of goods sold after the revocation of C.'s authority by B.'s death, no such set-off is available, as the sale is wrongful. S. C., 52 L. J. Ch. 881; 24 Ch. D. 54. This head of set-off arises from the rule of law that a vendor, who accredits his agent and authorizes him to contract, as principal, with a purchaser, who knows him only as principal, cannot, by resuming the character of principal, deprive his vendee of the equities which he has against the apparent vendor, whether by common law (as by payment), or by a set-off. It has been held that a broker (whose character differs materially from that of a factor), in selling goods without disclosing the name of his principal, acts beyond the scope of his authority, and that the buyer, therefore, cannot set off a debt due from the broker to him in an action for the price by the principal; *Baring v. Corrie*, 2 B. & A. 137; *Cooke v. Eshelby*, 56 L. J. Q. B. 505; 12 App. Cas. 271; though, of course, the relation is capable of being modified by the course of dealing between the broker and his principal. See notes to *George v. Clagett*, Smith's L. C. A mutual credit with an agent who becomes bankrupt is not within the principle of *George v. Clagett*, in a case where the damages are unliquidated. *Turner v. Thomas*, 40 L. J. C. P. 271; L. R. 6 C. P. 610.

If a creditor sue one of two debtors jointly liable, the defendant may show that fact and plead a set-off of a debt due from plaintiff to the defendant, and his co-debtor. *Stackwood v. Dunn*, 3 Q. B. 822.

As to set-off against auctioneer, see *Manley v. Berkett*, 81 L. J. K. B. 1232; [1912] 2 K. B. 329.

[To action by assignee of chose in action.] A builder, D., entered into a contract with the defendant to build a house; D. assigned his interest in the contract to the plaintiff, who sued the defendant thereon under J. Act, 1873, s. 25 (6); it was held that the defendant might set off or deduct from the plaintiff's claim, the damages he had sustained by D.'s breach of the contract, but could not recover damages against the plaintiff. *Young v. Kitchen*, 47 L. J. Ex. 579; 3 Ex. D. 127. See also *Newfoundland Government v. Newfoundland Ry.*, 57 L. J. P. C. 35; 13 App. Cas. 199; where it was said that claims may be set off as between the original parties to the contract, and also as against an assignee if flowing out of and inseparably connected with the dealings and transactions which also give rise to the subject of the assignment. The debtor cannot set up against an innocent assignee a claim of a strictly personal nature that he may have against the assignor, such as a claim for damages for having been fraudulently induced to enter into the contract. *Stoddart v. Union Trust*, 81 L. J. K. B. 140; [1912] 1 K. B. 181. Nor can a lessee set up against the mortgagee of the reversion a claim for damages against the assignor. *Reeves v. Pope*, 83 L. J. K. B. 771; [1914] 2 K. B. 284. See also *Roxburghe v. Cox*, 50 L. J. Ch. 772; 17 Ch. D. 520, and *Webb v. Smith*, 30 Ch. D. 192.

Tender.

On issue joined as to the tender, the date of the writ, as stated on the statement of claim, is evidence of the commencement of the action. See *Whipple v. Manley*, 5 L. J. Ex. 191; 1 M. & W. 432.

The defence of tender is only applicable to liquidated claims; *Davys v. Richardson*, 57 L. J. Q. B. 409; 21 Q. B. D. 202; and to cases where the party pleading has been guilty of no breach of his contract. *Hume v. Peploe*, 8 East, 168, 170. Hence, where a debt is payable on a day certain, as on an acceptance, a defence of tender *post diem* is generally inapplicable. *S. C. Poole v. Tumbridge*, 6 L. J. Ex. 74; 2 M. & W. 223; 2 Wms. Saund. 48 b (i). Where a note is payable on demand, a tender of the amount and interest *de die in diem* is a good defence. *Norton v. Ellam*, 6 L. J. Ex. 121; 2 M. & W. 461, 463.

By whom a tender must be made.] The tender need not be made by the debtor himself; it is sufficient if made by his agent; and a tender by an agent, at his own risk, of more than the money given to him by his principal, is good. *Read v. Goldring*, 2 M. & S. 86.

To whom a tender must be made.] A tender to a person authorized by the creditor to receive money for him is sufficient. *Goodland v. Blewith*, 1 Camp. 477; *Kirton v. Braithwaite*, 5 L. J. Ex. 165; 1 M. & W. 310. Where a clerk, in the habit of receiving money for his master, was directed by him not to receive the sum in question, for that he had put it into the hands of his attorney, and the clerk, on tender made, refused to receive the money, assigning the reason, it was held to be a good tender to the principal. *Moffat v. Parsons*, 5 Taunt. 307. So if he refuse, saying he had no instructions. *Finch v. Boning*, 4 C. P. D. 143. But a tender made to the managing clerk of the plaintiff's attorney, who at the time disclaimed any authority from his master to receive the debt, was held insufficient. *Bingham v. Allport*, 2 L. J. K. B. 86; 1 Nev. & M. 398; *Watson v. Hetherington*, 1 Car. & K. 36. A tender of the debt sued for to the solicitor on the record, while he continues to be such, is a good tender to the principal. *Crozer v. Pilling*, 4 B. & C. 26; 3 L. J. (O. S.) K. B. 131. And a tender to a person in the office of the plaintiff's solicitor, to whom the defendant was referred by the clerk in the office, and who refused the tender only as being not enough, was held a good tender without showing who that person was. *Willmot v. Smith*, M. & M. 238. So a tender to a person in the plaintiff's (a merchant) place of business, who appeared to be conducting it, is good, though not, in fact, entrusted to receive money. *Barrett v. Deere*, *Id.* 200. But it is otherwise where the payment is not connected with the plaintiff's business, but quite collateral to it. *Sanderson v. Bell*, 3 L. J. Ex. 66; 2 Cr. & M. 304. Where the money was brought to the house of the plaintiff and delivered to his servant, who appeared to go with it to his master and returned saying that his master would not take it, it was held to be evidence from which the jury might infer a tender. *Anon.*, 1 Esp. 349. A tender of a partnership debt to one of several partners is sufficient. *Douglas v. Patrick*, 3 T. R. 683. As to a tender to a company registered under the Companies Act, 1862, see *Duval & Co. v. Gans*, 73 L. J. K. B. 907, 910; [1904] 2 K. B. 692.

Tender—To what amount.] Tender of a part of one entire debt is inoperative; *Dixon v. Clark*, 16 L. J. C. P. 237; 5 C. B. 365; and the debtor cannot apply a set-off in reduction of the amount due so as to make a tender of the balance good. *Searles v. Sadgrave*, 5 E. & B. 639; 25 L. J. Q. B. 15; *Phillipotts v. Clifton*, 10 W. R. 135. If the objection appears on the record, the defence may be objected to in point of law; otherwise the plaintiff must reply that the sum tendered was part of a larger amount due, which

formed one entire cause of action. *Hesketh v. Fawcett*, 12 L. J. Ex. 326; 11 M. & W. 356; *Dixon v. Clark*, *supra*; *Searles v. Sadgrave*, *supra*. If a man tender more than he ought to pay it is good; for the other ought to accept so much as is due to him. *Wade's Case*, 5 Rep. 114; *Astley v. Reynolds*, Str. 916. Thus proof of a tender of £20 9s. 6d. in bank notes and silver will support a plea of tender of £20. *Dean v. James*, 4 B. & Ad. 546; 2 L. J. K. B. 94. But it seems that such a tender is only good where it is made in moneys numbered, so that the creditor may take what is due to him; therefore a tender of a £5 note, requiring change, is not good. *Betterbee v. Davis*, 3 Camp. 70; *Robinson v. Cook*, 6 Taunt. 336; *Watkins v. Robb*, 2 Esp. 711; *Brady v. Jones*, 2 D. & Ry. 305. But a tender of too much, without requiring change, is good. *Read v. Goldring*, 2 M. & S. 86. Tender of enough to pay one of several items in a bill, if offered in satisfaction of the whole, is not good; but if specifically applied by the debtor to that one item at the time of payment, it is a good tender. *Hardingham v. Allen*, 17 L. J. C. P. 198; 5 C. B. 793. And where a greater sum is tendered than the sum pleaded, and the creditor refuses to receive it only on the ground that the amount is not sufficient, and not on account of the form of the tender, the tender is good. *Black v. Smith*, Peake, 88; *Saunders v. Graham*, Gow, 121. Where defendant laid down a gross sum in coin, and desired the plaintiff to tell him what was due, and to take principal and interest out of it, this was held good. *Bevans v. Rees*, 8 L. J. Ex. 263; 5 M. & W. 306. Where a party has separate demands for unequal sums against several persons, a tender of one sum for the debts of all is not a good tender of any one of the debts. *Strong v. Harvey*, 4 L. J. (O. S.) C. P. 57; 3 Bing. 304. A tender to one of several partners, including a debt due to the partnership, and also a debt due to that one partner individually, is a good tender of the partnership debt, unless objected to on account of the form of the tender. *Douglas v. Patrick*, 3 T. R. 683; and see *Black v. Smith*, *supra*. A tender to the creditor's solicitor, who has demanded payment, need not include the costs of the solicitor's letter. *Kirton v. Braithwaite*, 5 L. J. Ex. 165; 1 M. & W. 310; and see *Caine v. Coulton*, 1 H. & C. 764; 32 L. J. Ex. 97.

Tender—In what kind of money.] By the Coinage Act, 1870 (33 & 34 V. c. 10), s. 4, "A tender of payment of money, if made in coins which have been issued by the mint in accordance with the provisions of this Act, and have not been called in by any proclamation made in pursuance of this Act, and have not become diminished in weight, by wear or otherwise, so as to be of less weight than the current weight, that is to say, than the weight (if any) specified as the least current weight in the first schedule to this Act, or less than such weight as may be declared by any proclamation made in pursuance of this Act, shall be a legal tender,—

In the case of gold coins for a payment of any amount;*

In the case of silver coins for a payment of an amount not exceeding 40s., but for no greater amount;

In the case of bronze coins for a payment of an amount not exceeding 1s., but for no greater amount.

Nothing in this Act shall prevent any paper currency which under any Act, or otherwise, is a legal tender from being a legal tender."

The schedule gives least current weights in the case of gold coins only.

Sect. 11 empowers His Majesty in Council by proclamation among other things—(5) To call in coins; (6) To direct that any coins other than gold, silver or bronze, may be current and a legal tender up to 5s.; (7) To direct

* By proclamations under 29 & 30 V. c. 65, s. 1, the gold coins issued by the branch mints at Sydney and Melbourne were made, and have continued to be, a legal tender.

that coins coined in any foreign country may be a legal tender at prescribed rates, having regard to the weight and fineness of the coin as compared with the current coins of the realm; (8) To direct the establishment of branch mints in his Majesty's dominions.

By the 3 & 4 W. 4, c. 98, s. 6, it is provided that a tender of a note or notes of the Bank of England, expressed to be payable to bearer on demand, shall be a legal tender to the amount expressed in such note or notes for all sums *above* £5 on all occasions on which any tender of money may be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin. Such notes are not legal tender by the Bank of England, or any of its branch banks; nor are they legal tender in Ireland, 8 & 9 V. c. 37, s. 6; or Scotland, *Id.* c. 38, s. 15.

Currency notes issued by the Treasury for £1 and 10s. were authorised by 4 & 5 Geo. 5, c. 14, and made legal tender.

The party to whom the tender is made is not obliged to state his objection to receiving it, but if he do so he must rely on the objection he states, and he will be taken to have waived other objections. Thus, if he claim a larger amount than that offered, and give that alone as a reason for not accepting it, he cannot afterwards object that the tender was in country bank notes; *per* Bayley, B., in *Polglass v. Oliver*, 1 L. J. Ex. 5, 6; 2 C. & J. 17; *Lockyer v. Jones*, Peake, 180, n. A tender of a cheque on a banker may be good under the like circumstances. *Wilby v. Warren*, Tidd, Prac., 9th ed. 187; *Jones v. Arthur*, 8 Dowl. 442; *Cubitt v. Gamble*, 35 T. L. R. 223. Such a tender is bad if objected to on that ground. *Johnston v. Boyes*, 68 L. J. Ch. 425; [1899] 2 Ch. 73.

Tender—Money must be produced.] The actual production of the money due is necessary unless the creditor dispense with the production of it at the time, or do anything which is equivalent to a dispensation. *Thomas v. Evans*, 13 East, 101; *Polglass v. Oliver*, *supra*; *Dickinson v. Shee*, 4 Esp. 68. But where the defendant went to the plaintiff and told him he had £8 18s. 6d. in his pocket, which he had brought for the purpose of satisfying his demand, but the plaintiff told him "he need not give himself the trouble of offering it, for that he would not take it," the tender was held to be good. *Douglas v. Patrick*, 3 T. R. 684; and see *Ryder v. Townsend*, 7 D. & Ry. 119; 4 L. J. (O. S.) K. B. 27. The agent of the defendant met the plaintiff in the street and told him that he was come to settle the business between the defendant and him, and that he was desired by the defendant to offer him £4; the plaintiff said he would not take it; the witness then said he would give him the other 10s. out of his own pocket, and run the risk of being repaid; he then pulled out his pocket-book and told the plaintiff that if he would go into a neighbouring public-house he would pay him, but the plaintiff said he would not take it; this was held to be a good tender of £4 10s. *Read v. Goldring*, 2 M. & S. 86. Where a witness stated that the defendant was willing to give the plaintiff £10, and the witness offered to go and fetch that sum, but that the plaintiff said "she need not trouble herself, for he could not take it," this was held to be a good tender. *Harding v. Davies*, 2 C. & P. 77. Where money was offered by letter, which the plaintiff declined by letter, saying, "I decline your tender," this was held insufficient. *Powney v. Blomberg*, 13 L. J. Ch. 450; 14 Sim. 179. On a plea of tender of £1 12s. 6d., the jury found specially that the defendant's attorney called on the plaintiff, and said "I come to pay you £1 12s. 6d. which the defendant owes you"; that the attorney put his hand in his pocket, but did not produce the money, the plaintiff saying, "I can't take it; the matter is now in the hands of my attorney." It was held that, upon this finding, the defendant was not entitled to judgment. *Finch v. Brook*, 1 Bing. N. C. 253; 1 Scott, 70; 4 L. J. C. P. 1. But the court seems to have been of opinion that a dispensation of the production might have been inferred from the above facts, and found by the jury. See *Ex pte. Danks*, 2 D. M. & G. 936; 22 L. J. Bky. 73.

Tender must be unconditional.] In order to support a plea of tender, there must be evidence of an *unqualified* offer. An offer of payment, clogged with a condition that it should be accepted as the balance due, does not amount to a legal tender. *Evans v. Judkins*, 4 Camp. 156; *Huxham v. Smith*, 2 Camp. 21; *Strong v. Harvey*, 4 L. J. (O. S.) C. P. 57; 3 Bing. 304; *Hough v. May*, 5 L. J. K. B. 186; 4 Ad. & E. 954. But a tender, accompanied by a statement by the defendant that "he has come to pay the amount of his (the plaintiff's) bill," is sufficient, though the plaintiff insisted that "it was not his bill," and refused it on that account; for such statement is no more than is implied in every tender, viz., that the debtor intends to cover the whole demand, and asserts that it does so. *Henwood v. Oliver*, 10 L. J. Q. B. 158; 1 Q. B. 409; *Bowen v. Owen*, 17 L. J. Q. B. 5; 11 Q. B. 130. So a tender of the full amount demanded, accompanied with a protest, is good. *Scott v. Uxbridge & Rickmansworth Ry.*, 35 L. J. C. P. 293; L. R. 1 C. P. 596; *Greenwood v. Sutcliffe*, 61 L. J. Ch. 59; [1892] 1 Ch. 1. If the tender cannot be accepted without supplying evidence of an admission that no more is due, then it is conditional, and therefore bad. *Bowen v. Owen*, *supra*. So where a tender is accompanied with a demand of a receipt in full of all demands. *Glasscott v. Day*, 5 Esp. 48; *Higham v. Baddely*, Gow, 213; *Ryder v. Townsend*, 4 L. J. (O. S.) K. B. 27; 7 D. & Ry. 119. Where the defendant tendered the money, saying, "If you will give me a stamped receipt, I will pay you the money," and the plaintiff refused to take it, Abhott, C.J., held this to be no tender. *Laing v. Meader*, 1 C. & P. 257. But see now sect. 103 of the Stamp Act, 1891, by which the payee of money is liable to a penalty if, in any case where a receipt would be liable to duty, he refuse to give a receipt duly stamped, and he is bound also, under sect. 101 (2), to cancel the stamp if adhesive. Where the creditor did not object to the demand of a receipt, but only that the sum was insufficient, the tender was held good. *Richardson v. Jackson*, 10 L. J. Ex. 303; 8 M. & W. 298. Where a cheque is sent in a letter requesting a receipt in return, this is not a conditional tender. *Jones v. Arthur*, 8 Dowl. 442. But where two quarters' rent, due Michaelmas and Christmas, was demanded, and the tenant tendered the Christmas only, and demanded a receipt for that quarter's rent, this was held to be no sufficient tender, even of that quarter's rent, the contest between the parties being whether one or two quarter's rent was due. *Finch v. Miller*, 5 C. B. 428. Where the defendant tendered a sum of money, and at the same time delivered a counter-claim upon the plaintiff, and the plaintiff did not take up the money or paper, but simply said, "You must go to my attorney," the tender was held insufficient. *Brady v. Jones*, 2 D. & Ry. 305.

Whether a tender be conditional or not is a question for the jury, where the words or facts accompanying it are disputed. *Eckstein v. Reynolds*, 6 L. J. K. B. 198; 7 Ad. & E. 80. But if the goodness of it turns on the meaning or legal effect of a letter or writing accompanying it, then the question is for the judge. *Semble*, *Bowen v. Owen*, 17 L. J. Q. B. 5; 11 Q. B. 130. The same rule would seem, on principle, to apply to unwritten expressions used by the party tendering, where the tenor of them is not disputed.

Tender—Prior or subsequent demand and refusal.] The defence will be defeated by showing a demand and refusal prior or subsequent to the tender. *Bennett v. Parker*, 1 R. 2 C. L. 89; *Poole v. Tumbridge*, 6 L. J. Ex. 74; 2 M. & W. 223, 226; 1 Wms. Saund. 33 c (2). The demand and refusal must be replied specially. Rules, 1883, O. xix. r. 15. The demand must be proved to be of the precise sum tendered. *Spybey v. Hide*, 1 Camp. 181; *Rivers v. Griffiths*, 5 B. & A. 630. The demand must be by a person authorized at the time to receive the money; and therefore a demand by a clerk of the plaintiff's solicitor (who does not bring his master's receipt) is insufficient. *Coore v. Callaway*, 1 Esp. 115. The subsequent adoption of an unauthorized demand is not enough. Story on Agency, § 247. A subse-

quent demand upon one of two joint debtors is sufficient. *Peirse v. Bowles*, 1 Stark. 323. A letter sent by the plaintiff and received by the defendant, demanding the sum tendered, is not sufficient evidence of a subsequent demand; for, at the time of the demand, the defendant should have an opportunity of immediately paying the sum demanded. *Edwards v. Yeates*, Ry. & M. 360; but see *Hayward v. Hague*, 4 Esp. 93.

ACTIONS ON SPECIALTIES.

ACTION ON COVENANTS RELATING TO LAND.

THE evidence in this action depends upon the particular breaches of covenant alleged by the plaintiff, and the mode in which they are stated or denied in the pleadings. A covenant is nothing more than an agreement expressed in an instrument in writing, executed as a deed. Such agreements, after proof of the deed in which they are contained, are subject to the rules of construction applicable to ordinary documents.

Covenants in general.] There need be no formal words of covenant. Any words in a deed, showing an agreement to do a thing, make a covenant; as "that the lessee shall repair;" Com. Dig. Covenant. (A. 2). "It is agreed that A. shall pay B. for his goods," is a covenant by B. to deliver them to A., as well as by A. to pay. So, a lease by A. to B. "excepting a room and free passage to it," is a covenant by B. not to disturb the passage, but is not a covenant as to disturbing in the room. So, a covenant may be in the form of a proviso or condition. *Id.*; *Brookes v. Drysdale*, 3 C. P. D. 52; or of a recital; *Clark v. Clark*, 54 L. J. P. 57; 10 P. D. 188. Thus a recital of an intended fine in an agreement may amount to a covenant to levy one. *Farrall v. Hilditch*, 5 C. B. (N. S.) 840; 28 L. J. C. P. 221. So the recital in a lease of the intention of the parties that a mill should be erected, and a covenant to leave it in repair, amount in law to a covenant to erect it. *Sampson v. Easterby*, 9 B. & C. 505; 5 L. J. (O. S.) K. B. 291; 6 Bing. 644. But a conveyance by A. to a railway company of land, "intended to be formed into a new course" for a river, and a covenant by the company to make a bridge over the new cut for A.'s use, does not imply a covenant to make the new cut or divert the river. *Rashleigh v. S. E. Ry. Co.*, 10 C. B. 612. This case was, however, doubted in the House of Lords on an appeal, and was compromised. See *Knight v. Gravesend, &c.*, *Waterworks Co.*, 2 H. & N. 6; 27 L. J. Ex. 73. An acknowledgment by A. in a deed that he owes B. £—, may be treated as a covenant to pay, if an intention to enter into an engagement to pay appear on the face of the deed; *Saunders v. Milsome*, L. R. 2 Eq. 573; *Brooks v. Jennings*, L. R. 1 C. P. 476; *Courtney v. Taylor*, 12 L. J. C. P. 380; 6 M. & Gr. 851; but not if the acknowledgment be merely for a collateral purpose; *S. C.*; *Holland v. Holland*, 38 L. J. Ch. 398; L. R. 4 Ch. 449; *Jackson v. N. E. Ry.*, 47 L. J. Ch. 303; 7 Ch. D. 573. See also *Knight v. Gravesend, &c.*, *Waterworks Co.*, *supra*. An indenture between A. and B. provided that A. should buy all the coal used by him from B., but that B. "should not be compelled to supply more than 500 tons per week," and in case of inability to supply "to the extent agreed upon," and notice thereof to A., A. might buy elsewhere: this was held to be a covenant by B. to supply coal to the extent of 500 tons unless unable from substantial cause. *Wood v. Copper Miners' Co.*, 18 L. J. C. P. 293; 7 C. B. 906. A covenant by the lessee of a coal mine to draw to, and deposit on the surface of the demised premises by some of the pits or shafts of the demised mine, for the use of the lessor, all the manure made underground, does not imply a covenant by the lessee to make pits or shafts on the demised land, although such pits may have been

contemplated by both parties. *James v. Cochrane*, 7 Ex. 170; 21 L. J. Ex. 229; 8 Ex. 556; 22 L. J. Ex. 201.

A covenant by one person with himself and others jointly is void. *Ellis v. Kerr*, 79 L. J. Ch. 291; [1910] 1 Ch. 529; *Napier v. Williams*, 80 L. J. Ch. 298; [1911] 1 Ch. 361.

By 8 & 9 V. c. 106, s. 4, in deeds executed since the 1st October, 1845, the word "give" or "grant" shall not imply any covenant in respect of real property, except by force of some Act of Parliament (such as by the Lands Clauses Consolidation Act, 1845, s. 132). The former Act does not restrain the effect of the word "demise," which still implies a covenant for title, but such implied covenants are restrained by express covenants contained in the same deed and incompatible with them; for *expressum facit cessare tacitum*; Shep. Touch. cap. 7, p. 165. By virtue of the Conveyancing Act, 1881, 44 & 45 V. c. 41, s. 6, general words are, so far as a contrary intention is not therein expressed, now implied in conveyances; and also by sect. 7, covenants for title. See also sects. 49—64 containing provisions as to the construction and effect of deeds and other contracts.

Defences denying execution of deed.] By Rules, 1883, O. xix., r. 20, under this defence, which now in part takes the place of the old plea of *non est factum*, the plaintiff need only produce and prove the execution of the deed. Where the action is not for any liquidated sum, it is also necessary to prove the amount of damage.

To support a plea of *non est factum* it is not sufficient to show that a misrepresentation has been made as to the contents of the deed which it is sought to avoid; it must be shown that the deed was of a character and class different from what it was represented to be. *Howatson v. Webb*, 75 L. J. Ch. 346; 77 L. J. Ch. 32; [1907] 1 Ch. 537; [1908] 1 Ch. 1. Query, whether the old authorities on the plea of *non est factum* extend beyond cases where the party is blind or illiterate. S. C. If the document is of a different character and class from what it is represented to be, the defendant can plead *non est factum*. *Bagot v. Chapman*, 76 L. J. Ch. 523; [1907] 2 Ch. 222; *Foster v. Mackinnon*, 38 L. J. C. P. 310; L. R. 4 C. P. 704; *Carlisle and Cumberland Banking Co. v. Bragg*, 80 L. J. K. B. 472; [1911] 1 K. B. 489. See also *Hunter v. Walters*, 41 L. J. Ch. 175; L. R. 7 Ch. 75; *King v. Smith*, 69 L. J. Ch. 598; [1900] 2 Ch. 425; *National Provincial Bank of England v. Jackson*, 33 Ch. D. 1; *Onward Building Society v. Smithson*, 62 L. J. Ch. 138; [1893] 1 Ch. 1. Notwithstanding an expression to the contrary in *Bagot v. Chapman*, *supra*, it would seem that if the plea of *non est factum* is to succeed the deed must be wholly and not partly void. *Howatson v. Webb*, 77 L. J. Ch. 32; [1908] 1 Ch. 1.

Under special defences the defendant may show that the deed was executed as an escrow, and was to take effect as a deed only upon some given event which has not happened; or that the deed, after being sealed, was tendered to the covenantee, and he expressly rejected it; or in the case of a corporation deed, irregularity, or want of due authority in the execution of the deed.

If the seal, other than that of the defendant, be removed, the deed may be given in evidence, if it be a several deed; *Matthewson v. Lydiate*, 5 Rep. 22; Cro. Eliz. 408; *contra*, if it be a joint or joint and several deed. *Id.*; *Seaton v. Henson*, 2 Lev. 220.

Where a bond is produced at the trial in a cancelled state, *e.g.*, with the seal broken off, the question seems to be whether the bond was cancelled before or after defence pleaded. *Nicholls v. Haywood*, Dyer, 59 a; *Michael v. Scockwith*, Cro. Eliz. 120; *Whelpdale's Case*, 5 Rep. 119; and see *Todd v. Emly*, 12 L. J. Ex. 142; 11 M. & W. 1. But the party relying on the deed may show that the seal was removed under circumstances not amounting to a cancellation.

If a bond be sealed and delivered to a man's use, and he die before notice, his executors may sue upon it. Dyer, 167.

In an action by lessor, on covenants contained in a lease under seal, and

which depend on the existence of the term, as, for instance, those to repair and pay rent during the term, the defendant may set up as a special defence that the lease had not been executed by the lessor. *Swatman v. Ambler*, 8 Ex. 72; 22 L. J. Ex. 81; *Pitman v. Woodbury*, 3 Ex. 4. *Quære*, if he can do so after he has entered and occupied during the term. *Vide* S. C. and *Cooch v. Goodman*, 11 L. J. Q. B. 225; 2 Q. B. 580. If the defendant got all the title he stipulated for, an informality in the execution by the lessors will not affect the lessee's covenants. *How v. Greek*, 3 H. & C. 391; 34 L. J. Ex. 4; *Toler v. Slater*, 37 L. J. Q. B. 33; L. R. 3 Q. B. 42. And such a defence is not applicable to a covenant to invest money contained in a mortgage deed, which the mortgagor alone executed. *Morgan v. Pike*, 14 C. B. 473; 23 L. J. C. P. 64.

The lease may be proved *primâ facie* by producing the counterpart executed by the defendant, without notice to produce the original lease. *Houghton v. Kœnig*, 18 C. B. 235; 25 L. J. C. P. 218. But the defendant may put in the original lease, and show that it is void by reason of the non-execution thereof by the lessor. *Wilson v. Woolfryes*, 6 M. & S. 341. Where there is a discrepancy between the two instruments the lease shall prevail; *Sheppard's Touchstone*, 52; unless the lease only is inconsistent with itself, in which case reference may be made to the counterpart, to ascertain and correct the mistake. *Burchell v. Clark*, 46 L. J. C. P. 115; 2 C. P. D. 88; *Matthews v. Smallwood*, 79 L. J. Ch. 322; [1910] 1 Ch. 777. But generally where an indenture is in two parts, one party executing each part, if there is a material variation between the two parts, the indenture is void for want of mutuality. *Wynne's Case*, L. R. 8 Ch. 1002.

Where one of several covenantees sued as sole covenantee without joining the others or showing their death, this was formerly a variance on a plea denying the contract; but if one of several joint covenantors were sued without naming or joining the rest, this was only pleadable in abatement; 1 Wms. Saund. 154, a, (1). A covenant by A., B., and C., that they or some of them will pay, &c., may be sued as on a covenant by any one of them. *Caldwell v. Becke*, 2 Ex. 318.

A question formerly arose under a denial of the contract, or other appropriate defence, whether the plaintiffs who sued were the proper parties to the action. Where the covenant is with A. and B. jointly, yet if the interest of each is several, as on a conveyance of distinct lands by each, they could not join as plaintiffs; 1 Wms. Saund. 154 (1); although they can now do so under Rules, 1883, O. xvi., r. 1. But if the covenant is expressly made to several, though for the benefit of one only, it is a joint covenant and all should join. *Anderson v. Martindale*, 1 East, 497. The rule, as expressed in the latest cases, is that where the covenant is to or with several persons, it will be construed to be joint or several, according to the interest of the covenantees apparent in the deed, provided that the words admit of such construction. But if the covenant be expressly and unambiguously a joint one, then the interest will not control the construction, and all the covenantees must join. *Sorsbie v. Park*, 13 L. J. Ex. 9; 12 M. & W. 146; *Hopkinson v. Lee*, 14 L. J. Q. B. 101; 6 Q. B. 964; *Haddon v. Ayers*, 1 E. & E. 118; 28 L. J. Q. B. 105; *Palmer v. Mallet*, 57 L. J. Ch. 226; 36 Ch. D. 411; *White v. Tyndall*, 57 L. J. P. C. 114; 13 App. Cas. 263.

The benefit of an indivisible covenant, e.g., to repair or work mines, on a joint demise by tenants in common, runs with the entire reversion only; and therefore all the covenantees or their representatives must join in suing on a breach of the covenant. *Thompson v. Hakewell*, 19 C. B. (N. S.) 713; 35 L. J. C. P. 18; following *Foley v. Addenbrooke*, 12 L. J. Q. B. 163; 4 Q. B. 197; and on the authority of Litt., s. 314; Co. Litt. 196 b; see also *Bradburne v. Botfield*, 14 L. J. Ex. 330; 14 M. & W. 559; *Wakefield v. Brown*, 15 L. J. Q. B. 373; 9 Q. B. 209; *Keightley v. Watson*, 3 Ex. 716; *Magnay v. Edwards*, 22 L. J. C. P. 170; 13 C. B. 479; *Pugh v. Stringfield*, 3 C. B. (N. S.) 2; 27 L. J. C. P. 34. It would seem that if the covenant,

in such a lease, were to pay a money or other divisible rent, the tenants in common or their representatives might maintain separate actions for their respective shares of the rent. See *Thompson v. Hakewell*, *supra*. Where the reversion expectant on the determination of a lease vested in tenants in common A., B., and C., it was held that A. could by himself sue the lessee for breach of a covenant in the lease. *Roberts v. Holland*, 62 L. J. Q. B. 621; [1893] 1 Q. B. 665. *Sed quære*, the covenant in this case being to deliver up the premises in good repair. *Ex rel. amici*.

The insertion of more covenantors than ought to be joined is now immaterial. Where the action is on an implied covenant, persons who are parties to the deed, only for confirmation, with no legal estate (as where trustee and *cestui que trust* join as lessors), should not be joined as defendants. *Smith v. Pocklington*, 1 C. & J. 445.

At common law, no person not made, by name or description, a party to an indenture could sue thereon. Com. Dig. Fait, (D. 2); *Chesterfield, &c., Colliery Co. v. Hawkins*, 3 H. & C. 677; 34 L. J. Ex. 121; *Kitchin v. Hawkins*, L. R. 1 Q. B. 22. But now, on equitable principles, a person having a beneficial right thereunder, as *cestui que trust*, may sue thereon. *Gandy v. Gandy*, 54 L. J. Ch. 1154; 30 Ch. D. 57. And by 8 & 9 V. c. 106, s. 5, under an indenture executed after Oct. 1st, 1845, "the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture." *Dyson v. Forster*, 78 L. J. K. B. 246; [1909] A. C. 98. Where the lessee of a house is trustee for W., W. is not liable on the covenants of the lease, although W. occupies. *Ramage v. Womack*, 69 L. J. Q. B. 40; [1900] 1 Q. B. 116.

[*Covenant to pay money.*] On a covenant by A. to pay B. a sum of money, A. is bound to seek out B. "if he be *infra regnum Angliæ*; but if he be not within the kingdom, he is not bound to seek him." Sheppard's Touchstone, cap. 6, p. 136. Where, however, the payment is to be at a certain place, a demand for payment must be made at that place. *Thorn v. City Rice Mills*, 58 L. J. Ch. 297; 40 Ch. D. 357. Where two places are named for payment, there is no default until the payee has selected the place, and made demand there. S. C. A proviso which is in terms repugnant to a covenant creating a personal liability to pay is void. *Furnivall v. Coombes*, 12 L. J. C. P. 265; 5 Man. & G. 736; *Williams v. Hathaway*, 6 Ch. D. 544; *Watling v. Lewis*, 80 L. J. Ch. 242; [1911] 1 Ch. 414. But a proviso limiting without destroying the personal liability is valid. *Williams v. Hathaway, supra*.

[*Statutes of Limitation to actions on specialty.*] The Limitation Act, 1623, 21 J. 1, c. 16, did not apply to deeds or specialties.

By the Real Property Limitation Act, 1833, 3 & 4 W. 4, c. 27, s. 42, "no arrears of rent, or of interest in respect of any sum of money charged upon or payable out of any land or rent, or in respect of any legacy, or any damages in respect of such arrears of rent or interest, shall be recovered by any distress, action, or suit, but within six years next after the same respectively shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent; provided, nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years."

By the Real Property Limitation Act, 1874 (37 & 38 V. c. 57), s. 8, "no action or suit or other proceeding shall be brought to recover any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of any land or rent, at law or in equity, or any legacy, but within 12 years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for, or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent; and in such case no such action or suit or proceeding shall be brought but within 12 years after such payment or acknowledgment, or the last of such payments or acknowledgments if more than one was given." By sect. 10, "no action, suit, or other proceeding shall be brought to recover any sum of money or legacy, charged upon, or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable, and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust." See *Hughes v Coles*, 53 L. J. Ch. 1047; 27 Ch. D. 231; *In re Stephens*, 59 L. J. Ch. 109; 43 Ch. D. 39; *Williams v. Williams*, 69 L. J. Ch. 77; [1900] 1 Ch. 152.

Sects. 8 and 9 replace 3 & 4 W. 4, c. 27, s. 40, under which section the period of limitation was 20 years instead of 12.

By 23 & 24 V. c. 38, s. 13, the period of limitation for claims in respect of the share of the estate of an intestate, made against his personal representative, is 20 years. See *In re Johnson*, 29 Ch. D. 964; *Willis v. Earl Beauchamp*, 55 L. J. P. 17; 11 P. D. 59; and *In re Pardoe*, 75 L. J. Ch. 161; [1906] 1 Ch. 265; reversed on facts, 75 L. J. Ch. 748; [1906] 2 Ch. 340, no opinion being expressed as to the statute.

By the Trustee Act, 1888 (51 & 52 V. c. 59), s. 8, actions against trustees are now in some cases subject to Statutes of Limitations, and in the case of an action against a trustee and executor the question often arises as to whether the claim falls within that section or 37 & 38 V. c. 57, ss. 8, 10, *supra*. See *In re Timmis*, 71 L. J. Ch. 118; [1902] 1 Ch. 176, and cases there cited. Sect. 8, sub-s. 1 (a) of the Act of 1888, applies to an action against an executor for an account. *In re Richardson*, 89 L. J. Ch. 258; [1920] 1 Ch. 423.

37 & 38 V. c. 57, s. 8, applies to the sums payable under stat. 42 G. 3, c. 116, ss. 123, 125, to the person who has redeemed the land tax, in respect of the tax so redeemed. *Skene v. Cook*, 71 L. J. K. B. 446; [1902] 1 K. B. 682. A "present right to receive" is not equivalent to a "present right to enforce payment;" thus where improvement works have been done in a street, the cost of which is to be apportioned among the owners of the houses forming the street, and the apportioned shares are payable by the respective owners, and made a charge on their houses, the statute runs although there has been no apportionment. *Hornsey Local Board v. Monarch Investment Building Soc.*, 59 L. J. Q. B. 105; 24 Q. B. D. 1. See *In re Owen*, 63 L. J. Ch. 749; [1894] 3 Ch. 220, and *In re Pardoe*, *supra*.

A payment to prevent the barring by 37 & 38 V. c. 57, s. 8, must be an acknowledgment, by the person making the payment, of his liability, and an admission of the title by the person to whom it is paid. *Harlock v. Ashberry*, 51 L. J. Ch. 394; 19 Ch. D. 539. It must be made by the person liable to pay principal or interest; payment of rent by the tenant of the mortgaged property to the mortgagee, in pursuance of notice by him, is no bar. S. C. See also *Newbould v. Smith*, 55 L. J. Ch. 788; 33 Ch. D. 127, affirmed on another ground, 14 App. Cas. 423; and *In re Ld. Clifden*, 69 L. J. Ch. 478; [1900] 1 Ch. 774. Payment by a person bound to pay

as between himself and the mortgagor only, is sufficient. *Bradshaw v. Widdrington*, 71 L. J. Ch. 627; [1902] 2 Ch. 430. So *prima facie* is payment by a solicitor acting for both the mortgagor and mortgagees. S. C. Payment of part of the amount due under a judgment, obtained in a foreign court, does not affect the bar under sect. 8. *Taylor v. Hollard*, 71 L. J. K. B. 278; [1902] 1 K. B. 676. Assuming that sect. 8 applies to an action brought on a mortgage deed, against a surety, payment of interest by the mortgagor prevents the section operating as a bar. *In re Frisby*, 59 L. J. Ch. 94; 43 Ch. D. 106. It is, however, doubtful whether the section applies to such an action. *Vide* S. C.; *In re Powers*, 30 Ch. D. 291. Where rent out of which the interest of the mortgage ought to be paid is receivable by, and belongs to the same person who is entitled to the interest, the statute does not bar the mortgagee. *Topham v. Booth*, 56 L. J. Ch. 812; 35 Ch. D. 607. The above cases were distinguished in *In re England*, 65 L. J. Ch. 21; [1895] 2 Ch. 100, 820. Where the receiver appointed by the court to receive the rents of three estates, A., B., and C., included in one mortgage, entered into possession of C. only, and out of the rents paid the mortgage interest, this was held to be in law payment by the mortgagor in respect of the mortgage debt, and prevented the statute from operating. *Chinnery v. Evans*, 11 H. L. C. 115; see also *Cronin v. Dennehy*, 1 R. 3 C. L. 289; and *Lewin v. Wilson*, 55 L. J. P. C. 75; 11 App. Cas. 639. A payment made after 12 years from the accruing of the debt, but within 12 years before action, bars the statute. *In re Ld. Clifden*, 69 L. J. Ch. 478, 480; [1900] 1 Ch. 774, 778.

A debt charged on personal estate by vendor's lien is not barred by any statute of limitations, and is at any time recoverable with interest from its date. *In re Stuclely*, 75 L. J. Ch. 58; [1906] 1 Ch. 67.

By the Civil Procedure Act, 1833, 3 & 4 W. 4, c. 42, s. 3, it is enacted, that all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond, or other speciality, and all actions of debt or scire facias upon any recognizance, shall be sued or brought within 20 years after the cause of such actions or suits, but not after; provided, that nothing herein contained shall extend to any action given by any statute, where the time for bringing such action is or shall be by any statute specially limited.

By sect. 4, provision is made for persons who are, at the time such cause of action accrued, within the age of 21 years, covert, of unsound mind, or *beyond the seas*; such person to be at liberty to bring the actions, so as they commence the same within such times after their coming to, or being of full age, discover, of sound memory, or *returned from beyond the seas*, as other persons having no such impediment should, according to the provision of the Act, have done; and if any person against whom there shall be any such cause of action, shall be, at the time of cause of action accrued, beyond the seas, then the person entitled shall be at liberty to sue such person within the times before limited after the return of such person from beyond the seas. [As to the words in italics, *vide* 19 & 20 V. c. 97, *infra*.]

Sect. 5. Provided that, if any acknowledgment shall have been made either by writing signed by the party liable by virtue of such indenture, speciality or recognizance, or his agent, or by part payment, or part satisfaction on account, of any principal or interest then due thereon, it shall be lawful for the person entitled to such action to bring his action for the money remaining unpaid, and so acknowledged to be due, within 20 years after such acknowledgment or part payment or part satisfaction; or in case the person entitled to such action shall, at the time of such acknowledgment, be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making it, beyond the seas, then within 20 years after the disability shall have ceased, or the party shall have returned from beyond the seas, as the case may be; and the plaintiff in such action may, by way of replication, state such acknowledgment, and that the action was brought within the time aforesaid, in answer to a plea of this statute.

Sect. 7. No part of the United Kingdom, the Isle of Man, or the Channel Islands, being dominions of the Queen, are beyond seas within the meaning of this Act.

By 19 & 20 V. c. 97, s. 10, no person or persons entitled to any action limited by the Acts 3 & 4 W. 4, c. 27, s. 42, or *Id.* c. 42, s. 3, shall be entitled to any further time to sue by reason only that such person, or one or more of such persons, was or were beyond seas at the time when the cause accrued; and by sect. 11, in case of joint debtors, no further time is to be allowed for suing, by reason only that some of them were beyond seas when the cause accrued; but a judgment recovered in such case will not *per se* be a bar to an action against the absent debtor or debtors after their return. Sect. 14 provides that part payment by one debtor shall not deprive his co-debtor of the benefit of the statute.

By the J. Act, 1873, s. 25 (2), no claim by a *cestui que trust* against his trustee on an express trust is to be barred by any Statute of Limitations. See, however, 37 & 38 V. c. 57, s. 10, and 51 & 52 V. c. 59, s. 8. But although the claim is not barred by the statute, yet where there has been laches on the part of the plaintiff, his remedy may be limited to six years' arrears of interest. *Thomson v. Eastwood*, 2 App. Cas. 215.

The effect of the 3 & 4 W. 4, c. 27, s. 42, and c. 42, s. 3, together, is that no more than six years' arrears of rent or interest in respect of any sum charged on, or payable out of, any land or rent shall be recovered by way of distress, action, or suit, other than and except an action of covenant or debt on the specialty, in which case the limitation is 20 years. *Paget v. Foley*, 2 Bing. N. C. 679; 5 L. J. C. P. 258; *Sims v. Thomas*, 12 Ad. & E. 536; 9 L. J. Q. B. 399; *Grant v. Ellis*, 11 L. J. Ex. 228; 9 M. & W. 113; *Manning v. Phelps*, 10 Ex. 59; 24 L. J. Ex. 62; *Bowyer v. Woodman*, L. R. 3 Eq. 313. Where however the lessor's title has been extinguished under 3 & 4 W. 4, c. 27, s. 34, the right to recover arrears of rent has also gone. *In re Jolly*, 69 L. J. Ch. 661; [1900] 2 Ch. 616. A personal covenant to pay a rentcharge cannot be enforced after the expiration without acknowledgment of 12 years from the last payment. *Shaw v. Crompton*, 80 L. J. K. B. 52; [1910] 2 K. B. 370.

Now, by 37 & 38 V. c. 57, s. 8, in an action on the covenant in a mortgage deed, to pay the mortgage debt, the period of limitation has been reduced to 12 years; *Sutton v. Sutton*, 52 L. J. Ch. 333; 22 Ch. D. 511; so in an action on a bond given as collateral security with a mortgage; *Fearnside v. Flint*, 52 L. J. Ch. 479; 22 Ch. D. 579; even although the mortgage is on a reversion, which had not fallen into possession at the date of the writ. *Kirkland v. Peatfield*, 72 L. J. K. B. 355; [1903] 1 K. B. 756; so too the period of limitation is 12 years in respect of the mortgagor's interest in the proceeds of sale of land held on trust for sale. *In re Fox*, 82 L. J. Ch. 393; [1913] 2 Ch. 75; and so in an action on a judgment; *Hebblethwaite v. Peever*, [1892] 1 Q. B. 124; *Jay v. Johnstone*, 62 L. J. Q. B. 128; [1893] 1 Q. B. 189; even although a suggestion had within 12 years, been entered on the roll under C. L. P. Act, 1852, s. 129. *Ex pte. Tynte*, 15 Ch. D. 125. But an action on a bond given by A. to C., conditioned to secure the payment of principal and interest due under B.'s mortgage to C., is not within sect. 8. *In re Powers*, 30 Ch. D. 291. Where J. and A. entered into a joint and several covenant in a mortgage deed to pay the sum of £3,000 and interest on demand, J. joining as surety for A., the statute did not begin to run in favour of J. until a demand for payment had been made on him, the claim being collateral. *Brown v. Brown*, 62 L. J. Ch. 695; [1893] 2 Ch. 300; *Bradford Old Bank v. Sutcliffe*, 68 L. J. K. B. 85; [1918] 2 K. B. 833.

Dividends declared on the shares of a company registered under the Companies Acts, the certificate of which is under the seal of the company, are recoverable within 20 years from the date on which they were payable; *In re Artizans' &c. Cor.*, 73 L. J. Ch. 581; [1904] 1 Ch. 796; and capital to be returned on the shares is recoverable from the date of the notice of

the order confirming the resolution. S. C. In the case of a company under the Companies Clauses Acts, 1845, 1863, interest due on debenture stock issued thereunder, is recoverable within 20 years. *In re Cornwall Minerals Ry.*, 66 L. J. Ch. 561; [1897] 2 Ch. 74. And the same rule would seem to apply to dividends payable on shares of such company, S. C.; *In re Severn, &c. Bridge Co.*, 65 L. J. Ch. 400; [1896] 1 Ch. 559, and *In re Artizans' Land, &c., Cor.*, *supra*.

An action to recover a simple contract debt, charged on land, is still barred under 21 J. 1, c. 16, by the lapse of six years. *Barnes v. Glenton*, 68 L. J. Q. B. 502; [1899] 1 Q. B. 885.

3 & 4 W. 4, c. 27, s. 42, does not affect the right of a mortgagee to retain out of the proceeds of the mortgaged property for more than six years' interest. *In re Marshfield*, 56 L. J. Ch. 599; 34 Ch. D. 721; *Dingle v. Coppen*, 68 L. J. Ch. 337; [1899] 1 Ch. 726; *In re Lloyd*, 72 L. J. Ch. 78; [1903] 1 Ch. 385.

Mere delay in enforcing a specialty debt for any period within 20 years affords no bar to its recovery. *In re Baker*, 51 L. J. Ch. 315; 20 Ch. D. 230.

A sufficient written acknowledgment within 3 & 4 W. 4, c. 42, s. 5, must be specially replied. *Kempe v. Gibbon*, 16 L. J. Q. B. 120; 9 Q. B. 609. It must be shown which of the three sorts of acknowledgments,—viz., writing, payment, or satisfaction in part—is relied on. *Forsyth v. Bristowe*, 8 Ex. 347; 22 L. J. Ex. 70. The acknowledgment need not imply a promise, or be in itself a cause of action; *Moodie v. Bannister*, 4 Drew. 432; 28 L. J. Ch. 881; and an admission by the executors of the obligor in their answer to a suit *inter alios* is enough, S. C. Hence under sect. 5, the acknowledgment need not be to the creditor or his agent.

In an action of covenant for £400 due on a mortgage deed, to which the Stat. of Limitations was pleaded, plaintiff replied an acknowledgment within 20 years, and put in a deed of conveyance by defendant to trustees for payment of "all mortgages, debts, &c.," in which it was recited that the land was "subject to a mortgage to W. H. (plaintiff) for £400 and interest:" held insufficient, because it did not acknowledge an existing debt, but only an outstanding mortgage. *Howcutt v. Bonser*, 18 L. J. Ex. 262; 3 Ex. 491. In an action by mortgagee against mortgagor for principal and interest, after the lapse of 20 years, defendant pleaded the statute, to which plaintiff replied an acknowledgment in writing, and also part payment, within 20 years; within 20 years the defendant had assigned his equity of redemption by a deed reciting payment of interest "up to the date thereof:" held, that this was evidence of payment within 20 years: held also, that payment of interest by the assignee after assignment, was payment by the "agent" of the defendant. *Forsyth v. Bristowe*, 8 Ex. 716; 22 L. J. Ex. 255; see also *Dibb v. Walker*, 62 L. J. Ch. 536; [1893] 2 Ch. 429.

On a plea that the "debt and cause of action" did not accrue *infra*, &c., pleaded to a bond, declared upon, without showing the condition, and issue thereon, it appeared at the trial to be a *post obit* bond, and that the *cestui que vie* died within 20 years: held, that the plaintiff was entitled to recover, for the real cause of action arises on the condition. *Tuckey v. Hawkins*, 16 L. J. C. P. 201; 4 C. B. 655. To a declaration on a bond, without stating the condition, which was for payment of an annuity, the defendant pleaded that the causes of action did not accrue within 20 years; on which plaintiff joined issue, and suggested breaches of non-payment of arrears within 20 years. On the trial, it appeared that there had been *also* breaches of condition 20 years ago, by payments of the annuities at irregular times, all of which, however, had been accepted by the plaintiff: held that a new cause of action arose on each breach of the condition; that the previous breaches had been waived by acceptance, and that the plaintiff was entitled to a verdict on the issue. *Amott v. Holden*, 18 Q. B. 593; 22 L. J. Q. B. 14. A bond conditioned to replace stock is not within sect. 5 of the Act, which relates only to conditions for payment of money;

therefore an acknowledgment that it was not replaced, and a payment within 20 years of money conditioned to be paid in lieu of dividends, if the stock should not be replaced, will not rebut the statute so far as relates to the breach or condition to replace. *Blair v. Ormond*, 17 Q. B. 423; 20 L. J. Q. B. 444. But the condition to pay periodically the money due in lieu of dividends, was held to continue in force, and that plaintiff was entitled to damages for a breach for *non-payment* within 20 years. S. C. The acknowledgment by a devisee in trust where his co-devisee dissents in ineffectual. *Astbury v. Astbury*, 67 L. J. Ch. 471; [1898] 2 Ch. 111.

M. died indebted on a bond, in which the heirs were bound, having devised his estates in strict settlement; payment of interest by the devisee in possession, who took a life estate, was held to prevent the devisee in tail, in remainder, from setting up the statute when he came into possession. *Roddam v. Morley*, 1 De G. & J. 7; 26 L. J. Ch. 438; *In re Lacey*, 76 L. J. Ch. 316; [1907] 1 Ch. D. 330. So payment of interest by the tenant for life of an equity of redemption, under a settlement made by the owner of the equity of redemption, keeps alive the covenant of such owner. *Dibb v. Walker*, 62 L. J. Ch. 536; [1893] 2 Ch. 429.

The following are some of the most material statutes relating to actions on leases or other conveyances of real property, and the issues arising therein.

Where defendant is sued as assignee of the reversion.] 32 H. 8, c. 34, s. 2, first gave a right of action by the lessee against the assignee of the lessor on the covenants in the lease, the burden of which ran with the reversion. This statute applied only to leases by deed. By the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 11 (1), "The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled."

This section "in no way alters the old law as to the class of covenants the burden of which will run with the reversion." *Davis v. Town Properties Investment Cor.*, 72 L. J. Ch. 389, 393; [1903] 1 Ch. 797, 805.

Where plaintiff sues as assignee of reversion.] 32 H. 8, c. 34, s. 1, first enabled the assignee of the reversion to sue the lessee on the covenants in the lease, the benefit of which ran with the land. This statute applies only to leases by deed. *Cole v. Kelly*, 89 L. J. K. B. 819; [1920] 2 K. B. 106. By the Conveyancing Act, 1881, s. 10 (1), "Rent reserved by a lease and the benefit of every covenant or provision therein contained having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased." The expression "lease" in this section means an instrument in writing. *Blane v. Francis*, 86 L. J. K. B. 364; [1917] 1 K. B. 252; and where a tenant under a lease containing covenants continues in occupation under an agreement for a quarterly tenancy con-

tained in letters, the covenants of the lease are carried on by implication into the quarterly tenancy and are "contained" in the written agreement within sect. 10. *Cole v. Kelly*, 89 L. J. K. B. 819; [1920] 2 K. B. 106.

Where the lessor at the time of granting a lease has no title, but afterwards acquires one, the lease and reversion take effect in interest, and an action will lie by the assignee of the reversion on the covenants in the lease. *Webb v. Austin*, 13 L. J. C. P. 203; 7 M. & Gr. 701, and 728, n.; *Sturgeon v. Wingfield*, 15 L. J. Ex. 212; 15 M. & W. 224. And in *Cuthbertson v. Irving* (4 H. & N. 742; 28 L. J. Ex. 306), it was decided that a mortgagor of premises, having leased them to the defendant by an instrument which did not, and afterwards assigned the reversion by an instrument which *did*, declare his title, the defendant was estopped from objecting to the equitable title of the assignee. In this last case the interest of the plaintiff was purely one by estoppel. The lessee is not estopped from showing that the lessor had not a fee simple in the land demised, provided he does not assert that he had no estate in the land which would give effect to the deed. *Weld v. Baxter*, 11 Ex. 816; 25 L. J. Ex. 214; 1 H. & N. 568; 26 L. J. Ex. 112. If the lessor's want of title appear on the lease, both parties are estopped from asserting a legal reversion, and the covenants are in gross and not assignable. *Pargeter v. Harris*, 15 L. J. Q. B. 113; 7 Q. B. 708; and see *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J. Ex. 115. Where a lessee makes an underlease for more than his term, and reserves rent, this rent is assignable by way of estoppel, and the assignee can sue the underlessee for the rent without attornment. *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J. Q. B. 374. The assignee of part of the reversion in all the land may sue; Co. Litt. 215a; 1 Wms. Saund. 241a (5) (c); so the assignee of the reversion of part of the land; *Twynnam v. Pickard*, 2 B. & A. 105; and so a reversioner who has assigned the reversion of a part only. *Swansea, Mayor, &c., of, v. Thomas*, 52 L. J. Q. B. 340; 10 Q. B. D. 48. The assignment may be under a private Act. *Sunderland Orphan Asylum v. Wear (River) Commissioners*, 81 L. J. Ch. 269; [1912] 1 Ch. 191.

When, during a subsisting lease, a second lease is made to commence immediately, for a longer term than the unexpired estate under the former, the second lease passes a reversion together with a right to the rent under the former lease, without attornment, that ceremony being rendered unnecessary by virtue of 4 & 5 Anne, c. 3, s. 9. *Horn v. Beard*, 81 L. J. K. B. 935; [1912] 3 K. B. 181.

Defence of assignment over of reversion by plaintiff.] The lessor cannot bring an action of covenant on the lease after he has parted with his reversion, for any breach of a covenant running with the land, which has accrued subsequently to the grant of the reversion, but the action can be brought only by the assignee of the reversion; for the stat. 32 H. 8, c. 34, has transferred the privity of the contract, together with the estate in the land, to the assignee of the reversion. 1 Wms. Saund. 241 f (6). That statute applied only to leases by deed, but 44 & 45 V. c. 41, s. 10 (1), extends to all leases in writing. *Blane v. Francis*, 86 L. J. K. B. 364; [1917] 1 K. B. 252; *Cole v. Kelly*, 89 L. J. K. B. 819; [1920] 2 K. B. 106. The defendant may therefore plead that the breach accrued after the assignment by the lessor of his reversion, but only in respect of covenants which run with the land. *Stokes v. Russell*, 3 T. R. 678; affirmed 1 H. Bl. 562; *Pargeter v. Harris*, *supra*, and see *Davis v. Town Properties Investment Cor.*, 72 L. J. Ch. 389; [1903] 1 Ch. 797.

Of a similar nature is the question, who is the proper person to sue on the death of the lessor, owner in fee, for breaches of covenant which have accrued in his lifetime? It is laid down that where there are covenants real, that is which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the substantial injury has taken place since his death, the heir, and not the

executor, is the proper plaintiff. But the executor may sue for a breach of covenant during the testator's lifetime grounded on the special damage thereby caused to the testator's personal estate; 2 Wms. Saund. 181 *c* (*h*); *Kingdon v. Nottle*, 1 M. & S. 355; *Id. v. Id.*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188; *Raymond v. Fitch*, 2 C. M. & R. 588, 598; 5 L. J. Ex. 45; or even although there be no such special damage. *Ricketts v. Weaver*, 13 L. J. Ex. 195; 12 M. & W. 718. But, where the covenant does not run with the land, the executor alone can sue. *Raymond v. Fitch*, *supra*.

The rights of a mortgagor to sue are now governed by the J. Act, 1873, s. 25 (5).

Defence of assignment over of term or of reversion by defendant.] In an action against the assignee of a term on a covenant in the lease, he may plead that he assigned over the term before breach, for the assignee is only liable for those breaches which have occurred while he is assignee; *Taylor v. Shum*, 1 B. & P. 21; *Paul v. Nurse*, 8 B. & C. 486; 7 L. J. (O. S.) K. B. 12; but for those breaches he may be sued even after he has parted with the term. *Harley v. King*, 4 L. J. Ex. 144; 2 C. M. & R. 18. The assignee is not liable for breaches committed before the assignment to him. *S. Saviour's v. Smith*, 3 Burr. 1271; and see *Coward v. Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153. If the defence be traversed, the defendant must prove the assignment, that is, that the whole term has been legally transferred by him to another. 8 & 9 V. c. 106, s. 3, requires that an assignment should be proved by an instrument under seal. But as an underlease by the defendant for the whole of his term amounts to an assignment (*Parmenter v. Webber*, 8 Taunt. 593; *Beardman v. Wilson*, 38 L. J. C. P. 91; L. R. 4 C. P. 57; *Lewis v. Baker*, 74 L. J. Ch. 39; [1905] 1 Ch. 46), and the above section allows leases not exceeding three years to be by parol, it follows that a good assignment of such a lease may be made by way of underlease, without deed or writing. Where the defendant proved that, although he had executed the assignment, it had not been delivered to his assignee, having remained in the hands of the defendant's solicitor, who had prepared it for, and by order of the assignee, and who had a lien upon it, it was held to be sufficient. *Odell v. Wake*, 3 Camp. 394. It would be otherwise if delivered as an escrow, or rejected by the assignee. The defendant need not prove notice to the plaintiff of the assignment; *Pitcher v. Tovey*, 1 Salk. 81; 4 Mod. 71; nor the assent of the assignee to the assignment, for assent is presumed. *Leach v. Thompson*, 1 Show. 296; *Freem*, 2nd. ed. 503 (*b*); see *Siggers v. Evans*, 24 L. J. Q. B. 305; 5 E. & B. 367; and *Hobson v. Thelluson*, 36 L. J. Q. B. 302; L. R. 2 Q. B. 642. But his express refusal may, of course, be shown, and perhaps his incapacity to accept. As to infancy, see *Valentini v. Canali*, 24 Q. B. D. 166. A reply that the assignment was fraudulent will not be supported by proof that the assignment was to a beggar in order to get rid of liability. *Lekeux v. Nash*, Str. 1221; *Taylor v. Shum*, *supra*; *Onslow v. Corrie*, 2 Madd. 330. But if there were real fraud, as a secret trust for the benefit of the assignor it would probably defeat the defence, if such fraud were replied. See *S. C. Hyam's Case*, 1 D. F. & J. 75; 29 L. J. Ch. 243; *Ex pte. Bunn*, 2 D. F. & J. 297; 31 L. J. Ch. 4; and *Ex pte. Bugg*, 2 Dr. & Sm. 452; 35 L. J. Ch. 43.

An assignee who takes the demised premises from the lessee by indenture indorsed on the lease "subject to the payment of the rent and the performance of the covenants and agreements reserved and contained in the lease," is not liable in covenant to the lessee for rent which the lessee has been called on by the lessor to pay after the assignee has assigned over. *Wolveridge v. Steward*, 3 L. J. Ex. 360; 1 Cr. & M. 644.

A lessor who has assigned his reversion, remains liable on his express covenants running therewith. *Stuart v. Joy*, 73 L. J. K. B. 97; [1904] 1 K. B. 362.

Defence traversing assignment to plaintiff.] Where the plaintiff sues as assignee of the reversion, and the defendant traverses the title as stated, the plaintiff must prove it by showing the mesne conveyances from the original lessor. See *Carvick v. Blgrave*, 1 B. & B. 531.

Where a lease made by *cestui que trust* under a power in a settlement, with covenants for rent, &c., with the lessor and "his assigns," recited the equitable estate of the lessor, it was held that "assigns" meant assigns of the settlor, and that the assignee of the legal reversion, though not assignee of the lessor, was entitled to take advantage of the covenants and condition of re-entry; *Greenaway v. Hart*, 14 C. B. 340; 23 L. J. C. P. 151; and that the lessee was not estopped from disputing the lessor's title to sue. S. C.

The assignee of the reversion cannot sue for breaches of covenant which accrued before the assignment to him. *Martyn v. Williams*, 1 H. & N. 817; 26 L. J. Ex. 117. And although 1 V. c. 26, s. 3, enacts that a right of entry for condition broken shall pass by will, yet this does not extend to an action on a covenant broken in the testator's lifetime.

Defence of surrender.] A surrender of a lease, such as could not be created without writing, must be by deed, 8 & 9 V. c. 106, s. 3, unless the surrender be by act and operation of law. The mere destruction of the sealed lease by consent of both parties was, at law, no surrender of the lease by operation of law; and debt lies for rent notwithstanding, for the estate is not divested. *Ward (Lord) v. Lumley*, 5 H. & N. 87; 29 L. J. Ex. 322. A surrender by the assignee of the lease of part of the premises does not affect the liability of the lessee for, at any rate, the apportioned part of rent for the remainder of the premises. *Baynton v. Morgan*, 58 L. J. Q. B. 139; 22 Q. B. D. 74.

As to what amounts to a surrender by act and operation of law, see *ante*, *Action for Use and Occupation, Defendant's Occupation*, and *Furnivall v. Grove*, 8 C. B. (N. S.) 456; 30 L. J. C. P. 3.

Defence of eviction.] An action of covenant for non-payment of rent can be defeated by proof of an eviction of the defendant from the premises in question, either by the lessor or one whose title is better than his.

Where there has been an eviction, by title paramount, from part of the land demised, the lessor may sue the assignee of the lease in covenant for the apportioned part of the rent. *Stevenson v. Lambard*, 2 East, 575. The action in such case is brought on the privity of estate. So in an action of covenant brought by the lessor against his lessee, where the action is founded on the privity of contract; see *Swansea (Mayor of) v. Thomas*, 52 L. J. Q. B. 340; 10 Q. B. D. 48, dissenting from dictum, *contra*, in *Stevenson v. Lambard*, *supra*. The apportionment is to be made on the values of the respective parcels at the date of the eviction. *Hartley v. Maddocks*, 68 L. J. Ch. 496; [1899] 2 Ch. 199. An eviction from part of the subject-matter of the lease was held to be no defence to an action for breaches of covenants to repair, and not to assign or underlet, it not appearing that the defendant had given up possession of the whole. *Hodgskin v. Queenborough*, Willes, 131, n. (b); *Newton v. Allin*, 10 L. J. Q. B. 179; 1 Q. B. 518. And it would seem that the tenant, in such a case, cannot discharge himself from his liability to such covenants, by surrendering the residue of the premises, from which he has not been ousted, to the landlord, if the latter refuse to accept possession of them. *Morrison v. Chadwick*, 18 L. J. C. P. 189; 7 C. B. 266. Where the tenant was required to leave the premises on a requisition by the Government authorities under the Defence of the Realm Regulations, this was held not to be an eviction by title paramount. *Whitehall Court v. Ettlinger*, 89 L. J. K. B. 126; [1920] 1 K. B. 680.

Defence of bankruptcy of the plaintiff.] In an action of covenant for rent the defendant pleaded that the plaintiff became bankrupt after the rent was

due. The plaintiff replied that he let the premises in question as trustee for a third person, and had no beneficial interest in the rent. It was held sufficient, under this replication, to show that the plaintiff had from time to time been in the habit of paying over the rent to the person who was stated to have the beneficial interest in the premises, and that there was no need of proving an express declaration of trust under the Statute of Frauds. *Houghton v. Kæinig*, 18 C. B. 235; 25 L. J. C. P. 218.

Where defendant is sued as assignee of the lease.] Where an issue is taken upon the assignment it will be necessary to prove either a transfer of the interest by deed, or facts from which an assignment may by law be inferred. Where the statement of claim states generally that the term has vested in the defendant by assignment, it will be sufficient *prima facie* evidence to show that the defendant has paid rent as assignee, or is in possession of the premises. 2 Phillips, Ev., 7th ed. 151; Peake, Ev., 5th ed. 284. Where A. had been tenant of certain premises, and upon his leaving them, B. had taken possession, it was held that he might be presumed to come in as assignee of A., though he had never paid rent. *Doe d. Morris v. Williams*, 6 B. & C. 41. The jury may, however, decline to act upon such evidence, and find that there was no assignment in writing. *Paull v. Simpson*, 15 L. J. Q. B. 382; 9 Q. B. 365. When the defendant has never entered or done anything to admit the assignment, his title may be proved by producing memorials of the mesne conveyances registered by parties under whom the defendant claims, after notice to the defendant to produce the originals. *Wollaston v. Hakewill*, 10 L. J. Q. B. 303; 3 M. & Gr. 297. In this case it was decided that an executor who had not entered was liable as assignee, unless he discharged himself by pleading that he was no otherwise assignee than as executor, and that he had never entered into possession. Proof that the defendant is *executor de son tort* appears sufficient to impose upon him the liability of assignee. *Paull v. Simpson*, *supra*. But one who has occupied premises under an *executor de son tort*, without any legal assignment of the lease, would seem to be free from such liability, except perhaps where the substitution in the tenancy could be proved to be fraudulent. S. C. The personal liability of an executor who has entered into possession of his testator's leaseholds is limited to the profits which he makes, or by the exercise of due care, skill, and diligence could make, out of them. *Minford v. Carse*, [1912] 2 I. R. 245. Where a person has entered into possession of, or received the rents and profits of, premises demised to an intestate, and paid the rent reserved thereon, he is estopped from denying that he is assignee of the term, even though he is not chargeable as *executor de son tort*. *Williams v. Heales*, L. R. 9 C. P. 177. That decision was considered in *Stratford-upon-Avon Corporation v. Parker*, 83 L. J. K. B. 1309; [1914] 2 K. B. 562. There it was decided that a person who had been in the habit of collecting the rents of the demised premises for his mother, who was the assignee of the lease, and continued to do so after her death intestate, paying the ground rent in her name to the plaintiffs, the lessors, and the balance to his sister, and after the latter's death retaining the surplus for such persons as might by law be entitled thereto, was not liable by privity of estate or by estoppel upon a repairing covenant in the lease. Where a term has been assigned by way of mortgage it is not necessary, in an action on a covenant charging the mortgagee as assignee, to prove that he has entered upon the mortgaged premises. *Williams v. Bosanquet*, 1 B. & B. 238. There the lease was under seal, and it was validly assigned by deed to the mortgagee. See *Purchase v. Lichfield Brewery Co.*, 84 L. J. K. B. 742; [1915] 1 K. B. 184, where on the assignment to mortgagees of an agreement for a term of years not under seal it was held that the mortgagees, who had not taken possession, were not liable to the lessors for rent. A trustee to whom a debtor's estate, including a lease, has been assigned for the benefit of creditors is liable as

assignee if he do not repudiate the lease. See *White v. Hunt*, 40 L. J. Ex. 23; L. R. 6 Ex. 32, where the tenancy was from year to year.

Action against assignee of lease—Defence.] In answer to this action the defendant may prove that he is not an assignee of the whole term, but only an under-tenant. *Holford v. Hatch*, 1 Dong. 183; *Derby (Earl) v. Taylor*, 1 East, 502, and see *Bryant v. Hancock*, 67 L. J. Q. B. 507; [1898] 1 Q. B. 716; affirm. on other grounds, 68 L. J. Q. B. 889; [1899] A. C. 442. If he be charged as assignee of all the estate in certain premises and he is in fact an assignee of an undivided part of the premises only, he cannot plead this in bar to the action; *Merceron v. Dowson*, 5 B. & C. 479; 4 L. J. (O. S.) K. B. 211; as it amounted to a plea in abatement only. *Grattan v. Wall*, 1 R. 2 C. L. 484. By Rules, 1883, O. xxi. r. 20, "no defence shall be pleaded in abatement." The defendant is not chargeable as assignee of the land for the entire rent, if the assignment be of part only. *Curtis v. Spitty*, 1 Bing. N. C. 756; 4 L. J. C. P. 236. The defendant may show that he is only devisee of the equity of redemption, the legal estate being in the mortgagee; *Carlisle (Mayor) v. Blamire*, 8 East, 487; or that he is equitable assignee only, having taken possession under an agreement to take an assignment; *Cox v. Bishop*, 8 D. M. & G. 815; 26 L. J. Ch. 389; or only appointee, and not liable as such on a covenant binding the assigns of the appointor. *Roach v. Wadham*, 6 East, 289; or that he only acquired a title against the lessee under stat. 3 & 4 W. 4, c. 27, s. 34, although he paid the lessor the rent reserved by the lease until he gave up possession at its expiration. *Tichborne v. Weir*, 67 L. T. 735.

A covenant by a lessee G., in an underlease by him to D., to perform the covenants in G.'s head lease, so far as relates to premises not demised to G., does not run with the land. *Dewar v. Goodman*, 78 L. J. K. B. 209; [1909] A. C. 72. See, further, as to what covenants run with the land, so as to bind the assignees, *Spencer's Case*, 1 Smith's L. Cas. and notes.

Action by lessee against assignee.] The usual covenant by the assignee of a lease with the lessee L. is one of indemnity only, and L. cannot by injunction enforce the negative covenants therein by means of the covenant to perform and observe those covenants, and to indemnify L. from all claim in respect of the same. *Harris v. Boots, &c.*, 73 L. J. Ch. 708; [1904] 2 Ch. 376.

Action for rent under indenture of demise.] An action lies by the lessor, or the grantee of his reversion against the lessee, on his express covenant to pay rent, notwithstanding he have assigned the lease, and the lessor or his grantee have accepted the assignee as his tenant. 1 Wms. Saund. 240; 2 *Id.* 302 (5). But the lessor cannot, after he has parted with his reversion, bring an action of covenant for rent which accrued due after the grant of the reversion; the action can only be brought by the grantee of the reversion; for the stat. 32 H. 8, c. 34, has transferred the privity of contract together with the estate in the land to him. 1 Wms. Saund. 241 f (6). But where the lessor has assigned his reversion, in a part only of the land, the lessee is liable to him on the covenant, for an apportioned rent, in respect of the residue of the land, although the lessee had assigned all his interest in the whole of the land. *Swansea (Mayor) v. Thomas*, 52 L. J. Q. B. 340; 10 Q. B. D. 48. And now see the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 10 (1). The apportionment is to be made according to the values of the respective parcels as at the date of the assignment. *Salts v. Battersby*, 79 L. J. K. B. 937; [1910] 2 K. B. 155. The lessor may bring an action of debt against the assignee of the lessee by reason of the privity of estate; but debt will not lie against the original lessee, after the acceptance of the assignee by the lessor as his tenant, for this extinguishes the privity of contract which was created between them by

the lease. 1 Wms. Saund. 241 b (5); 2 *Id.* 302 (5); *Wadham v. Marlowe*, 8 East, 314, n.; 1 H. Bl. 437.

In an action of debt for rent, the statement of claim states a demise at a certain rent, the entry or holding of the defendant, and the accruing of rent during a certain period. Sometimes the lease by indenture is set out, but it is not then the gist of the action; but it is, of course, a material part of the claim where the action is in covenant.

Under the J. Act, 1873, s. 25 (5), a mortgagor may sue for the rent of land mortgaged, which he is allowed by the mortgagee to enjoy.

By the Law of Distress Amendment Act, 1908 (8 Edw. 7, c. 53), s. 9, if the rent of the immediate tenant of the superior landlord is in arrear, the superior landlord may give notice to any under-tenant or lodger by registered post, stating the amount of such arrears, and requiring payment to himself until the arrears have been duly paid. The notice operates to transfer to the superior landlord the right to recover, receive, and give a discharge for such rent. Personal service on the under-tenant, &c., instead of notice by registered post, is sufficient. *Jarvis v. Hemmings*, 81 L. J. Ch. 290; [1912] 1 Ch. 462.

Action for rent—Evidence on denial of the demise, &c.] When in the pleadings the lease is stated to be under seal, and the contract is denied, it may be disproved under a defence denying the demise, or the execution of the deed.

Where the demise is denied, it may be proved by production and proof of a lease, executed by the plaintiff and accepted by the defendant, or by proof of the execution of it by the defendant, just as if the plaintiff had sued on the deed, and the defendant had denied execution. See 1 Wms. Saund. 276 (11); and *sub tit. Action for recovery of land by landlord, post*, and *Action of replevin—Tenancy of the plaintiff, post*. Where it was alleged that the plaintiff had demised to the defendant three rooms, and it appeared in evidence that the demise was of three rooms and *the use of the furniture*, it was held to be rightly stated according to the legal effect; for the rent could not issue out of the chattels. *Walsh v. Pemberton*, 1 Selw. N. P., 2nd ed. 640; *Farewell v. Dickenson*, 6 B. & C. 251; 5 L. J. (O. S.) K. B. 154. But if the demise be of a messuage and tithes, or of a messuage and of a licence to sport, reserving an entire rent, and is not under seal, an action cannot be maintained for the rent reserved if the defendant have entered only; for the incorporeal right cannot pass except by deed; *Gardiner v. Williamson*, 2 B. & Ad. 336; 9 L. J. (O. S.) K. B. 233; *Bird v. Higginson*, 6 Ad. & E. 824; but if the tenant have enjoyed the right for the term, he must then pay the rent agreed on. See *Thomas v. Fredricks*, 16 L. J. Q. B. 393; 10 Q. B. 775; *Adams v. Clutterbuck*, 52 L. J. Q. B. 607; 10 Q. B. D. 403. The action lies although the plaintiff has re-entered for the non-payment of the rent sued for. *Hartshorne v. Watson*, 7 L. J. C. P. 138; 4 Bing. N. C. 178.

Action for rent—Defence—Payment.] The defendant may show payment to the plaintiff, or to another by his appointment; *Taylor v. Beal*, Cro. Eliz. 222; Gilb. Ev., 6th ed. 153; or that the plaintiff has agreed that a debt due by him to the defendant shall go in satisfaction of the rent; Gilb. on Debt, 443; but not that the plaintiff was bound by covenant to repair the premises, and that he (the defendant) expended the rent in necessary repairs; for this is only a cause of cross-action; *Taylor v. Beal*, Cro. Eliz. 222; B. N. P. 177; and would therefore now be matter for counter-claim. But if the lessor direct the lessee to repair, and the lessee repair accordingly, the money so laid out may be evidence of payment. Gilb. on Debt, 442.

A compulsory payment of a charge upon the land may be recouped by the defendant out of his rent. *Dyer v. Bowley*, 2 Bing. 94, and cases cited *sub tit. Action of replevin—Denial of rent being in arrear, post*.

As to deductions from rent for property tax or for compensation charge on licensed premises paid, *vide* Action for use and occupation—Payment, *ante*.

Action for rent—Defence—Readiness to pay on the land.] It is a good defence in an action of debt for rent that the defendant was on the premises demised, ready to pay the rent at the time it became due, but the plaintiff was not there to receive it. *Crouch v. Fastolfe*, T. Raym. 418; see also *Tinckler v. Prentice*, 4 Taunt. 549. It was held had in an action against the lessee on an express covenant to pay the rent. *Haldane v. Johnson*, 8 Ex. 689; 22 L. J. Ex. 264. But the defence would seem to be good in an action against an assignee of the lease, on a covenant to pay the rent, for such action is founded solely on privity of estate, and would therefore fall within the principle of *Crouch v. Fastolfe*, *supra*; see *per Cur.* 8 Ex. 694, 695; 22 L. J. Ex. 265.

Action for rent—Defence—Statute of Limitations.] Where the demise is by indenture, the action for rent is now limited, by 3 & 4 W. 4, c. 42, s. 3, to 20 years, and not, by 3 & 4 W. 4, c. 27, s. 42, to six years only.

Action for rent—Defence—Fraud.] It seems that fraud will not avoid a contract whereby an estate in land has passed to the defendant. *Feret v. Hill*, 15 C. B. 207; 23 L. J. C. P. 185. It is a good equitable defence that plaintiff had, to his knowledge, no title to part of the land he purported to demise. *Mostyn v. W. Mostyn Coal and Iron Co.*, 45 L. J. C. P. 401; 1 C. P. D. 145.

Breach of covenant not to assign, &c.] Where the covenant is "not to assign, transfer, set over, or otherwise do or put away the indenture of demise, or the premises hereby demised, or any part thereof," an underlease is no evidence of a breach; an assignment of the whole term must be proved. *Crusoe d. Blencowe v. Bugby*, 2 W. Bl. 766; 3 Wils. 234; see *Grove v. Portal*, 71 L. J. Ch. 299; [1902] 1 Ch. 727; 1 Smith's L. C. 12th ed. 50 *et seq.* But where the proviso was "not to set, let, or assign over the demised premises, or any part thereof," an underlease was considered to be within the terms of the proviso; *Roe d. Gregson v. Harrison*, 2 T. R. 425; and where a lease contained a proviso for re-entry in case the lessee "should demise, lease, grant, or let the premises, or any part thereof, or convey, alien, assign, or set over the indenture, or his estate therein, or any part thereof, for all or any part of the term," it was held that proof that the lessee had entered into partnership with A., and agreed that he should have the use of a back-room and other parts of the premises exclusively, was evidence of a forfeiture. *Roe d. Dingley v. Sales*, 1 M. & S. 297. Such a covenant is broken by a sub-demise by way of mortgage. *Serjeant v. Nash, Field & Co.*, 72 L. J. K. B. 630; [1903] 2 K. B. 304. But not by a mere licence to use parts only of the demised premises. *Edwardes v. Barrington*, 85 L. T. 650. A covenant by a farmer not to underlet or permit any other to use or occupy any part of the lands, buildings, &c., without the landlord's consent, is broken by a sale or letting of the grass keep on the farm without the consent of the landlord. *Richards v. Davies*, 89 L. J. Ch. 601; [1921] 1 Ch. 90. *Semble*, agistment would not be a breach. S. C. An assignment by an assignee of a lease to his co-assignee is a breach of a covenant not to assign. *Varley v. Coppard*, L. R. 7 C. P. 505. But see hereon *Bristol Corporation v. Westcott*, 12 Ch. D. 461, 465, *per* Jessel, M.R. Where a lease is granted to partners, B. & H., it is no breach of a covenant, not "to part with the possession" of the premises, for H. to give up possession thereof to B. S. C. Taking a lodger is not a breach of a covenant not to underlet the house; *Dod d. Pitt v. Laming*, 4 Camp. 77; unless there be a distinct agreement for exclusive occupation of particular rooms. *Greenslade v. Tapscott*, 3 L. J.

Ex. 328, 329; 1 C. M. & R. 55, 59. See further as to the nature of a lodger's occupation, *sub tit. Action for illegal distress, post*.

On a covenant "not to let, assign, transfer, or otherwise part with the premises demised, or the lease," depositing the lease as a security is no breach. *Doe d. Pitt v. Hogg*, 4 D. & Ry. 226; *Doe d. Pitt v. Laming*, Ry. & M. 36. See also *Gentle v. Faulkner*, 69 L. J. Q. B. 777; [1900] 2 Q. B. 267. A lease contained a stipulation that for every acre, and so in proportion for a less quantity, of the land which the lessee should "suffer to be occupied" by any other person without the consent of the landlord, an additional rent should be paid; and the tenant undertook to "use, occupy," dress, and manure the land according to the custom of the country. The tenant, without the consent of the landlord, suffered other persons to use small portions of the land for the purpose of raising a potato crop, and it was proved to be the custom of the country for farmers to pursue that course; it was held that the landlord was entitled to the additional rent, this being an occupation of the land by other persons. *Greenslade v. Tapscott*, 3 L. J. Ex. 328; 1 C. M. & R. 55. The lessee of a theatre, under a covenant not to grant, assign, or dispose of stalls or boxes "for a longer period than one year or season," let a box for a year, and then let it to another person in reversion for one year, commencing on a day certain in the following year or "such subsequent day during the year on which the theatre may be opened"; this was held to be no breach. *Croft v. Lumley*, 6 H. L. C. 672; 27 L. J. Q. B. 321.

A compulsory assignment by law is not a breach of a covenant not to assign. Thus the sale of a lease under a *bonâ fide* execution against the lessee is not a forfeiture of a condition not to assign. *Doe d. Mitchenson v. Carter*, 8 T. R. 57. But if the tenant give a warrant of attorney to his creditor, for the express purpose of enabling him to take the lease in execution, it will be a fraud, and a breach of the condition. *S. C. Id.* 300. Bankruptcy of the lessee on his own petition is no breach of a covenant not to assign. *In re Riggs; Ex pte. Lovell*, 70 L. J. K. B. 541; [1901] 2 K. B. 16. But an assignment of the whole of the debtor's personal property, registered under the Bankruptcy Act, 1861, s. 192, was a breach of the covenant. *Holland v. Cole*, 1 H. & C. 67; 31 L. J. Ex. 481; and see *Doe d. Cheere v. Smith*, 5 Taunt. 795. An assignment without consent by the liquidator in the voluntary liquidation of a company is a breach of the covenant. *Cohen v. Popular Restaurants*, 86 L. J. K. B. 617; [1917] 1 K. B. 480. An assignment, operating as an act of bankruptcy, and therefore void, will not be a breach of the covenant. *Doe d. Lloyd v. Powell*, 5 B. & C. 308. Where the covenant binds the lessee "and his assigns" not to assign over without licence, the compulsory assignment by bankruptcy will not discharge the covenant in the hands of subsequent voluntary assignees. See *Winter v. Dumergue*, 14 W. R. 281, 699. So, although the devolution on an executor is not a breach of the covenant, yet if executors are named therein the executor cannot assign without licence. *Roe d. Gregson v. Harrison*, 2 T. R. 425. Whether a devise by will is a breach of a covenant not to assign seems to be an unsettled question. *Shep. Touch.* 144; *Fox v. Swann*, *Styles*, 482; *Crusoe d. Blencowe v. Bugby*, 3 Wils. 237; *Doe d. Goodbehere v. Bevan*, 3 M. & S. 361; *Doe d. Evans v. Evans*, 9 Ad. & E. 719.

A covenant not to assign without consent runs with the land, and binds the assigns, although not mentioned. *Goldstein v. Sanders*, 84 L. J. Ch. 386; [1915] 1 Ch. 549; *In re Stephenson*, 84 L. J. Ch. 563; [1915] 1 Ch. 802. It is otherwise if the parties indicate an intention that the covenant should not so run. *In re Stephenson, supra*.

A covenant not to assign without the consent of the lessor, "such consent not being arbitrarily withheld," does not amount to a covenant by the lessor, but qualifies the lessee's covenant, so that if the lessor arbitrarily withhold his consent the lessee may assign without any breach of covenant. *Sear v. House Property and Investment Soc.*, 50 L. J. Ch. 57; 16 Ch. D. 387; *Treloar v. Bigge*, 43 L. J. Ex. 95; L. R. 9 Ex. 151; *Andrew v. Bridgman*,

77 L. J. K. B. 272; [1908] 1 K. B. 596; *Lewis & Allenby v. Pegge*, 83 L. J. Ch. 387; [1914] 1 Ch. 782; *Mills v. Cannon Brewery*, 89 L. J. Ch. 354; [1920] 2 Ch. 38; *Ideal Film Renting Co. v. Nielsen*, [1921] 1 Ch. 575; *In re Winfrey & Chatterton*, [1921] 2 Ch. 7. It seems that a refusal "upon advice," though without stating the grounds, is not "arbitrary," and that to be such it must be "unfair and unreasonable." *Treloar v. Bigge*, *supra*. Refusal to consent to an assignment to L. for the purpose of his carrying on a highly dangerous business on the premises is not unreasonable or capricious. *Lepla v. Rogers*, [1893] 1 Q. B. 31, 35. But a refusal by the landlord in order that he may obtain possession of the premises is unreasonable. *Bates v. Donaldson*, 65 L. J. Q. B. 578; [1896] 2 Q. B. 241; see also *In re Winfrey & Chatterton*, *supra*. In the case of such a covenant the lessor must be requested for his consent prior to the assignment, or the assignment, even to a proper tenant, will be a breach. *Barrow v. Isaacs*, 60 L. J. Q. B. 179; [1891] 1 Q. B. 417; *Eastern Telegraph Co. v. Dent*, 68 L. J. Q. B. 564; [1899] 1 Q. B. 835, doubting *Hyde v. Warden*, 47 L. J. Ex. 121; 3 Ex. D. 72, where it was held that, where consent was not to be withheld from assignment "to any responsible and respectable person," an assignment to such a person was no breach. A corporation may be a "respectable and responsible person" within this covenant. *Wilmott v. London Road Car Co.*, 80 L. J. Ch. 1; [1910] 2 Ch. 525. Where the lease provides that the licence shall not be unreasonably withheld, and a licence to assign to H. is granted with an unreasonable condition, the lessee Y. may, by an action against the lessor, obtain under Rules 1883, O. xxv., r. 5, a declaration that the lessor A. is not entitled to impose the condition, and that Y. may assign to H. without any further consent from A. *Young v. Ashley Gardens Properties*, 72 L. J. Ch. 520; [1903] 2 Ch. 112. See further *In re Spark's Lease*, 74 L. J. Ch. 318; [1905] 1 Ch. 456; *Evans v. Levy*, 79 L. J. Ch. 383; [1910] 1 Ch. 452. Where a lease contains a condition against sub-letting, &c., without the lessor's consent, and a sub-lease is granted with such consent to B., B. is under no restriction as to parting with his possession of the land so demised to him. *Williamson v. Williamson*, 47 L. J. Ch. 738; L. R. 9 Ch. 729. See also *Mackusick v. Carmichael*, 87 L. J. K. B. 65; [1917] 2 K. B. 581.

By the Conveyancing Act, 1892 (55 & 56 V. c. 13), s. 3, a covenant, condition, or agreement against assignment, &c., without licence is, unless otherwise expressed in the lease, deemed to be subject to a proviso that no fine shall be payable for such licence, but the proviso shall not preclude the right to require payment of a reasonable sum in respect of legal or other expense incurred in relation to such licence. The demand of an increased rent as a condition for consenting to an assignment is a demand of a fine or sum of money in the nature of a fine, and is therefore contrary to sect. 3. *Jenkins v. Price*, 76 L. J. Ch. 507; [1907] 2 Ch. 229 (reversed on other grounds, 77 L. J. Ch. 41; [1908] 1 Ch. 10). Sect. 3 does not render the payment of a sum of money to obtain the lessor's consent illegal. *Waite v. Jennings*, 75 L. J. K. B. 542; [1906] 2 K. B. 11. It reads into the lease its provisions as a qualification of the covenant against assignment without consent. *Andrew v. Bridgman*, 77 L. J. K. B. 272; [1908] 1 K. B. 596. If, therefore, the lessee has paid money to the lessor without protest for the purpose of obtaining consent to assign, he cannot recover it back. S. C. The section applies to all leases, whether made before or after the commencement of the Act. *West v. Gwynne*, 80 L. J. Ch. 578; [1911] 2 Ch. 1.

Whether it is sufficient *prima facie* evidence of a breach of a covenant not to assign or underlet to show that a stranger is in possession of the premises, apparently as a tenant, see the conflicting decisions in *Doe d. Hindly v. Rickarby*, 5 Esp. 4, and *Doe v. Payne*, 1 Stark 86. See also *Doe d. Morris v. Williams*, 6 B. & C. 41.

The measure of damages in an action for a breach of a covenant not to assign, &c., is such a sum of money as will put the plaintiff in the same

position as if the covenant had not been broken, and the plaintiff had retained the liability of the defendant instead of an inferior liability. *Williams v. Earle*, 37 L. J. Q. B. 231; L. R. 3 Q. B. 739. Where the assignment was made by the defendant R. to L. for the purpose of his carrying on a highly dangerous business on the premises, which was carried on therein, and in consequence thereof the premises were burned down, R. was held liable for the damage occasioned by the fire. *Lepla v. Rogers*, *supra*.

As a right of re-entry is commonly annexed to this covenant, its effect is more likely to come into question in an action for the recovery of land than in an action of covenant.

Breach of covenant as to trade on premises.] A covenant not to use a building "as a public-house for the sale of beer, wine, malt liquors, or spirits"; *Pease v. Coats*, 36 L. J. Ch. 57; L. R. 2 Eq. 688; or "as a beerhouse, inn, or public-house for the sale of spirituous liquors"; *L. & N. W. Ry. Co. v. Garnett*, 39 L. J. Ch. 25; L. R. 9 Eq. 26; *Holt v. Collyer*, 50 L. J. Ch. 311; 16 Ch. D. 718; is not broken by the sale of beer by retail under a licence "not to be drunk on the premises," for "beerhouse" means a house for the sale of beer to be consumed on the premises. S. CC. Nor is a covenant entered into in 1854, that "the trade or calling of an hotel or tavern keeper, publican, or beershop keeper, or seller by retail of wine, beer, spirits, or spirituous liquors," should not be carried on on the premises, broken by the sale of wine in bottle by a grocer in the ordinary course of his trade; for the covenant is directed against the trade of a gin palace, and not that of a wine merchant. *Jones v. Bone*, 39 L. J. Ch. 405; L. R. 9 Eq. 674. See also *Stuart v. Diplock*, *infra*. But where the covenant was not to use the building "as an inn, public-house, or taproom, or for the sale of spirituous liquors or ale or beer," it was held that, although the covenant did not prevent the sale of wine, it extended to the sale by a grocer of spirituous liquors in bottle. *Feilden v. Slater*, 38 L. J. Ch. 379; L. R. 7 Eq. 523. So a covenant not to use the premises "as a beershop or public-house" is broken by the sale, by a grocer, of beer not to be consumed on the premises, for "beershop" means any place where beer is sold. *S. Albans (Bishop) v. Battersby*, 47 L. J. Q. B. 571; 3 Q. B. D. 359; *L. & Suburban Land & Building Co. v. Field*, 50 L. J. Ch. 549; 16 Ch. D. 645. So a covenant not to erect a public-house, beerhouse, or house for the sale of beer, wine, or spirituous liquors, nor to carry on the trade of an innkeeper, victualler, or retailer of wine, spirits, or beer is broken by the sale of such liquors at refreshment bars at a theatre. *Buckle v. Fredericks*, 44 Ch. D. 244. See also *Fitz v. Iles*, 62 L. J. Ch. 258; [1893] 1 Ch. 77. As to the construction of the restrictive covenant in a tied public-house, see *Clegg v. Hands*, 59 L. J. Ch. 477; 44 Ch. D. 503; *Manchester Brewery Co. v. Coombs*, 70 L. J. Ch. 814; [1901] 2 Ch. 608.

In a lease, a covenant against carrying on the trade of a victualler or publican, or against the house being used as a public-house or an ale-house, applies to any person licensed to sell beer or cider under 11 G. 4 & 1 W. 4, c. 64; see sect. 31; and a covenant against the trade of a vintner, or using the house as a public-house, applies to any person licensed to sell wine on the premises under 23 & 24 V. c. 27. See sect. 44. A covenant that the plaintiff "should have the exclusive right of supplying all ale, &c., which might be consumed in any house, &c., which might be erected on the land (conveyed) and which should be opened or used as an inn, &c.," is equivalent to a negative covenant that no other person than the plaintiff shall supply ale, &c. *Catt v. Tourle*, 38 L. J. Ch. 665; L. R. 4 Ch. 654. Such a covenant is conditional on the plaintiff being willing to supply the defendant with good marketable ale, &c., at reasonable prices. *Luker v. Dennis*, 47 L. J. Ch. 174; 7 Ch. D. 227; *Courage v. Carpenter*, 79 L. J. Ch. 184; [1910] 1 Ch. 262; see also *Edwick v. Hawkes*, 50 L. J. Ch. 577; 18 Ch. D. 199. Where a covenant restrains the lessee, G., from carrying on the

business of a "restaurant similar to that carried on by R.," G. must not carry on a restaurant which would be likely seriously to compete with R.'s business. *Drew v. Guy*, 63 L. J. Ch. 547; [1894] 3 Ch. 25. A covenant not to carry on the business of a ladies' outfitter is not broken by carrying on a part of that business, which is also part of another distinct business, e.g., that of hosiers, even although it is a substantial part of the business of ladies' outfitter, and only a subordinate part of the other business. *Stuart v. Diplock*, 59 L. J. Ch. 142; 43 Ch. D. 343. Cf. *Wartski v. Meaker*, 110 L. T. 473. A covenant not to let the premises as a "motor garage and office" is not infringed by letting them for the temporary storage of motor cars. *Derby Motor Cab Co. v. Crompton & Evans' Union Bank*, 31 T. L. R. 185.

A covenant not to use or exercise "any public trade or business" in a house, and that it should "be used and occupied as a private dwelling-house only" is broken by opening a school thereon; *Wickenden v. Webster*, 6 E. & B. 387; 25 L. J. Q. B. 264; *German v. Chapman*, 47 L. J. Ch. 250; 7 Ch. D. 271; or by taking, as boarders, scholars of a school kept elsewhere by the defendant. *Hobson v. Tulloch*, 67 L. J. Ch. 205; [1898] 1 Ch. 424. So a covenant not to carry on, or permit to be carried on, any trade or business of any description whatsoever, is broken by opening thereon a charitable institution, under a superintendent, in which working girls are lodged and boarded, even although gratuitously; *Rolls v. Miller*, 53 L. J. Ch. 682; 27 Ch. D. 71; or a hospital where the patients make small payments. *Bramwell v. Lacy*, 48 L. J. Ch. 339; 10 Ch. D. 691.

A covenant not to do or suffer to be done anything on the premises which may be to the annoyance, nuisance, grievance, or damage of the lessor, his heirs or assigns, or the inhabitants of the neighbouring houses, is broken by anything which reasonably troubles the mind and pleasure of an ordinary sensible inhabitant, although it may not amount to physical detriment to comfort, or amount to a common law nuisance; *Tod-Heatley v. Benham*, 58 L. J. Ch. 83; 40 Ch. D. 80; as by the establishment on the premises of a hospital for the treatment of diseases which may be infectious. S. C. Cf. *Frost v. King Edward VII. Welsh National Memorial, &c.*, 87 L. J. Ch. 561; [1918] 2 Ch. 180. And it is sufficient that annoyance is in fact caused to the inhabitants of the neighbouring houses. *Tod-Heatley's case, supra*. See observations in that case on *Harrison v. Good*, 40 L. J. Ch. 294; L. R. 11 Eq. 338, and see also *Wauton v. Coppard*, 68 L. J. Ch. 8; [1899] 1 Ch. 92. As to a bill-poster's hoarding, see *Nussey v. Provincial Bill-posting Co.*, 78 L. J. Ch. 539; [1909] 1 Ch. 734.

Where a breach of covenant as to trade, &c., in a lease has continued for upwards of 20 years, and, with full knowledge of it by the lessor, rent has been received by him, a licence is to be presumed. *Gibson v. Doeg*, 27 L. J. Ex. 37; 2 H. & N. 615; *Hepworth v. Pickles*, 69 L. J. Ch. 55; [1900] 1 Ch. 108. As to waiver by acquiescence in breaches of similar covenants by tenants of other plots on the same estate, see *Peek v. Matthews*, L. R. 3 Eq. 515; *German v. Chapman*, 47 L. J. Ch. 250; 7 Ch. D. 271.

As to the breach of a covenant in a lease of licensed premises, properly to carry on the trade thereon, and not to forfeit the licence, see *Bryant v. Hancock*, 68 L. J. Q. B. 889; [1899] A. C. 442; *Wilson v. Twamley*, 73 L. J. K. B. 703; [1904] 2 K. B. 99; and *Palethorpe v. Home Brewery Co.*, 75 L. J. K. B. 555; [1906] 2 K. B. 5.

Breach of covenants for good husbandry, &c.] If the breach allege that the defendant did not use the farm in a husbandlike manner, "but, on the contrary, committed waste," the plaintiff is bound to prove waste. *Harris v. Mantle*, 3 T. R. 307. See also *Edge v. Pemberton*, 13 L. J. Ex. 48; 12 M. & W. 187. As to the conversion of a farm into a market garden by erecting forcing houses thereon, see *Meux v. Cobley*, 61 L. J. Ch. 449; [1892] 2 Ch. 253. Where the breach is for bad husbandry, and the particulars delivered rely on non-cultivation, the plaintiff cannot show mere

bad cultivation. *Doe d. Winnall v. Broad*, 10 L. J. C. P. 80; 2 M. & Gr. 523. But in such cases as these the judge would probably now amend. A judge, however, will not amend as of course, if the amendment will only entitle to nominal damages for a breach, which defendant probably would not have contested. *Times Insurance Co. v. Hawke*, 28 L. J. Ex. 317. A covenant to spend on the farm all manure collected on it extends to manure made by the cattle of strangers not fed on the farm, but turned on by a temporary licence. *Hindle v. Pollitt*, 9 L. J. Ex. 288; 6 M. & W. 529. A covenant by the tenant that he would not "during the last year of the said term thereby granted sell or remove from the said farm and lands any of the hay, straw, and fodder which should arise and grow on the said farm," extends to all hay, &c., which had grown on the land at any time during the term. *Gale v. Bates*, 3 H. & C. 84; 33 L. J. Ex. 235.

Husbandry covenants may be controlled or explained by proof of custom not expressly or impliedly excluded by the covenant. Such customs apply to leases under seal as well as by parol. *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's L. C. In a covenant to pay a penal rent for using land otherwise than for pasture or meadow, it is for the jury to say whether the use of it as a race-course was in fact incompatible with the covenant. *Semb. Aldridge v. Howard*, 4 M. & Gr. 921. A covenant that the tenant will, when required, perform each year for the landlord a certain amount of team-work, gives the landlord a right to team-work generally, and not merely for agricultural purposes. *Marlborough (Duke) v. Osborne*, 5 B. & S. 67; 33 L. J. Q. B. 148.

A covenant not to sell or carry away from the demised premises any hay, straw, &c., grown or produced there, without the consent in writing of the plaintiff first had and obtained, under the increased rent of £10 for every ton so given, sold, or carried away, was held to give the tenant a right to remove hay, straw, &c., upon paying the increased rent. *Legh v. Lillie*, 6 H. & N. 165; 30 L. J. Ex. 25. Such a covenant runs with the reversion. *Chapman v. Smith*, 76 L. J. Ch. 394; [1907] 2 Ch. 97. Where there was a lease reserving yearly rent, payable on half-yearly days, and a further rent, payable on the same days, for every acre converted into tillage without licence, or planted with rape, woad, or potatoes, or from which successive crops should be taken, without summer fallows, &c., it was held that, after one breach of covenant, the increased rent attached and continued to the end of the term. *Bowers v. Nixon*, 18 L. J. Q. B. 35; 12 Q. B. 558, n., affirm. in error. A covenant not to take more than two crops during four years means any four years, and not each succeeding four years, reckoning from taking the lease. *Fleming v. Snook*, 5 Beav. 250.

Where the grantee, H., of the right of sporting over certain lands in the occupation of R. covenanted with the grantor, W., to keep down the rabbits "so that no appreciable damage may be done to the crops thereon," it was held that W., being under no liability to compensate R. for injury done to the crops, by breach of the covenant, could only recover nominal damages therefor from H. *West v. Houghton*, 4 C. P. D. 197. The demise of a right of shooting does not, even if it incorporates an express covenant for quiet enjoyment, and a covenant by the lessor to use his best endeavours to preserve the game for the benefit of the lessee, prevent the lessor from turning his property to the best advantage for which it is suited. *Dick v. Norton*, 85 L. J. Ch. 623.

The Agricultural Holdings Act, 1908 (8 E. 7, c. 28), s. 10, relates to compensation to tenants for damage done by game. *Id.* s. 26, regulates cropping and disposal of produce by tenants; and see *Meggesson v. Groves*, 86 L. J. Ch. 145; [1917] 1 Ch. 158.

As to the implied obligations to use and cultivate lands in husbandlike manner, see *Wedd v. Porter*, 85 L. J. K. B. 1298; [1916] 2 K. B. 91.

Breach of covenant to insure.] The covenant to insure has always been construed strictly in courts of common law. As to the onus of proof in

actions for not insuring, see cases cited *Onus Probandi*, ante. The covenant, however, usually provides some mode of proof, as that the lessee shall produce his policy when required. In *Doe d. Darlington v. Ulph*, 18 L. J. Q. B. 106; 13 Q. B. 204, where there was a covenant "to insure at all times previously to the expiration of the term thereby granted," and the lessee did not effect an insurance till a month after the creation of the term, it was held that, in the absence of evidence to explain this delay, the plaintiff was entitled to a verdict, and that the jury ought not to be asked whether the insurance was effected within a reasonable time. *Semble*, if the lessee had insured the premises shortly after the execution of the lease, he would have complied with his covenant. S. C. per Patteson, J. In *Price v. Worwood*, 4 H. & N. 512; 28 L. J. Ex. 329, the omission to insure had been repeatedly confessed by the tenant, who excused himself by saying that he could not afford the insurance. As he appeared to be no richer at the time of issuing the writ, it was held that there was some evidence to go to the jury of the breach. The obligation under the covenant (apart from special provisions) is to take out the usual policy current at the date of the lease. *Upjohn v. Hitchens*, 87 L. J. K. B. 1206; [1918] 2 K. B. 48.

If the covenant is to insure in the name of A., it is a breach to insure in the joint names of A. and the lessee. *Penniall v. Harborne*, 11 Q. B. 368. But see *Havens v. Middleton*, 10 Hare, 641; 22 L. J. Ch. 746.

A covenant to keep buildings insured against fire runs with the land, for 14 G. 3, c. 78, s. 83, enables the landlord to have the insurance money laid out in reinstating the premises, so that the covenant, with the aid of the statute, amounts to a covenant to repair. *Vernon v. Smith*, 5 B. & A. 1. The operation of this section is general, as opposed to local application. *Ex pte. Gorely*, 4 D. J. & S. 477; 34 L. J. Bky. 1; *Sinnott v. Bowden*, 81 L. J. Ch. 832; [1912] 2 Ch. 414. The section applies as between mortgagor and mortgagee. S. C.

Breach of covenant to repair, &c.] As to buildings then erected, a covenant to repair, or put in repair, or deliver up in repair, runs with the land, and binds assignees, though not named in it. *Martyn v. Clue*, 18 Q. B. 661; 22 L. J. Q. B. 147. But a covenant to do an act not in respect of the demised premises, but which will protect from forfeiture the lessee's estate, does not run with the land. *Dewar v. Goodman*, 78 L. J. K. B. 209; [1909] A. C. 72. The assignee of a lease is not liable, on a general covenant, to repair buildings erected during the term, unless assigns are named in it. *Spencer's Case*, 5 Rep. 61; *Bally v. Wells*, 3 Wils. 25; *Doughty v. Bowman*, 17 L. J. Q. B. 111; 11 Q. B. 444. In *Cornish v. Cleife*, 3 H. & C. 446; 34 L. J. Ex. 19, a covenant, in a demise of three houses and a field, "well and sufficiently to repair, sustain and keep the said tenements or dwelling-houses, field or plot of ground and premises, and every part thereof, as well in houses, buildings," &c., during the term, was held not to extend to houses erected during the term in the field. This agrees with the ruling in *Doe d. Worcester School, &c., Trustees v. Rowlands*, 9 C. & P. 734; but is inconsistent with the decision in *Brown v. Blunden*, Skin. 121; and the opinions of the judges expressed in *Darcy v. Ashwith*, Hob. 234; and *Dowse v. Earle*, 3 Lev. 265; S. C., *sub nom. Dowse v. Call*, 2 Vent. 128, cited in Bac. Abr. Covenant (F).

A covenant to keep a house in repair is satisfied by keeping it in substantial repair according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at the time of the demise. *Stanley v. Towgood*, 6 L. J. C. P. 129; 3 Bing. N. C. 4; *Young v. Mantz* or *Mantz v. Goring*, 4 Bing. N. C. 451; 7 L. J. C. P. 204. So in the case of an old house such a covenant does not mean that the house should be delivered up in a renewed form or of greater value than it was at the beginning of the term, or that the consequences of the elements should be averted; but the tenant

has the duty of keeping the house in the state in which it was at the time of the demise, by the timely expenditure of money and care; *Gutteridge v. Munday*, 1 M. & Rob. 334; 7 C. & P. 129; accord. *Lister v. Lane*, 62 L. J. Q. B. 583; [1893] 2 Q. B. 212. On an issue as to the amount of damages for not keeping in repair, the bad state of the premises when demised was held legitimate evidence for the defendant. *Burdett v. Withers*, 7 Ad. & E. 136; 6 L. J. K. B. 219. See also *Walker v. Hatton*, 11 L. J. Ex. 361; 10 M. & W. 249; *Martyn v. Clue*, *supra*. But in *Payne v. Haine*, 16 L. J. Ex. 130; 16 M. & W. 541, a tenant under such covenant was held bound to put in repair, though the nature of the repairs ought to be measured by the age and class of the demised premises. But if the tenant takes the house on the undertaking of the lessor to put the drains in order, the tenant's obligation under the covenant is to keep the drains in repair after they have been put in order by the lessor. *Henman v. Berliner*, 87 L. J. K. B. 984; [1918] 2 K. B. 236. In *Easton v. Pratt*, 2 H. & C. 683; 33 L. J. Ex. 233, it was held that a lease, whereby the lessee covenanted that he would "well and sufficiently repair, uphold, support, paint, maintain, amend and keep" the demised premises, and the said premises "so well and sufficiently repaired," &c., at the expiration of the term surrender, was a "repairing lease," on the ground that "whatever was the state of the premises at the time of the demise the tenant would be bound under this covenant to put the premises into, and keep the premises in, a state of good and sufficient repair. *Payne v. Haine* (*supra*) is an authority on this point;" 33 L. J. Ex. 235; the report in 2 H. & C. 687 is to the same effect. *Accord. Saner v. Bilton*, 47 L. J. Ch. 267; 7 Ch. D. 815; *Truscott v. Diamond Rock Boring Co.*, 51 L. J. Ch. 259; 20 Ch. D. 251. See *London Corporation v. Great Western Ry.*, 79 L. J. Ch. 622; [1910] 2 Ch. 314. It is sufficient if the covenant be substantially complied with. *Harris v. Jones*, 1 M. & Rob. 173. Under a covenant to "substantially repair, uphold and maintain" a house, the tenant has been held bound to keep up the painting of the inner doors, inside shutters, &c. *Monk v. Noyes*, 1 C. & P. 265. But the tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan, or the like. *Soward v. Leggatt*, 7 C. & P. 613. Where a house was built on a timber platform resting on boggy soil, and the timber rotted, causing the wall of the house to bulge, so that it became dangerous and had to be pulled down, the defendant was held not liable to make good the defect by under-pinning, which was the only way possible, as it arose from the effect of time and nature on such a house. *Lister v. Lane*, 62 L. J. Q. B. 583; [1893] 2 Q. B. 212; *Wright v. Lawson*, [1903] W. N. 108; 19 T. L. R. 510; and *Torrens v. Walker*, 75 L. J. Ch. 645; [1906] 2 Ch. 166. A lessee under a covenant to put in repair, or to keep in repair, is not bound in either case to substitute new buildings for old. *Belcher v. M'Intosh*, 2 M. & Rob. 186; 8 C. & P. 720. The result of the above cases is that an agreement to keep a house "in good tenantable repair, and so to leave the same at the expiration thereof," obliges the tenant to put and keep the premises in such "repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a reasonably-minded tenant of the class who would be likely to take it." *Proudfoot v. Hart*, 59 L. J. Q. B. 389; 25 Q. B. D. 42. This repair may involve re-papering and re-painting, but, *semble*, not re-gilding. S. C. "Good repair" is much the same thing as "tenantable repair." *Id. per* Ld. Esher, M.R. See further *Crawford v. Newton*, 36 W. R. 54. It may require partial rebuilding of the premises. *Lurcott v. Wakely*, 80 L. J. K. B. 713; [1911] 1 K. B. 905. Where the covenant is to keep and leave the house in as good a plight as it was in at the time of the making of the lease, it is said that ordinary and natural decay is no breach of the covenant, and that the covenantor is only bound to do his best to keep it in the same plight, and therefore to keep it covered, &c.; Fitz. Ab. Cov. 4; Shep. Touch. 169; *Johnson v. S. Peter, Hereford*,

4 Ad. & E. 520; see also *Miller v. Burt*, 63 S. J. 117. A lessee who covenants to deliver up the premises in good repair "fair wear and tear and damage by tempest excepted" is not liable for permissive waste. *Davies v. Davies*, 38 Ch. D. 499; see also *Scales v. Lawrence*, 2 F. & F. 289; and *Terrell v. Murray*, 17 T. L. R. 570. But where the lessee covenants to repair the inside of a warehouse, "damage by fire, storm and tempest or other inevitable accident, and reasonable wear and tear only excepted," the total destruction of the property caused by its user by the lessee, is not within the exception. *Manchester Bonded Warehouse Co. v. Carr*, 49 L. J. C. P. 809; 5 C. P. D. 507. The lessee, under the covenants to repair, is not bound to reinstate the house, which was altered by him before the lease was executed, though since the date fixed by the habendum for the beginning of the term. *Shaw v. Kay*, 17 L. J. Ex. 17; 1 Ex. 412. The covenant may remain in force though part of the property has been acquired and demolished by a local authority under its statutory powers. *Piggott v. Middlesex County Council*, 77 L. J. Ch. 813; [1909] 1 Ch. 134. Under a covenant by the lessee to repair, uphold, support, sustain, and maintain the dwelling-house, the lessee was held bound to reinstate the premises where during the currency of the term the house was struck and damaged by a bomb discharged from an enemy aeroplane. *Redmond v. Dainton*, 89 L. J. K. B. 910; [1920] 2 K. B. 256. Where the lessee covenanted to keep the premises in repair and to deliver them up in a state of repair at the end of the term, and to insure against fire, and in case of fire to lay out the insurance money in rebuilding, and the premises were requisitioned by the War Office, it was held that he was liable to repair and rebuild where the premises were burnt during the occupation of the War Office, notwithstanding that the term had expired and the insurance money had not been received. *Curling v. Matthey*, 37 T. L. R. 717.

On a covenant to repair, it is not sufficient evidence of a breach to show that the house has been thrown down by a tempest, unless the covenantor has not repaired within a reasonable time after. *Shep. Touch*. 173. Where the defendant pleads that he was always ready to repair, but a reasonable time had not elapsed, and issue is taken thereon, proof that the defendant absolutely refused to repair entitles the plaintiff to a verdict. *Green v. Eales*, 11 L. J. Q. B. 63; 2 Q. B. 225. Where the damage was alleged to be occasioned by the defendant's neglect to repair and "from no other cause," it was held sufficient to show that the premises became insecure by the removal of an adjoining wall by a third party, and that the defendant did not set about the repair in time to prevent the mischief consequent on such removal. *S. C.* If the lessee were bound to repair and leave the house in the same plight as he found it, and it were burnt by sparks from the chimney of the lessor's house near, it was held that the lessee was excused from rebuilding, for this came by the act of the lessor himself. 1 Rob. Ab. 454, pl. 8.

Each assignee is liable to the lessor for his own default only. But where the plaintiff, a lessee under covenant to repair, assigned over to defendant, who assigned to B., who assigned to C., &c., and there was evidence that when C. held the premises they were out of repair and B. stated that he put the premises in no better state than when he received them from the defendant, the jury were held entitled, there being no evidence by the defendant himself, in presuming that the delapidations took place while the defendant held the lease, and the plaintiff was held entitled to substantial, and not nominal, damages, without showing the exact amount of non-repair attributable to the defendant himself. *Smith v. Peat*, 9 Ex. 161; 23 L. J. Ex. 84. A lessee, under covenant to deliver up certain fixtures at the end of his term, on April 1, remained in possession till the 10th, when possession was demanded by the lessor, and on the 13th he bought the title of a mortgagee of the lessor and refused to re-deliver: held that the lessor was entitled only to damage for the detention of the fixtures between the 10th and 13th, and not to the full value of them.

Watson v. Lane, 11 Ex. 769; 25 L. J. Ex. 101. The breach of a covenant to put premises in repair is not a continuing breach. *Coward v. Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153. See, however, *Martyn v. Clue*, 18 Q. B. 661; 22 L. J. Q. B. 147.

Where the covenant is to keep in repair during the continuance of the term, an action for the breach of the covenant may be maintained before the term has expired. *Luxmore v. Robson*, 1 B. & A. 584. In *Marriott v. Cotton*, 2 Car. & K. 533, Rolfe, B., directed the jury that nominal damages only could be recovered in such an action, for the lessor (as he said) might pocket the damages and leave the premises unrepaired, and so oblige the lessee to repair them for his own convenience; but the Ct. of Q. B. held the direction wrong, and a verdict was subsequently entered for substantial damages. See *Bell v. Hayden*, 9 Ir. C. L. R. 301, 303; *Smith v. Peat*, *supra*. The proper measure of damages is the diminution to the value of the reversion at the time of action. *Doe d. Worcester School, &c. Trustees v. Rowlands*, 9 C. & P. 734; *Bell v. Hayden*, *supra*; *Mills v. E. London Union*, 42 L. J. C. P. 46; L. R. 8 C. P. 79; *Henderson v. Thorn*, 62 L. J. Q. B. 586; [1893] 2 Q. B. 164, 166. Where the landlord himself repaired the premises before action, he was held entitled to recover only nominal damages. *Williams v. Williams*, 43 L. J. C. P. 382; L. R. 9 C. P. 659. See *Clare v. Dobson*, 80 L. J. K. B. 158; [1911] 1 K. B. 35. Where, however, the above-mentioned measure of damages is inapplicable, such diminution of value is not the only test; thus, the lessor may sue, though his reversion has been forfeited by the entry of the ground landlord for the breach, and the test is what will be the cost of repair. *Davies v. Underwood*, 2 H. & N. 570; 27 L. J. Ex. 113. This is indeed the general rule laid down by Ld. Holt in *Vivian v. Champion*, 2 Ld. Raym. 1125, and was approved by the court in *Davies v. Underwood*, *supra*, but was not followed in *Mills v. E. London Union*, *supra*; and no hard and fast rule can be laid down as to the damages recoverable during the currency of the term. "All the circumstances of the case must be taken into consideration and the damages must be assessed at such a sum as reasonably represents the damage which the covenantee has sustained by the breach of covenant," *per* Ld. Herchell in *Conquest v. Ebbets*, 65 L. J. Ch. 808, 809; [1896] A. C. 490, 494. Thus in a case of a breach of covenant to repair in a sub-lease granted with notice to the sub-lessee of a similar covenant in the superior lease, the damages are the cost of repair, with a rebate for present payment, this being the difference of the value of the reversion repaired and unrepaired. S. C.

Where the action is brought after the expiration of the lease, the damages recoverable are, in general, the cost of putting the premises into the state of repair contemplated by the covenant. *Morgan v. Hardy*, 17 Q. B. D. 770, not affected on this point by the judgment of the C. A.; 56 L. J. Q. B. 363; 18 Q. B. D. 646; or H. L., 58 L. J. Q. B. 44; 13 App. Cas. 351; *Joyner v. Weeks*, 60 L. J. Q. B. 510; [1891] 2 Q. B. 31. Such measure is not affected by reason of the lessor, J., having re-let the premises to a third person, L., from the end of the defendant's lease, on such terms that J. is, at the time of the action, in as good a position as if the defendant had kept his covenants; S. C.; nor by changes in the surrounding neighbourhood, owing to which less repairs might make the house equally valuable for letting. *Morgan v. Hardy*, *supra*. See also *Rawlings v. Morgan*, 18 C. B. (N. S.) 776; 34 L. J. C. P. 185; *Conquest v. Ebbets*, 65 L. J. Ch. 808; [1896] A. C. 490; and *Ellis v. Torrington*, 89 L. J. K. B. 369; [1920] 1 K. B. 399. Where an action was brought for non-repair of premises, demised by the plaintiff to the defendant, the defendant being bound to repair and insure, and the jury found that the premises, which had been burnt down, would cost £1,600 to rebuild, and that this would exceed by £600 the value of the old premises, if they had been repaired by the defendant before the fire, the court held that £1,000 was the measure of damage. *Yates v. Dunster*, 11 Ex. 15; 24 L. J. Ex. 226. See also *In re*

Russell, 29 Ch. D. 254; *In re Driscoll*, [1918] 1 I. R. 152. Damages for loss of rent during the time occupied by the plaintiff after the expiration of the term in doing the repairs are recoverable. *Woods v. Pope*, 6 C. & P. 782; 1 Bing. N. C. 467; *Proudfoot v. Hart*, 25 Q. B. D. 47, *per Cave, J.*; *Birch v. Clifford*, 8 T. L. R. 103. If a second action be brought on a covenant to keep premises in repair, the verdict recovered in the former action may be proved in mitigation of damages, but is not pleadable in bar. *Coward v. Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153. If the second action be at the end of the term and be brought for damages, some of which are included in the former action, the proper damages are the cost of repairs, less the amount previously recovered, and an allowance for depreciation from the repairs not having been duly executed. *Henderson v. Thorn*, 62 L. J. Q. B. 586; [1893] 2 Q. B. 164. See further on the measure of damages on repairing covenant, *Minshull v. Oakes*, 2 H. & N. 793; 27 L. J. Ex. 194; and *Mayne on Damages*, 8th ed. pp. 312, *et seq.*

Breaking a doorway through the wall of the demised house amounts to a breach of a covenant to keep in repair. *Doe d. Vickery v. Jackson*, 2 Stark. 293. So pulling down a brick wall dividing the courtyard in front from another yard at the side was held a breach of the covenant. *Doe d. Wetherall v. Bird*, 6 C. & P. 195. But a mere covenant to repair is not broken by alterations and improvements where they are evidently contemplated by the lease; as where a private dwelling-house is demised by lease containing a covenant to repair the premises and all such buildings, "improvements and additions," as should be made thereupon by the lessee. *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; 2 L. J. K. B. 11; see also *Doherty v. Allman*, 3 App. Cas. 709. A covenant to deliver all "windows" then or thereafter affixed or belonging to the premises, extends to a plate-glass shop window put up by the lessee, so as to be moveable without screws, nails, or glue, and fastened only by wedges. *Burt v. Haslett*, 25 L. J. C. P. 201, 295; 18 C. B. 893. On a covenant to repair, the breach alleged that defendant did not repair, "but on the contrary permitted the premises to be ruinous for want of repair." Held, that plaintiff must show permissive and not voluntary waste. *Edge v. Pemberton*, 13 L. J. Ex. 48; 12 M. & W. 187.

Where the lessee is obliged to repair in consequence of his lessor's refusal to do so, he cannot recover the expense of finding other premises for use during the repairs. *Green v. Eales*, 11 L. J. Q. B. 63; 2 Q. B. 225. A lessee, who underlets with covenants to repair in the same terms as in his own lease, is not necessarily entitled to recover from the under-lessee the cost of an action for non-repair brought against himself; for though the covenants of the lessee and under-lessee may be in words the same, they are, in substance, different if entered into at different times. *Walker v. Hatton*, 11 L. J. Ex. 361; 10 M. & W. 249. This case was decided on the ground that a covenant to repair is to be construed with reference to the state of the premises when it began to operate; and this ground is no doubt a sound one if by "state of the premises" is meant their age, and not their state of repair, for the lessee's liability under a repairing lease is not dependent on the state of repair in which the premises were at the time of the demise. *Easton v. Pratt*, 2 H. & C. 683; 33 L. J. Ex. 233. But the lessee may recover the amount of dilapidations recovered against himself and occasioned by the under-lessee's neglect. *Penley v. Watts*, 10 L. J. Ex. 229; 7 M. & W. 601; *Walker v. Hatton*, *supra*. And he may recover the costs of such action, if he have given notice of it to the under-lessee, and received his sanction for defending it: and his sanction may be inferred if he do not prohibit the defence. *Semb, Blythe v. Smith*, 5 M. & Gr. 405, 412-3; 12 L. J. C. P. 203; and see *Rolph v. Crouch*, 37 L. J. Ex. 8; L. R. 3 Ex. 44. And where the under-lessee, A., contracted with the lessee, B., to perform the covenants of the superior lease, A. is under a contract to indemnify B., and is, without such sanction, liable to B. for the costs of an action brought against B. by the superior landlord, and

reasonably defended. *Hornby v. Cardwell*, 51 L. J. Q. B. 89; 8 Q. B. D. 329. The lessee cannot recover from his under-lessee, as special damage, the value of a lease forfeited for non-repair, unless it appears that the forfeiture was solely owing to the under-lessee's non-repair. *Clow v. Brogden*, 2 M. & Gr. 39. Where A. demised to L. with special covenants to repair and insure, and L. underlet to H. with like covenants, and A. afterwards recovered possession for breach of L.'s covenant, it was held that L. could not, in an action of covenant against H., recover damages for the loss of his beneficial reversion in the term; for the term was forfeited for the breach, not of H.'s covenants, but of L.'s covenants, and there was no covenant by H. to indemnify. *Logan v. Hall*, 16 L. J. C. P. 252; 4 C. B. 598. So L. cannot in such case recover from H. the costs he incurred in obtaining relief from the forfeiture. *Clare v. Dobson*, 80 L. J. K. B. 158; [1911] 1 K. B. 35, following *Ebbetts v. Conquest*, 64 L. J. Ch. 702; [1895] 2 Ch. 377, *per* Lindley, L.J.

Where the defendant covenanted to keep the demised premises in repair, the same being first put into repair by the landlord, it was held that the repairing by the landlord was a condition precedent to the defendant's obligation on his covenant. *Neale v. Ratcliffe*, 15 Q. B. 916; 20 L. J. Q. B. 130; *Coward v. Gregory*, 36 L. J. C. P. 1; L. R. 2 C. P. 153. A lessor cannot be sued on a covenant to keep demised premises in repair, unless he has had notice of the want of repair. *Makin v. Watkinson*, 40 L. J. Ex. 33; L. R. 6 Ex. 25; *Manchester Bonded Warehouse Co. v. Carr*, 49 L. J. C. P. 809; 5 C. P. D. 507; *Torrens v. Walker*, 75 L. J. Ch. 645; [1906] 2 Ch. 166. It implies a licence to the landlord to go on the land, for a reasonable time, to effect the repairs requisite. *Saner v. Bilton*, 47 L. J. Ch. 267; 7 Ch. D. 815. Where the covenant is to repair, the defendant being allowed rough timber by the lessor, the general averment by the plaintiff (lessor) of readiness to supply, &c., will not oblige him to show that he has cut down and prepared timber, defendant not having required him to do so. *Semb. Martyn v. Clue*, 18 Q. B. 661; 22 L. J. Q. B. 147. A covenant by the lessee that he will "at his own cost (being allowed all necessary materials for this purpose . . . and carting such materials free of cost a distance not exceeding five miles from the farm) when and so often as need shall require well and substantially repair and maintain the farm-house, &c.," does not constitute a covenant by the lessor to supply the materials; it is only a qualification of or condition precedent to the lessee's liability to repair. *Westacott v. Hahn*, 86 L. J. K. B. 956; 87 L. J. K. B. 555; [1917] 1 K. B. 605; [1918] 1 K. B. 495. An agreement by the landlord to put a building in good tenable repair is satisfied if it is in such repair when the tenant takes possession, and he does so without objection, although in fact the repairs prove insufficient to strengthen the building sufficiently for the particular purpose to which the tenant applies it. *McClure v. Little*, 19 L. T. 287.

A covenant by lessor to keep premises in proper condition for storing cartridges has reference only to the physical condition of the premises. *Newby v. Sharpe*, 47 L. J. Ch. 617; 8 Ch. D. 39.

The lessee's liability for past non-repair is not affected by notice to quit given by him under a proviso in the lease that on such notice "the indenture and every clause, matter, and thing therein contained shall upon the expiration of the notice determine and be void." *Blore v. Giuliani*, 72 L. J. K. B. 114; [1903] 1 K. B. 356.

Where the covenant is to execute repairs in a particular year, if the lease is then subsisting, the lessee's obligation attaches as soon as the year begins, although the lease may be properly determined before the end of the year. *Kirklington v. Wood*, 86 L. J. K. B. 319; [1917] 1 K. B. 332.

As to the liability over of an assignee who has indemnified the defendant, and has been brought in as a third party, see *Gooch v. Clutterbuck*, 68 L. J. Q. B. 808; [1899] 2 Q. B. 148.

In the case of a building let in flats, the owner is bound, on notice that

the stairs, roof, &c., which he has not demised are out of repair, to take reasonable care to repair the same, or he will be liable for damage resulting to his tenant from such non-repair. *Hargroves, &c. v. Hartopp*, 74 L. J. K. B. 233; [1905] 1 K. B. 472; *Dunster v. Hollis*, 88 L. J. K. B. 331; [1918] 2 K. B. 795 (not following *Hart v. Rogers*, 85 L. J. K. B. 273; [1916] 1 K. B. 646, where Scrutton, J., held that in such a case there is an absolute obligation on the landlord). The rule that a landlord who has covenanted to repair is entitled to notice of defects does not apply where he retains possession and control of the premises to which his covenant relates. *Melles v. Holme*, 87 L. J. K. B. 942; [1918] 2 K. B. 100.

A covenant not to make alterations in premises let for the purpose of trade must be limited to such alterations as would affect the form and structure of the building, and not exclude things fixed to the premises for the purpose of carrying on the business in a reasonable way. See *Bickmore v. Dimmer*, 72 L. J. Ch. 96; [1903] 1 Ch. 158. Thus under such a covenant a jeweller was allowed to fix a large double clock face on the front of his premises by bolts let into their front wall. S. C. A covenant not to make any alterations in the arrangement or appearance of the premises, and not to use them except as a private dwelling-house, is broken by converting, by internal structural alterations, the house into flats. *Day v. Waldron*, 88 L. J. K. B. 937.

As to specific performance of a covenant by a grantee or lessee to build on the land granted or demised, see *Wolverhampton Corporation v. Emmons*, 70 L. J. K. B. 429; [1901] 1 K. B. 515; *Molyneux v. Richard*, 75 L. J. Ch. 39; [1906] 1 Ch. 34.

Breach of covenant to pay rates and taxes.] This covenant seems to extend to subsequently imposed taxes of the same nature as those in existence at the time of the covenant, but not to taxes of a different nature; see *Brewster v. Kitchell*, 1 Salk. 198; 1 Ld. Raym. 317. In this case the covenant was to pay a rent-charge, without deducting any taxes. A covenant to pay the rent without "any deduction, defalcation, or abatement"; *Bradbury v. Wright*, 3 Doug. 624; or an agreement to pay all taxes; *Amfield v. White*, Ry. & M. 246; obliges the tenant to pay the land tax. See *Christ's Hospital v. Harrild*, 2 M. & Gr. 707, as to tenant's liability for rent-charge in lieu of land tax. A parliamentary tax is one imposed directly by Act of Parliament. *Palmer v. Earith*, 14 L. J. Ex. 428; 14 M. & W. 428. A sewers rate did not fall within a covenant of this description. S. C. See also *Baker v. Greenhill*, 11 L. J. Q. B. 161; 3 Q. B. 148. A covenant to pay all taxes and assessments, except "the level tax, property tax, and land tax," was held not to include the tithe rent-charge of which the lessor was owner. *Jeffrey v. Neale*, 40 L. J. C. P. 191; L. R. 6 C. P. 240. A covenant to pay all assessments charged upon the demised premises includes inhabited house duty. *Eastwood v. McNab*, 83 L. J. K. B. 941; [1914] 2 K. B. 361. A covenant by the lessor in the lease of a warehouse, to pay all rates, taxes, and impositions whatsoever, whether parliamentary, parochial, or imposed by the Corporation of the City of London, or otherwise howsoever, which then were, or thereafter might be, rated, charged, or assessed on the said premises or any part thereof, or on the said yearly rent, or on the landlord, owner, or tenants of the said yearly rent, does not include water-rate due to a water company. *Badcock v. Hunt*, 58 L. J. Q. B. 134; 22 Q. B. D. 145. *Secus*, in the case of the lease of a shop and basement, forming part of a block of buildings to the whole of which water for domestic purposes was being supplied by the Metropolitan Water Board, where the lessor covenanted "to procure to be paid all rates and taxes payable in respect of the demised premises." *Bourne v. Salmon, &c.*, 76 L. J. Ch. 374; [1907] 1 Ch. 616.

A covenant to pay rent "clear of all deductions" does not imply a contract under the Metropolitan Management Amendment Act, 1862 (25 & 26 V. c. 102), s. 96, by the tenant to pay assessments charged by that section on the owner. *Home & Colonial Stores v. Todd*, 63 L. T. 829.

Covenants to pay taxes, &c., are frequently so framed as not to be limited in their application to the usual annual assessments made, but to extend to sums levied for the permanent improvement of the premises. How far they so extend depends on the construction of the covenant in each case. *Budd v. Marshall*, 50 L. J. Q. B. 28; 5 C. P. D. 490, per Jaggallay, L.J. Thus, "all outgoing whatsoever, rates, taxes, scots, &c., whether parochial or parliamentary, which then were or should be thereafter" chargeable on the said marsh lands demised, were held to include an extraordinary assessment made by commissioners of sewers for a work of permanent benefit on the land. *Waller v. Andrews*, 7 L. J. Ex. 67; M. & W. 312. So a covenant to pay rent, "free and clear of and from all manner of parliamentary, parochial, and other taxes, rates and assessments, deductions, or abatements whatsoever," was held to include the expense of paving footways adjoining the houses, which paving was done under a local Act requiring the expense to be paid primarily by the tenants, and empowering them to deduct from their landlord's rent the sum so paid by them. *Payne v. Burridge*, 13 L. J. Ex. 190; 12 M. & W. 727. So a covenant "to pay and discharge all taxes, rates, duties and assessments whatsoever which during the continuance of the demise should be taxed, assessed, or imposed on the tenant or landlord of the premises demised in respect thereof," was held to include the sum which the vestry had compelled the owner to pay them under the provisions of the Metropolitan Management Acts, 1856, 1862, as the proportionate part of the expense of paving the adjoining street under those Acts. *Thompson v. Lapworth*, 7 L. J. C. P. 74; L. R. 3 C. P. 149. *Hartley v. Hudson*, 48 L. J. C. P. 51; 4 C. P. D. 367 (decided under the Public Health Acts, 1848, 1875), is to the same effect. So where the tenant covenanted to "bear, pay and discharge all other taxes, rates, duties and assessments whatsoever," which would be charged "on the said premises or any part thereof, or upon the landlord or tenant in respect thereof, or in respect of the said yearly rent;" *Budd v. Marshall*, 50 L. J. Q. B. 24; 5 C. P. D. 481 (Public Health Act, 1875); or "all burthens, duties and services;" *Sweet v. Seager*, 2 C. B. N. S. 119 (Metropolis Management Act, 1855); or "all taxes, rates, assessments and outgoing whatsoever," "imposed upon the said demised premises," or "upon the landlord or tenant in respect thereof or on the rent hereby reserved;" *Crosse v. Raw*, 43 L. J. Ex. 144; L. R. 9 Ex. 209 (Sanitary Act, 1866, s. 10); *Aldridge v. Ferne*, 55 L. J. Q. B. 587; 17 C. B. D. 212 (Metropolis Management Acts, 1855, 1862); *Smith v. Robinson*, 62 L. J. Q. B. 509; [1893] 2 Q. B. 53; *Foulger v. Arding*, 71 L. J. C. B. 499; [1902] 1 K. B. 700; *In re Warriner*, 72 L. J. Ch. 701; [1903] 2 Ch. 367 (Public Health (London) Act 1891). So even where the covenant does not contain the above words in italics. S. C.; *Brett v. Rogers*, 66 L. J. Q. B. 287; [1897] 1 Q. B. 525; *Farlow v. Stevenson*, 69 L. J. Ch. 06; [1900] 1 Ch. 128. See also *Greaves v. Whitmarsh*, 75 L. J. K. B. 33; [1906] 2 K. B. 340. The construction of the covenant is not affected by the shortness of the term. *Stockdale v. Ascherberg*, 73 L. J. K. B. 206; [1904] 1 K. B. 447; *In re Warriner*, *supra*. But as to a yearly tenancy see *Iarris v. Hickman*, 73 L. J. K. B. 31; [1904] 1 K. B. 13. See also *Midgley v. Coppock*, 48 L. J. Ex. 674; 4 Ex. D. 309 (decided between landlord and purchaser).

But under a covenant to pay "rates and assessments which, whether parliamentary, parochial, or otherwise now are or at any time during the said term shall be taxed, rated, charged, assessed, or imposed upon the said premises or any part thereof, or upon or payable by the occupier or tenant in respect thereof," it was held that a charge similar to that in *Thompson v. Lapworth*, 37 L. J. C. P. 74; L. R. 3 C. P. 149, must be borne by the landlord, as it was imposed on him in respect of the premises, and the tenant did not, by his covenant, relieve the landlord of this burthen. *Illum v. Dickinson*, 52 L. J. Q. B. 190; 9 Q. B. D. 632; *Wilkinson v. Jollyer*, 53 L. J. Q. B. 278; 13 Q. B. D. 1; *Baylis v. Jiggins*, 67 L. J.

Q. B. 793; [1898] 2 Q. B. 315. The decision in *Tidswell v. Whitworth*, 36 L. J. C. P. 103; L. R. 2 C. P. 326, decided on a local Act, is to the same effect. See this case explained in *Thompson v. Lapworth*, *supra*. So under a similar covenant the lessor was held bound to bear the cost of work done by him under an order made on him under the Public Health Act, 1875, s. 94. *Rawlins v. Briggs*, 47 L. J. C. P. 487; 3 C. P. D. 368. See also *Bird v. Elwes*, 37 L. J. Ex. 91; L. R. 3 Ex. 225.

"The authorities on this subject are in a very unsatisfactory condition"; *Foulger v. Arding*, 71 L. J. K. B. 499, 503; [1902] 1 K. B. 700, 709, *per Romer, L.J.* But it seems that the principles to be deduced from them may be shortly summed up as follows:—Where the covenant includes only an obligation to make money payments to the local or other authorities, then, although the tenant is liable to reimburse the owner when the duty is primarily to pay money to the authorities, yet he is not liable where the owner is primarily bound to do the work himself, and it is only on his default that the authority could do the work and assess him. The covenants may, however, be wide enough to cover the obligation to do work at the instance of the local authority; a covenant to pay all "duties" or "outgoings," or "impositions charged upon the premises or the landlord in respect thereof," being sufficient for this purpose. As to the construction of a covenant to pay rates levied on mines under the Rating Act, 1874, see *Chaloner v. Bolckow*, 47 L. J. Q. B. 562; 3 App. Cas. 933. Where the lessor L. has himself done work required by the sanitary authority, he cannot recover its cost from the tenant as an "outgoing," unless L. was compellable to do the work. *Harris v. Hickman*, 73 L. J. K. B. 31; [1904] 1 K. B. 13; nor where it was work which L. had covenanted with the tenant to do himself. *Howe v. Botwood*, 82 L. J. K. B. 569; [1913] 2 K. B. 387.

Expenses under the Private Street Works Act, 1892, 55 & 56 V. c. 57, ss. 12, 13, become a charge on the premises on the completion of the work, although not payable until final apportionment; hence where the lease is between those dates, they do not come within a covenant to pay present and future assessments, outgoings, &c. *Surtees v. Woodhouse*, 72 L. J. K. B. 302; [1903] 1 K. B. 396. The same principle applies to expenses under the Public Health Act, 1875, ss. 150, 257.

Where the "outgoing" is expenditure for work required by the Factory and Workshop Act, 1891, s. 7 (2) in respect of fire escape, *Horner v. Franklin*, 74 L. J. K. B. 291; [1905] 1 K. B. 479; or by *Id.* 1901, s. 101 (8) in respect of an underground bakery, *Stuckey v. Hooke*, 75 L. J. K. B. 504; [1906] 2 K. B. 20, no action will lie in respect thereof between the parties on the covenant. See also the London Building Acts (Amendment), 1905, 5 E. 7, cap. cxix., s. 20, and *Monro v. Burghclere (Lord)*, 87 L. J. K. B. 366; [1918] 1 K. B. 291.

An absolute covenant to pay rates is broken on non-payment, although no demand has been made on the tenant for payment. *Davis v. Burrell*, 10 C. B. 821.

Where the lessor covenants with the lessee to pay all rates and taxes "now payable or hereafter to become payable in respect of the premises," he is liable to pay them only on the rent reserved, and not on the full improved value of the premises. *Salaman v. Halford*, 79 L. J. Ch. 41; [1909] 2 Ch. 602, distinguishing *Watson v. Home*, 7 B. & C. 286; 6 L. J. (O. S.) K. B. 73; *Smith v. Humble*, 15 C. B. 321; *Mansfield v. Relf*, 77 L. J. K. B. 145; [1908] 1 K. B. 71. As was pointed out in *Salaman v. Halford*, *supra*, the two latter cases were concerned with land tax which turned on the language of the Land Tax Act, under which it was said that the rule as to the extent of the lessor's covenant was different.

Breach of covenant for title.] The covenants for title, on which remedies are sought in the courts of common law, are principally the covenant that the grantor is seised in fee, or has power to convey; and the covenant for quiet enjoyment, express or implied, and freedom from incumbrances. By

the Conveyancing Act, 1881 (44 & 45 V. c. 41), s. 7, in the case of conveyances on sale, mortgage, or settlement, or by a trustee, mortgagee, &c., executed after 31st December, 1881, the respective covenants which were usually inserted in such instruments are now implied. The breach of such implied covenants is ground of action, *Gt. W. Ry. v. Fisher*, 74 L. J. Ch. 241; [1905] 1 Ch. 316. By sect. 7 (7), such covenants may be varied or extended by the instrument. The statement of claim alleges, by way of breach, that the defendant was not seised, or had not power, &c., at the time of the conveyance, or that some person who before and at the time of the conveyance by the defendant had, and still has, lawful right to the premises, &c., entered and evicted the plaintiff, or that the entry or other disturbance was by or under the defendant himself.

Proof that the defendant is in as heir of the lessor is sufficient to charge him as assignee of the reversion of a lease. *Derisley v. Custance*, 4 T. R. 75. See *sub tit. Action against heir and devisee, post.*

A covenant for title by a vendor in fee does not extend to acts done previously to the last preceding sale. *David v. Sabin*, 62 L. J. Ch. 347, 351, 356; [1893] 1 Ch. 523, 534, 544. Thus where A. sells and conveys land to B., his heirs and assigns, and covenants with them for title, and B. conveys the land to C., C. cannot sue A. in respect of an incumbrance affecting the land prior to the later conveyance. *Spoor v. Green*, 43 L. J. Ex. 57; L. R. 9 Ex. 99. Where the incumbrance affecting the land was a mining lease granted by A., prior to the conveyance to B., it was held that the breach was complete at the time of the conveyance to B., and that no fresh cause of action arose on the subsequent subsidence of the surface, owing to the working of the mines prior to the conveyance to C. S. C. Where the covenant was of seisin in fee, and the premises were, in fact, copyhold of inheritance, the damages are the difference in value between lands of each tenure. *Gray v. Briscoe*, Noy, 142. So where there was an implied covenant for a good right to convey, and part of the land was subject to a right of way, the damages are "the difference between the value of the property as purported to be conveyed and that which the vendor had power to convey." *Turner v. Moon*, 70 L. J. Ch. 822; [1901] 2 Ch. 825. See also *Gt. W. Ry. v. Fisher*, 74 L. J. Ch. 241; [1905] 1 Ch. 316; *Eastwood v. Ashton*, 82 L. J. Ch. 313; [1913] 2 Ch. 39; affirmed in H. L., but this particular point was not dealt with, 84 L. J. Ch. 671; [1915] A. C. 900.

Liability under the Metropolitan Management Act, 1862 (25 & 26 V. c. 102), s. 77, to contribute to the expenses of paving a new road adjoining a house sold, is not an incumbrance on the property, although the expenses had been apportioned before sale. *Egg v. Blaney*, 57 L. J. Q. B. 460; 21 Q. B. D. 107. Where however a similar liability arises under the Public Health Act, 1875 (38 & 39 V. c. 55), s. 150, it becomes under s. 257 a charge on the premises as from the date of the completion of the works; *In re Bettesworth and Richer*, 57 L. J. Ch. 749; 37 Ch. D. 535; *In re Allen & Driscoll's Contract*, 73 L. J. Ch. 614; [1904] 2 Ch. 226; although until the apportionment, there is no liability to pay; *In re Boor*, 58 L. J. Ch. 285; 40 Ch. D. 572; and under the Private Streets Works Act, 1892 (55 & 56 V. c. 57) ss. 12, 13, the charge and the liability to pay are the same as under 38 & 39 V. c. 55, *supra*. *Stock v. Meakin*, 69 L. J. Ch. 401; [1900] 1 Ch. 683; *Surtees v. Woodhouse*, 72 L. J. K. B. 302; [1903] 1 K. B. 396.

On a covenant for quiet enjoyment generally, it will not support the breach to show a *tortious* disturbance by a stranger; for it is only a covenant against persons having lawful title; *Dudley v. Folliott*, 3 T. R. 587; 2 Wms. Saund. 178 (8); unless the covenant is against disturbance by a *particular person*, when it is sufficient to show any disturbance by him, whether by lawful title or otherwise. *Nash v. Palmer*, 5 M. & S. 374. So, where the covenant is against disturbance by the lessor, his heirs or executors, it is sufficient to show *any* disturbance by him or them. *Forte v. Vine*, 2 Roll. Rep. 21; 1 Wms. Saund. 181 b (g). Thus, where the lessor lets a seam of coal with

covenant for enjoyment without molestation, &c., and he afterwards works minerals in the stratum above the coal, so as to damage the coal mine, an action lies for breach of covenant; though a mere nuisance by the lessor on his own land is not necessarily a breach of such a covenant. *Shaw v. Stenton*, 2 H. & N. 858; 27 L. J. Ex. 253. See further *Spoor v. Green*, 43 L. J. Ex. 57; L. R. 9 Ex. 99, and *Harrison v. Muncaster (Lord)*, [1891] 2 Q. B. 680. Where the covenant is for quiet enjoyment against A. and any other person by his means, title, or procurement, it is sufficient proof of the breach to show an entry by A.'s wife, in whose name A. purchased jointly with his own. *Butler v. Swinerton*, Palm. 339. So, in the case of a covenant for quiet enjoyment against all claiming by, from, or under him, a claim of dower by his wife is a breach of the covenant. Godb. 333; Palm. 340. So, the appointee of A., by virtue of the power in the making of which A. concurred, is a person claiming under him. *Hurd v. Fletcher*, 1 Doug. 43; *Carpenter v. Parker*, 3 C. B. (N. S.) 206; 27 L. J. C. P. 78. So, where A., seized in fee, settled his estate upon himself for life, remainder to his first and other sons in tail, and made a lease, and covenanted for quiet enjoyment without interruption of the lessor, his heirs or assigns, or any other person claiming any estate, right or interest, by, from, or under him, the eldest son was held to be a person claiming under the lessor. *Evans v. Vaughan*, 4 B. & C. 261; 3 L. J. (O. S.) K. B. 217. Where the covenant is that the defendant has not done, permitted, or suffered any act, &c., the assenting to an act which the covenantor could not prevent is not a breach. *Hobson v. Middleton*, 6 B. & C. 295; 5 L. J. (O. S.) K. B. 160; *Thackeray v. Wood*, 6 B. & S. 766; 24 L. J. Q. B. 226. But where a mortgagee, who had entered into a similar covenant, was party to a deed whereby the mortgagor created an incumbrance on the mortgaged land, this is a breach of the covenant. See *Clifford v. Hoare*, 43 L. J. C. P. 225; L. R. 9 C. P. 362. A covenant for quiet enjoyment "acquitted of all grants, rents," &c., is broken by the existence of a quit rent, incident to the tenure, and due to the lord of the manor, though none was in arrear at the time of the conveyance. *Hammond v. Hill, Comyn*, 180. A covenant against interruption by the vendor, or his acts or defaults, extends to arrears of quit rent due while the vendor was in possession and unpaid by him, though it may have become due before he held the estate. *Howes v. Brushfield*, 3 East, 491. Entry on a lessee and distress for land-tax, due from lessor before the demise, is not a breach of covenant for quiet enjoyment, without disturbance by the lessor or any one claiming by, from, and under him; for that is not a claim under him, but a claim against him. *Stanley v. Hayes*, 11 L. J. Q. B. 176; 3 Q. B. 105. But *semb.* the plaintiff might have paid the tax and sued for money paid. Such a covenant is not broken by the re-entry by a superior landlord for non-payment of rent and non-repair under the conditions of his lease. *Kelly v. Rogers*, 61 L. J. Q. B. 604; [1892] 1 Q. B. 910. *Secus* where the covenantor, although having a good defence, has consented to the re-entry. *Cohen v. Tannar*, 69 L. J. Q. B. 904; [1900] 2 Q. B. 609. The entry of the party claiming lawful title is not less a breach of covenant because the covenantee, who sues, may have instigated him to enforce the claim. *Young v. Raincock*, 18 L. J. C. P. 193; 7 C. B. 310. Merely forbidding the plaintiff's tenant, A., to pay his rent, is not a breach of the covenant for quiet enjoyment. *Witchot v. Nine*, Brownl. & Gold. 81. But a notice by B. to A. to pay his rent to B., followed by payment, is a breach. *Edge v. Boileau*, 55 L. J. Q. B. 90; 16 Q. B. D. 117.

A legal proceeding interfering, not with the possession, but with a particular mode of enjoyment of land, as its use as a beerhop, was held not a breach of the covenant. *Dennett v. Atherton*, 41 L. J. Q. B. 165; L. R. 7 Q. B. 316; see *Porter v. Drew*, 49 L. J. C. P. 482; 5 C. P. D. 143. In *Sanderson v. Berwick Cor.*, 53 L. J. Q. B. 559; 13 Q. B. D. 547, 551, it was however stated to be in every case a question of fact whether the quiet enjoyment of the land has, or has not, been interrupted, and where the ordinary and

lawful enjoyment has been substantially interfered with by the acts of the covenantor or those lawfully claiming under him, the covenant is broken, although neither the title to the land, nor the possession of the land is otherwise affected. In *Harrison v. Muncaster (Lord)*, [1891] 2 Q. B., at p. 682, Lord Esher, M.R., said that the expression "claiming under him" must be restricted in its meaning to claiming a right under him to do the particular act complained of. The above statement in *Sandersons v. Berwick Cor.*, *supra*, "must be taken with reference to the facts then before the Court, which were that water was poured on the land demised so as to interfere with its enjoyment." *Manchester, &c., Ry. v. Anderson*, 67 L. J. Ch. 568, 572; [1898] 2 Ch. 394, 402. So the flooding of the plaintiff's warehouse, see *Anderson v. Oppenheimer*, 49 L. J. Q. B. 708; 5 Q. B. D. 602; or his mine; see *Harrison v. Muncaster (Lord)*, 61 L. J. Q. B. 102; [1891] 2 Q. B. 680; is an interference with its quiet enjoyment. The interruption must be "caused either by a direct act of interruption by the defendant himself, or by some act the consequence of which, it either was foreseen, or ought, if reasonable care had been exercised, to have been foreseen, would be an interruption." S. C. In *Tebb v. Cave*, 69 L. J. Ch. 282; [1900] 1 Ch. 642, it was held that the erection by the lessor of a wall so near the chimneys of the demised house as to make them smoke was a breach of the covenant for quiet enjoyment. *Sed quære*, for the interference was not here direct, see *Davis v. Town Properties Investment Cor.*, 72 L. J. Ch. 389, 392; [1903] 1 Ch. 797, 805, *per Romer and Cozens-Hardy, L.JJ.*; and *Jones v. Consolidated Anthracite Collieries*, 85 L. J. K. B. 465, 470; [1916] 1 K. B. 123, 136. Where S. let land to B., who subsequently surrendered his lease to S., after having, without S.'s knowledge, underlet a part to X. by way of mortgage, and S. then sold the land with the usual covenants to B., under whom D. claimed, it was held that the under-lease constituted a breach of the covenants for quiet enjoyment and against incumbrances, under which D. could sue S. *David v. Sabin*, 62 L. J. Ch. 347; [1893] 1 Ch. 523. It is no answer to such action that S. was induced by the fraud of B. in concealing the under-lease to execute the conveyance to him, for the action arises from privity of estate. S. C. A mere nuisance, *e.g.*, noise committed or allowed by the lessor, has been held not to be a breach of the covenant. *Jenkins v. Jackson*, 58 L. J. Ch. 124; 40 Ch. D. 71; *Browne v. Flower*, 80 L. J. Ch. 181; [1911] 1 Ch. 219; *Malzy v. Eichholz*, 85 L. J. K. B. 1132; [1916] 2 K. B. 308; *Phelps v. London Corporation*, 85 L. J. Ch. 535; [1916] 2 Ch. 255. See also *Harmer v. Jumbil (Nigeria) Tin Areas*, [1921] 1 Ch. 200; and *Manchester, &c., Ry. v. Anderson*, 67 L. J. Ch. 568; [1898] 2 Ch. 394.

A covenant not to use lands for certain specified trades, does not imply a warranty that it may be used for all other trades.

In a conveyance of land from A. to B., A. covenanted with B. for title and quiet enjoyment, notwithstanding any act or thing done or suffered by him, or any of his ancestors or predecessors in title; by a subsequent decree in Chancery, which bound B., although not a party to the suit, the land was declared subject to rights of common; this decree was, in the absence of any actual disturbance of B. in his possession, held no breach of the covenant for quiet enjoyment; nor, in the absence of evidence of a grant of common by A.'s predecessors in title, was it a breach of the covenant for title. *Howard v. Maitland*, 53 L. J. Q. B. 42; 11 Q. B. D. 695. A covenant for title applies to all defects of title within it, even although the defects appear on the conveyance; or are otherwise known to the purchaser. *Page v. Midland Ry.*, 63 L. J. Ch. 126; [1894] 1 Ch. 11; *May v. Platt*, 69 L. J. Ch. 357; [1900] 1 Ch. 616; *Gt. W. Ry. v. Fisher*, 74 L. J. Ch. 241; [1905] 1 Ch. 316.

For an instance of a qualified covenant for title, where a house is granted with appurtenances, as usually enjoyed therewith, see *Thackeray v. Wood*, 24 L. J. Q. B. 226; 6 B. & S. 766. As to breach of quiet enjoyment of stalls in a theatre, see *Leader v. Moody*, L. R. 20 Eq. 145.

A covenant in the usual form, that "the lessee paying the rent and

observing the covenants on his part to be observed, should peaceably hold and enjoy the said premises," is an independent covenant, and non-payment of rent and non-observance of the lessee's covenant is no answer to a breach by the lessor. *Dawson v. Dyer*, 5 B. & Ad. 584; *Edge v. Boileau*, 55 L. J. Q. B. 90; 16 Q. B. D. 117.

The defendant granted the plaintiff a lease he had no power to grant. The plaintiff obtained a fresh lease from the person having good title, and in an action against the defendant, on the covenant for quiet enjoyment, he was held entitled to recover the difference in the expenses and value of the void and of the valid lease. *Lock v. Furze*, 19 C. B. (N. S.) 96; 34 L. J. C. P. 201; L. R. 1 C. P. 441. So, where defendant demised premises to the plaintiff, and covenanted that the plaintiff should occupy them, through the term, without any interruption from the defendant, or any person claiming under him, an action of trespass was brought against the plaintiff by C., who claimed under the defendant, and the plaintiff gave notice of this action to the defendant; but the defendant took no notice thereof; the plaintiff then defended the action, and a verdict was recovered against him; it was held, that the plaintiff was entitled to recover against the defendant the amount of the verdict and costs he was so compelled to pay, together with his cost of defence, and compensation for the loss of the land, and the value of a conservatory he had erected on the land. *Rolph v. Crouch*, L. R. 3 Ex. 44. See also *Gt. W. Ry. v. Fisher*, 74 L. J. Ch. 241; [1905] 1 Ch. 316; and *Godwin v. Francis*, 39 L. J. C. P. 121; L. R. 5 C. P. 295. And in such case the expenses of removal into other premises seem to be recoverable, see *Grosvenor Hotel Co. v. Hamilton*, 63 L. J. Q. B. 661; [1894] 2 Q. B. 836. Where there had been no eviction, only such damages were recoverable as the plaintiff had sustained at the date of the writ. *Child v. Stenning*, 48 L. J. Ch. 392; 11 Ch. D. 82. In such case, however, the damages would now, under O. xxxvi. r. 58, "be assessed down to the time of assessment."

Where a breach is not assigned in the words of the covenant merely, but goes on to particularize the sort of breach, that alone must be proved; *Harris v. Mantle*, 3 T. R. 307; unless the judge shall authorize an amendment on the trial by striking out words of needless particularity. Where the breach of a covenant for enjoyment specifies an entry and expulsion by the defendant, it is not enough to prove a refusal by the defendant to let the plaintiff take possession. *Hawkes v. Orton*, 5 Ad. & E. 367. But where the first part of the breach contains the gist of the action, the plaintiff need not prove superfluous matter of aggravation. *Deffell v. Brocklebank*, 4 Price, 36.

The plaintiff may assign a breach on the implied covenant for quiet enjoyment contained in the word *demise*; Com. Dig. Cov. (A. 4); Shep. Touch. 160; in a lease under seal this word implies a power to lease, and hence to support the action it is not necessary that the lessee should be actually evicted; 1 Wms. Saund. 322 a, (2). The word *let* has in this respect the same effect as *demise*. *Mostyn v. W. Mostyn Coal and Iron Co.*, 45 L. J. C. P. 401; 1 C. P. D. 145; *Markham v. Paget*, 77 L. J. Ch. 451; [1908] 1 Ch. 697. See *Budd-Scott v. Daniell*, 71 L. J. K. B. 706; [1902] 2 K. B. 351, dissenting from the *dicta* of Kay, L. J., in *Baynes v. Lloyd*, 64 L. J. Q. B. 787; [1895] 2 Q. B. 610. The implied covenant ceases with the estate out of which the lease is granted; *Baynes v. Lloyd*, *supra*; *Adams v. Gibney*, 6 Bing. 656; 8 L. J. (O. S.) C. P. 242; see *Penfold v. Abbott*, 32 L. J. Q. B. 67; and is restrained by an express covenant for quiet enjoyment. *Lane v. Stephenson*, 4 Bing. N. C. 678; 5 Bing. N. C. 183; *Stannard v. Forbes*, 6 L. J. K. B. 185; 6 Ad. & E. 572; *Dennett v. Atherton*, 41 L. J. Q. B. 165; L. R. 7 Q. B. 316. A warranty of the demise by the lessor is not an implied covenant, but an express one, and extends to the whole term granted. *Williams v. Burrell*, 14 L. J. C. P. 98; 1 C. B. 402.

In a demise by parol there is from the mere relation of landlord and tenant an implied contract for quiet enjoyment, but not for good title. *Bandy v. Cartwright*, 8 Ex. 913; 22 L. J. Ex. 285; *Hall v. City of London*

Brewery Co., 2 B. & S. 737; 31 L. J. Q. B. 257; *Cross v. Warter*, (1870) W. N. 137; *Markham v. Paget*, 77 L. J. Ch. 451; [1908] 1 Ch. 697; and *Budd-Scott v. Daniell*, 71 L. J. K. B. 706; [1902] 2 K. B. 351. Whether there has been a breach of such contract is a question of fact. S. C. Mere interference with privacy or other comfort is not a breach. *Browne v. Flower*, 80 L. J. Ch. 181; [1911] 1 Ch. 219. The contract is confined to the acts of the lessor and of those claiming under him. *Jones v. Lavington*, 72 L. J. K. B. 98; [1903] 1 K. B. 253. In an agreement for a future tenancy there is no contract for quiet enjoyment; *Brashier v. Jackson*, 9 L. J. Ex. 313; 6 M. & W. 549; it is, however, an implied condition that the lessor has a good title to let for the proposed term, and he is liable for a breach of this condition. *Stranks v. St. John*, 36 L. J. C. P. 118; L. R. 2 C. P. 376. A person having only an *interesse termini* cannot maintain an action for quiet enjoyment against the grantor, *Wallis v. Hands*, 62 L. J. Ch. 586; [1893] 2 Ch. 75; but he may bring an action against him for not putting him into possession; S. C.; *Coe v. Clay*, 5 Bing. 440; 7 L. J. (O. S.) C. P. 162; *Jinks v. Edwards*, 11 Ex. 775. A mere agreement for a lease will not support such an action. *Drury v. Macnamara*, 5 E. & B. 612; 25 L. J. Q. B. 5, unless specific performance could be granted, for in such case damages may be granted as an alternative remedy. See further *Pease v. Courtney*, 73 L. J. Ch. 760; [1904] 2 Ch. 503. A tenant may sue his landlord, G., for injury to the demised house, by vibration caused by G.'s machines on adjacent land, although the house was unusually weak. *Grosvenor Hotel Co. v. Hamilton*, 63 L. J. Q. B. 661; [1894] 2 Q. B. 836.

Breach of covenant to yield up possession of premises at end of term.] A covenant to this effect is usually to be found in leases; but even in the absence of such a covenant, "when a lease is expired the tenant's responsibility is not at an end, for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term." *Harding v. Crethorn*, 1 Esp. 57; approved in *Christy v. Tancred*, 10 L. J. Ex. 228, 229; 7 M. & W. 127, 130. The same rule applies in the case of a tenancy under a parol agreement for a lease. *Henderson v. Squire*, 38 L. J. Q. B. 73; L. R. 4 Q. B. 170. The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent he has lost, and to the costs of an ejectment against an under-tenant, who has wrongfully held over. S. C. So, the lessor may recover damages occasioned by having to compromise an action, by a person (to whom he had let in reversion), for not giving possession, together with the costs of such action; and his acceptance of rent for the time held over is no answer. *Bramley v. Chesterden*, 2 C. B. (N. S.) 592; 27 L. J. C. P. 23. As to damages for not delivering up fixtures at the end of the term, see *Watson v. Lane*, 25 L. J. Ex. 101; 11 Ex. 769.

Action on other covenants relating to land.] Questions often arise, in other cases than those between lessor and lessee, as to when the benefit of a covenant relating to land made with the owner of the land enures to his successors in title, and when the burden of such a covenant made by the owner falls on his successors in title. The matter will be found fully discussed in the notes to *Spencer's Case*, 1 Smith, L. C. 12th ed. pp. 83 *et seq.*

ACTION FOR DOUBLE VALUE OF LAND DEMISED.

By the Landlord and Tenant Act, 1730, 4 G. 2, c. 28, s. 1, in case any tenant for life, lives, or years, or other person who shall come into possession of any lands, tenements, or hereditaments, by, from, or under, or by collusion with such tenant, shall *wilfully* hold over any lands, &c., after the determination of such term, and after demand made, and notice in writing given, for delivering the possession thereof by his landlord or lessor, or the person to whom the remainder or the reversion of such lands, &c., shall belong, or his agent thereunto lawfully authorized, such person so holding over shall, for the time he shall so hold over or keep the person entitled out of possession of the said lands, &c., pay to the person so kept out of possession, his executors, administrators, or assigns, at the rate of *double the yearly value*, of the lands, &c., so detained, for so long a time as the same are detained.

The landlord may also sue for a breach of the implied agreement to give up possession of the premises at the end of the term.

Proof of the demise.] Tenants in common could not sue jointly in this action, where there was no joint demise by them. *Wilkinson v. Hall*, 6 L. J. C. P. 82; 1 Bing. N. C. 713. Nor could husband and wife sue jointly on a parol demise, by the husband alone, of land whereof he is seised in right of his wife, but the action must be brought by the husband alone. *Harcourt v. Wyman*, 18 L. J. Ex. 453; 3 Ex. 817. But such misjoinder is not now material. A., the lessor of defendant, required delivery of the premises at Lady-day, when the lease ended, and then made a lease in reversion to B.; defendant held over, and did not recognize B. as landlord: held that A., and not B., was the proper person to sue. *Blatchford v. Cole*, 5 C. B. (N. S.) 514; 28 L. J. C. P. 140. A weekly tenant is not liable to the action. *Lloyd v. Rosbee*, 2 Camp. 453.

Proof of the determination of the term, and of the demand.] In general, the determination of the term will be proved by evidence of the service of a notice to quit upon the defendant; and if such notice be proved, it will not be necessary to show a demand; for the notice includes a demand. *Wilkinson v. Colley*, 5 Burr. 2694. A notice to quit, containing a threat of requiring double rent on refusal, is sufficient. S. C. The statute requires it to be in writing. Where the defendant has held over after the determination of a term certain, a demand in writing of the possession must be proved; but it need not appear that the demand was made immediately upon the expiration of the tenancy; *Cobb v. Stokes*, 8 East, 361; though the plaintiff will only be entitled to the double value from the time of the demand made. And where the rent is reserved quarterly, and the demand is made in the middle of the quarter after the expiration of the tenancy, the plaintiff cannot recover the single rent for the antecedent fraction of the quarter. S. C. A person appointed by the Court of Chancery to receive the rents and profits of the estate, is a sufficient agent within the statute to make the demand in his own name. *Wilkinson v. Colley*, 5 Burr. 2694. Where a trustee joined with *cestui que trust* in a mortgage to the plaintiff, and all parties joined in appointing G. to be the agent and attorney of the *cestui que trust* to demand and collect rent, to give notice to quit, &c., and to do everything that the *cestui que trust* could have done before the mortgage, it was held that G. was authorized to demand within the statute. *Poole v. Warren*, 8 Ad. & E. 582.

Value.] In estimating the value, only the land and its real easements and appurtenances can be included. Thus, where the owner of a mill let part of it to the defendant, with the use of the revolving shaft of a steam-engine, which passed through the part demised, at an entire rent, the value

of the power was excluded. *Robinson v. Learoyd*, 10 L. J. Ex. 166; 7 M. & W. 48. Generally speaking, the rent, if a rack-rent, will represent the value; but the unwillingness of the tenant to quit may sometimes be evidence of a greater value.

Defence.

It has been usual in this action to traverse the specific allegations in the statement of claim; but as the action is in the nature of a penal one, it has been suggested that the plea of not guilty by statute is sufficient to put the plaintiff on proof of the whole statement of claim. See *Jones v. Williams*, 4 M. & W. 375; 8 L. J. Ex. 70. *Contra*, *Castleman v. Hicks*, 2 M. & Rob. 422.

The defendant may show that the plaintiff has waived the notice to quit or demand of possession, and, where the plaintiff has accepted rent due from the defendant after the expiration of notice to quit, it is a question for the jury whether such rent was received in part satisfaction of the double value, or as a waiver of it. *Ryall v. Rich*, 10 East, 52. Such waiver need not be specially pleaded. *Rawlinson v. Marriott*, 16 L. T. 207. Where the landlord declared in debt, first for the double value, and secondly for use and occupation, and the tenant pleaded *nil debet* to the first count, and, as tender of the single rent before action brought to the second, and paid the money into court, which the plaintiff took out of court, and proceeded; it was held that this was no waiver of the plaintiff's right to the double value, so as to be ground of non-suit, but that it was a case to go to the jury, and that the plaintiff's going on with the action, after taking the single rent out of court, was evidence to show that he did not mean to waive his claim for the double value, but to take the single rent *pro tanto* only. *Ryall v. Rich*, *supra*. A recovery of possession in an action is no waiver of the landlord's right to the double value for the time between the expiration of the notice to quit and the time of recovering possession. *Soulsby v. Neving*, 9 East, 310. A tenant who holds over under a fair claim of right will not be considered as wilfully holding over within the statute, though it may appear eventually that he had no right. *Wright v. Smith*, 5 Esp. 203; *Crook v. Whitbread*, 88 L. J. K. B. 959. A tenant who, during proceedings as to the validity of a devise made by the lessor, held over after a notice to quit from the devisee to whom he had in the first instance attorned and paid rent, was held not to have made himself liable to a claim for double value after the validity of the devise had been established. *Swinfen v. Bacon*, 6 H. & N. 184, 846; 30 L. J. Ex. 33, 368. Where the action is against co-tenants, a statement by one, on receipt of notice to quit, that "he has nothing to do with the land," is not evidence in his favour to show that his holding was not wilful; but if one offer to give up the land, and the other alone holds out, it is doubtful whether the action will lie against both. *Hirst v. Horn*, 6 M. & W. 393.

Statute of Limitations.] This double value being in the nature of a penalty, can only be recovered within two years of the time the cause of action accrued. 3 & 4 W. 4, c. 42, s. 3.

ACTION FOR DOUBLE RENT.

By the Distress for Rent Act, 1737, 11 G. 2, c. 19, s. 18, if any tenant shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then such tenant,

his executors or administrators, shall thenceforward pay to the landlord double the rent or sum which he should otherwise have paid, to be levied, sued for, and recovered at the same times and in the same manner as the single rent or sum, before the giving of such notice, could be levied, &c.; and such double rent or sum shall continue to be paid during all the time such tenant shall continue in possession. The words "tenant" and "landlord" in the section are not limited to the case where the relationship of landlord and tenant existed when the notice to quit expired; the section imposes on a tenant who holds over the liability to pay double rent to the landlord whoever he may be, *e.g.*, the assignee of the reversion. *Northcott v. Roche*, 37 T. L. R. 364. The sum payable by the tenant under this section was said to be a penal sum to be calculated by reference to the rent, rather than rent properly so called. *Flannagan v. Shaw*, 89 L. J. K. B. 168; [1920] 3 K. B. 96. *Query*, whether this is so. See *per* Avory, J., in *Northcott v. Roche*, *supra*.

The notice mentioned in this statute need not be in writing, at least where the tenant holds under an oral demise; *Timmins v. Rowlinson*, 3 Burr. 1603; but it must give a fixed time for quitting; thus a notice to quit "as soon as the tenant can get another situation" does not render him liable on this statute, though he has got another situation. *Farrance v. Elkington*, 2 Camp. 591. The statute only applies to those cases in which the tenant has the power of determining his tenancy by a notice, and actually gives a valid notice sufficient to determine it. *Johnstone v. Huddleston*, 4 B. & C. 922; 4 L. J. (O. S.) K. B. 71. It was held by Best, C.J., that this action did not lie against a weekly tenant. *Sullivan v. Bishop*, 2 C. & P. 359. This decision was, however, against his own view, and in deference to the decision of Ld. Ellenborough in *Lloyd v. Rosbee*, 2 Camp. 140, which was, however, a claim for double *value*, and, it seems, having regard to the difference in the two statutes, that the decision in *Sullivan v. Bishop*, *supra*, is incorrect. See Bullen on Distress, 2nd ed., 135, n.

ACTION ON BOND.

The statement of claim either states only the penal part of the bond, as in the case of common money bonds, or sets out also the special conditions and alleges breaches. The allegation of breaches is obligatory on the plaintiff by 8 & 9 W. 3, c. 11, s. 8, either in the statement or reply, by way of *assignment*, which is traversable, or, in certain cases, by way of *suggestion*, which is not traversable, but must be proved in order to obtain an assessment of damages. Neither the J. Acts, 1873, 1875, nor the Rules, 1883, materially affect the procedure on bonds. Where breaches are not assigned in the statement of claim, the defendant must now set out the condition as part of his defence, if he intends to plead performance. Where issue is joined on the alleged breaches, the proof will, of course, depend on the allegations traversed. Where breaches are *suggested*, then the evidence will be as on a writ of inquiry, except that the truth of the breaches as well as the damages, will then have to be inquired into, and thereupon the defendant may controvert the breaches or any of them; but he cannot show excuse of performance, for that might have been pleaded by him at first. See *Canterbury (Archbishop) v. Robertson*, 3 L. J. Ex. 101; 1 Cr. & M. 690; *Webb v. James*, 11 L. J. Ex. 38; 8 M. & W. 645.

Where the breaches have been *suggested* after judgment for the plaintiff, it will be necessary to give some evidence that the bond produced, and in which the conditions are contained, is the same as that on which judgment has been obtained; for this purpose it will be sufficient if the solicitor for the plaintiff testify that the bond produced is the instrument delivered to

him to bring the action on, and that he knows of no other of the same date, and the bond need not be strictly proved. *Hodgkinson v. Marsden*, Peake, Ev. 5th ed. 287; 2 Camp. 122. Where the defendant on oyer set out the condition, which was for performance of covenants in an indenture of lease, and pleaded a plea of judgment recovered, on which there was judgment for the plaintiff; on the execution on the writ of inquiry, Ld. Kenyon ruled that it was not necessary to prove the execution of the lease, as the defendant was estopped from denying it. *Collins v. Rybot*, 1 Esp. 157. If the defendant let judgment go by default, and the plaintiff thereupon made his suggestion of breaches in which he sets out the condition of the bond, which appears to be for the performance of an award, or of articles of agreement, or the like, the plaintiff must prove the condition of the bond, the award, indenture, or articles, as well as the breaches suggested. *Edwards v. Stone*, 1 Wms. Saund. 58 f (1). But where the breaches are assigned, and not denied, the truth of them is not in issue.

Damages.] The jury are to find nominal damages and costs, as well as damages on the breaches, but the plaintiff cannot recover more than the amount of the penalty and costs. *Wilde v. Clarkson*, 6 T. R. 303; *Branscombe v. Scarborough*, 13 L. J. Q. B. 247; 6 Q. B. 13. Interest is payable, as such, on a common money bond, although not expressly reserved. *Farquhar v. Morris*, 7 T. R. 124; if reserved, then at the reserved rate; *In re Dixon*, 69 L. J. Ch. 609; [1900] 2 Ch. 561.

Where a certain sum is due from A. to B., and they agree that A. shall, in satisfaction thereof, pay a lesser sum on a given day, and in default of payment, the whole original debt shall at once become payable, B. is entitled on default to recover the debt. *Thompson v. Hudson*, 38 L. J. Ch. 431; L. R. 4 H. L. 1. So where the debt is to be repaid by instalments, and the whole to become payable on default in payment of one instalment. *Protector Endowment, &c. Co. v. Grice*, 49 L. J. Q. B. 812; 5 Q. B. D. 592; *Wallingford v. Mutual Society*, 50 L. J. Q. B. 49; 5 App. Cas. 685.

Defence.

Denial of execution.] This defence has the same effect as in actions on covenants.

The defendant may be sued by the name in which he executed the bond; but he may also, it seems, be sued by his real name; for where the writ was against W. B., and the declaration called him "W. F. B., sued by the name of W. B.," and the bond was executed by the defendant, W. F. B., in the name of W. B., by which he was then known, it was held no variance; and it was also held that, if the wrong name had avoided the bond, it should have been specially pleaded. *Williams v. Bryant*, 9 L. J. Ex. 47; 5 M. & W. 447.

Alteration of the bond.] The cases relating to the alteration of bonds are collected with those relating to simple contracts, *ante*, p. 545.

Payment.] Payment before the day fixed for it was always evidence of a plea of payment at the day. B. N. P. 174. But before 4 & 5 A., c. 3 (c. 16, Ruff.), s. 12, payment after the day fixed, or at a different place from that fixed, was not pleadable in bar. By that Act, payment of principal and interest, due on a mere money bond, made before action, is a bar, though not made exactly according to the condition. A tender without acceptance after the day is not within the statute, and therefore no bar. *Underhill v. Matthews*, B. N. P. 171. But see *per* Abbott, C.J., in *Murray v. Stair (Earl)*, 2 B. & C. 92. Though the Limitation Act, 1623, 21 J. 1, c. 16, did not apply to specialties, yet the defendant might, if the deed were twenty years old, and there had been no payment of interest or

acknowledgment of liability within that period, have pleaded *solvit ad diem*, and relied upon the presumption of payment arising from lapse of time. But if there had been any such payment of interest or acknowledgment, after the day appointed for the payment of the money, though upwards of twenty years had elapsed since the payment or acknowledgment, the defendant could not avail himself of this presumption of payment, under the plea of *solvit ad diem*, though he might under the plea of *solvit post diem*, given by 4 & 5 A., c. 3. *Moreland v. Bennett*, Str. 652; B. N. P. 174.

In an action on a common money bond or on an annuity bond, it rests on the defendant to prove a defence of payment, although such defence is in fact a denial of the breach of the condition. *Penny v. Foy*, 8 B. & C. 11; 6 L. J. (O. S.) K. B. 230.

Accord and satisfaction.] Accord and satisfaction, though not a good legal defence to an action on a bond, is good in equity. *Webb v. Hewitt*, 3 K. & J. 438; *Steeds v. Steeds*, 58 L. J. Q. B. 302; 22 Q. B. D. 537. But accord and satisfaction with a joint obligee, is no defence, unless the presumption be rebutted that the money was advanced by the obligees as tenants in common and not as joint tenants. S. C. See *Powell v. Brodhurst*, 70 L. J. Ch. 587, 589; [1901] 2 Ch. 160, 164.

ACTION ON REPLEVIN BOND.

The procedure in granting replevin bonds is now regulated by the County Courts Act, 1888 (51 & 52 V. c. 43), Part VI.

By sect. 134, the powers and responsibilities of sheriffs with respect to replevin bonds and replevins have ceased, and the county court registrar of the district in which the distress was taken is authorized to "approve of" replevin bonds, to grant replevins, and to issue all necessary process in relation to them, to be executed by the high bailiff. By sects. 134, 135, the registrar, at the instance of the party, takes security (in a bond with sureties, sect. 108, or a pecuniary deposit, sect. 109), conditioned to commence an action in the High Court, within a week after the date of the security, and to prosecute it with effect and without delay, and (unless judgment be by default) to prove to such court that the obligor had good ground for believing either that the title to some hereditament, toll, market, fair, or franchise was in question or that the rent or damage exceeded £20, and to make return of the goods, if the return be adjudged.

Sect. 136 provides for prosecuting the suit in the county court on a like security, with a condition to prosecute it within one month with effect and without delay, and to make return, &c.

By sect. 137 the defendant may remove a replevin suit out of the county court by *certiorari* on giving security, by like bond, or by deposit, approved of by a master of the Supreme Court, to "defend with effect" and (except in case of discontinuance, non pros. or nonsuit) to prove that he had good ground for believing that either the title to some hereditament, toll, &c., was in question, or that the rent or damage, in respect whereof the distress was taken, exceeded £20.

By sect. 108 the security is in the form of a bond with sureties "to the other party or intended party in the action or matter": the court in which the action is brought may, by order, give such relief to the obligors as may be just, which shall have the effect of a defeasance of the bond.

By County Court Rules, 1903, O. xxix. r. 3, "the bond shall be executed in the presence of the judge or registrar, or of a commissioner to administer oaths, or of a clerk to the registrar nominated to take affidavits."

Denial of execution.] This defence only puts in issue the due execution of the bond by the defendants.

The forms of bond prescribed by the County Court Rules, 1903, are provided in the Appendix thereto, Forms Nos. 287, 288.

Forfeiture of the bond.] Where the bond is to prosecute in a superior court, the defendants may have to show, besides the due prosecution of the replevin suit, &c., that the plaintiff in replevin satisfied the court at the trial (if there were one) that he had good ground for belief that title was in question, or that the rent or damage exceeded £20. For this purpose it should seem that the plaintiff in the replevin suit should prove or produce some declaration or certificate to that effect by the judge who tried it. See *Tunnicliffe v. Wilmot*, 2 Car. & K. 626, where the certificate was refused by Patteson, J., on particular grounds.

With regard to the prosecution with effect and without delay, the old decisions appear to apply. Thus to prosecute "with effect" means to a "not unsuccessful termination." *Jackson v. Hanson*, 8 M. & W. 477; *Tummons v. Ogle*, 6 E. & B. 571; 25 L. J. Q. B. 403. The obligation to prosecute "without delay" is broken by not proceeding with due diligence, though the suit is not thereby determined. *Harrison v. Wardle*, 5 B. & Ad. 146. And it is no defence that the delay was justified by the practice of the court, or by successive orders for time to deliver statements of claim; but the jury may find delay notwithstanding. *Gent v. Cutts*, 11 Q. B. 288. The abatement of the suit by death of the distrainee is a sufficient excuse. *Morris v. Matthews*, 2 Q. B. 293.

Damages.] The verdict is taken for the amount of the penalty; and this, it seems, with costs of suit, still limits the amount that can be afterwards actually recovered from the defendants. *Barnscombe v. Scarborough*, 6 Q. B. 13.

ACTION FOR PENALTY.

Actions on statutes for penalties have been usually in the form of actions of debt. In some cases that form is prescribed by the statute; in other cases, where no form is specified, the penalty has been treated as a statute debt when incurred, though not strictly referable to any contract. In the statement of the offence it is sometimes necessary to allege a contract, and such contract must then be proved as laid. But variances in such actions will be amended where justice requires. Leave to amend was refused in *Burnett v. Samuel*, 109 L. T. 630, but allowed in *Bird v. Samuel*, 30 T. L. R. 323.

In an action of debt on a penal statute the general evidence for the plaintiff is—proof of the commission of the act upon which the penalty has accrued, and if a time be limited by the statute for bringing the action, proof that the action was brought within the time. In an action for penalties for the defendant having sat and voted in the House of Commons when incapacitated for so doing, it was held unnecessary for the plaintiff to make oath under sect. 3 of 21 Jac. 1, c. 4, that he believed in his conscience that the offence was committed by the defendant within a year before action. *Forbes v. Samuel*, 82 L. J. K. B. 1135; [1913] 3 K. B. 706.

The Crown alone can sue for the penalty where the statute does not say who shall recover it, unless an interest therein is given to some person by the statute, expressly or by sufficient implication, as if it be created for the benefit of a party grieved. *Bradlaugh v. Clarke*, 52 L. J. Q. B. 505; 8 App. Cas. 354. It is not necessary to prove an authority from the Crown or the person entitled to the penalties. *Cole v. Coulton*, 2 E. & E. 695;

29 L. J. M. C. 125. A corporation cannot maintain the action unless empowered to do so by statute. *St. Leonards Guardians v. Franklin*, 47 L. J. C. P. 727; 3 C. P. D. 377.

Evidence of commencement of the action.] The writ is, in all cases, the commencement of the action, and the statement of claim will show the day on which it is issued; but where the writ has been renewed, strict proof of the continuance of the writ is requisite. Where the writ is dated on the day on which the penalty was incurred, evidence is admissible to prove that it issued after the cause of action accrued. *Clarke v. Bradlaugh*, 51 L. J. Q. B. 1; 8 Q. B. D. 63.

By 31 Eliz. c. 5, s. 5, actions or suits for forfeitures on a penal statute, limited to the King, must be brought within two years after the cause of action; and actions for penalties given to a common informer, suing *qui tam*, must be brought within one year. In *Dyer v. Best*, 35 L. J. Ex. 105; L. R. 1 Ex. 152, overruling *Calliford v. Blawford*, 1 Show. 353, this section was held to limit an action for a penalty, brought by an informer suing for himself alone, to one year; this decision was, however, disapproved by Bramwell, L.J., in *Robinson v. Currey*, 50 L. J. Q. B. 561, 563; 7 Q. B. D. 465, 471. By sect. 23 (1) of the Finance Act, 1907 (7 Ed. 7, c. 13), proceedings for the recovery of a fine or penalty under the Income Tax Acts may be commenced within three years after it is incurred.

By the Civil Procedure Act, 1833 (3 & 4 W. 4, c. 42), s. 3, all actions for penalties, damages, or sums of money given by existing or future Acts to parties grieved, must be brought within two years after the cause of action.

An officer of the Goldsmiths' Company suing for penalties under stat. 7 & 8 V. c. 22, s. 3, is not a common informer within 31 Eliz. c. 5, s. 5, nor a party grieved within 3 & 4 W. 4, c. 42, s. 3. *Robinson v. Currey*, 50 L. J. Q. B. 561; 7 Q. B. D. 465. Nor is an action brought under 53 & 54 V. c. 64, s. 3, by a shareholder in a company against a director for misrepresentation, within 3 & 4 W. 4, c. 42, s. 3. *Thomson v. Clanmorris*, 69 L. J. Ch. 337; [1900] 1 Ch. 718.

Defence.

By the Limitation Act, 1623 (21 J. 1, c. 4), s. 4, "if any information, suit, or action shall be brought or exhibited against any person or persons, for any offence committed or to be committed against the form of any penal law, either by or on the behalf of the king, or by any other, or on behalf of the king and any other, it shall be lawful for such defendants to plead the general issue, that they are not guilty, or that they owe nothing, and to give such special matter in evidence to the jury that shall try the same, which matter, being pleaded, had been a good and sufficient matter in law to have discharged the said defendant or defendants, against the said information, suit, or action, and the said matters shall be then as available to him or them, to all intent and purposes, as if he or they had sufficiently pleaded, set forth, or alleged the same matter in bar or discharge of such information, suit, or action." This right to plead not guilty by statute is reserved by Rules, 1883, O. xix. r. 12; by that rule that defence shall have the same effect as it before had.

O. xxi. r. 19, requires the defendant, when relying on the above section, to insert in the margin of the defence the words "By Stat. 21 J. 1, c. 4 (Public Act), s. 4," otherwise such defence will be taken not to have been pleaded by virtue of the statute. This section applies to actions on statutes subsequent, as well as prior, to its being passed. *Spencer (Earl) v. Swannell*, 7 L. J. Ex. 73; 3 M. & W. 154; *Jones v. Williams*, 8 L. J. Ex. 70; 4 M. & W. 375.

To an action for treble damages for pound breach, on 2 W. & M. sess. 1, c. 5, s. 3 (s. 4, Ruff), the defendant cannot plead "not guilty by statute,"

for it is not a penal action within 21 J. 1, c. 4. *Castleman v. Hicks*, 2 M. & Rob. 422. See, however, *Jones v. Williams*, *supra*.

The recovery of a penalty, by an informer, against a person for keeping a house for music and dancing without a licence under the Disorderly Houses Act, 1751 (25 G. 2, c. 36), s. 2, is a bar to a recovery of a second penalty against the same defendant, at the suit of another informer, although the offence is committed on several successive nights. *Garrett v. Messenger*, 36 L. J. C. P. 337; L. R. 2 C. P. 583. So one penalty only is recoverable against the defendant for acting or practising as an apothecary without having a certificate, although he attended and supplied medicine to three persons on one day. *Apothecaries Co. v. Jones*, [1893] 1 Q. B. 89.

The effect of bringing an action for a penalty is to make it a debt due to the plaintiff as soon as the writ is issued, and judgment obtained in a subsequent action at the suit of another person is no bar to the prior action. *Hutchinson v. Thomas*, 2 Lev. 141; *Girdlestone v. Brighton Aquarium Co.*, 3 Ex. D. 137. A prior action, however, brought by a person in collusion with the defendant to prevent a recovery at the suit of a *bonâ fide* plaintiff is no defence, and the fraud may be replied. S. C. As to what amounts to collusion in such a case, *vide* S. C., and in C. A., 4 Ex. D. 107; 48 L. J. Ex. 373. Prior writs for the same offences not proved to be collusive bar judgment in the subsequent action. *Forbes v. Samuel*, 82 L. J. K. B. 1135; [1913] 3 K. B. 706.

No damages are recoverable in a penal action, except the penalty. *Frederick v. Lookup*, 4 Burr. 2018; *Cuming v. Sibly*, *Id.* 2489.

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